NYSBA AUTUMN 2008 | VOL. 21 | NO. 2

International Law Practicum

A publication of the International Law and Practice Section
of the New York State Bar Association

Practicing the Law of the World from New York

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Deadlines

Manuscripts intended for publication in the Spring and Autumn issues must be received by the Editor-in-Chief by the preceding 1 December and 1 June, respectively.

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The Legal Profession and the Rule of Law

By Anne Ramberg

The following is an edited version of the address Ms. Ramberg gave upon the opening of the annual Fall Meeting of the International Law and Practice Section of the New York State Bar Association, in Stockholm, Sweden, on 17 September 2008.

I take great pleasure in welcoming you to Stockholm and this conference. We are proud Stockholm has been chosen as the venue for this conference, and in the coming days you will be dealing with a number of important issues.

As lawyers we are retained to serve the legitimate interest of our clients. In that context, the business of our clients is becoming increasingly globalized, and in addition, the legal rules in different jurisdictions are changing as they become more and more harmonized.

It is of course natural that as lawyers we are compelled to respond to the challenges resulting from these trends, and in recent times lawyers all over the world have been responding to changing conditions. An obvious feature of modern life in the law is the creation of very large and multi-jurisdictional law firms. These firms are highly specialized and possess vast resources. It is inevitable that high profitability is an essential feature for the partners in these firms. That is natural, and it is important for such firms to keep partners happy and to attract ambitious young lawyers to these large firms.

But too much focus on profitability entails dangers. One such danger is the transformation of a profession of high-minded and independent professionals into a business just like any other consultancy firm.

To meet that challenge to the profession, we need to stand firm in the preservation of the core values of the profession. In many places in Europe a heated debate over the professional core values has been taking place over the last few years. In large measure that debate has been triggered by changing business models adopted by some business sectors. In Sweden we have recently adopted a revised set of rules on professional ethics. In so doing we have been able to preserve those parts of the deontology which are close to the core of the profession. At the same time we have been able to adapt our ethical rules to contemporary conditions.

An independent legal profession is the cornerstone of a democratic society and a prerequisite for the preservation of the rule of law. However, to accomplish a successful struggle for human rights and the rule of law, we need to be strong. And strength comes from a united legal profession. To maintain unity, we need to create and preserve a professional identity which can be understood by all lawyers. The traditional individual lawyer representing the lawyer's client in court is, in the eyes of the public, still the lawyer who gives legitimacy to the profession. It is, however, obvious that the large law firms are often far more advanced in the way they run their respective practices, including in regard to management, training and know-how development, use of information technology and general efficiency in providing legal service. Here we need to encourage the smaller firms to follow suit.

In Europe another threat to the independent legal profession results from the efforts to permit the winds of market liberalization to transform the profession. In some places the result has been the split up of the formerly unified bar association into a purely regulatory body on the one hand, while the remainder of bar activities has been left to a professional interest body with no regulatory powers. To my mind this is an undesirable development: I believe that a united bar organization, with both professional interest objectives and regulatory authority, provides the best vehicle to serve the interests of the public as well as those of the lawyers.

The EU Commission has published reports on the economic effect of regulation on the legal profession. So has the OECD. Furthermore, the Commission has published a specific report on the relationship between regulation on the one hand and quality and price on the other hand in the conveyance sector of the legal market. This report was strongly criticized by the CCBE because of its lack of empirical standards and for evincing a lack of understanding of the legal profession and its core values. By and large I share that criticism.

Nevertheless, these reports and others all together make it clear that the legal profession as we know it today stands before a number of challenges. In particular the split between the representative and the regulatory tasks in many bar associations and law societies after the *Clementi* report has enhanced the opportunity for so-called market forces to function also in the legal service market. An example of this development is in the United Kingdom, where the economic interests of the consumer have apparently been considered to be the only vital concern in prescribing the future organizational structure of the Law Society. Much the same thinking seems to form the basis of the Danish decision to require the split of their bar association. These developments in England and Denmark suggest that also lawmakers in other countries in Europe will be tempted to follow suit.

In my view such ideas should be strongly resisted. They rest on a flawed view of the consumer interest and a lack of appreciation of the professional core values and

the need for strong and independent bar organizations—all in the public interest.

Let me next turn briefly to another subject close to our profession. This concerns the rule of law. It is self-evident that as lawyers we have a duty to draw the attention of the public to threats to established rule-of-law principles, whenever such threats emerge. We should be at the forefront in the legislative process. This includes the monitoring of new legislative proposals conferring additional powers on the executive which may violate fundamental human rights.

In this context, the Swedish bar is participating in the legislative process in different ways. We are acting as experts in parliamentary commissions. We are giving advice on all central legislative proposals, and the opinions expressed by the bar are usually taken into consideration. Indeed, the bar's opinions frequently result in material changes to the proposals. The fact that a democratic system does not guarantee the respect for human rights has become painfully clear in recent years: Some of the legislative measures taken after September 11 illustrate this fact. It is apparent that new national and international legislation sometimes results in a serious derogation of fundamental human rights principles.

This is very troubling, and as lawyers we have a duty to resist such laws. That duty does not mean that we should say no to all legislative reform intended to increase efficiency in the fight against crime and terrorism. But it does entail a duty to ensure that the rule of law is always given its proper place in the mindset of the legislators. The bars must always defend freedom of speech and respect for democratic institutions. The bars must always defend the core values of the legal profession. A case in point is the infringement of professional secrecy resulting from the European money laundering directives adopted by the EU.

I believe that the conference which is now about to start is a great effort in promoting interaction between lawyers from different jurisdictions. The fact that the New York State Bar Association has arranged this conference in Europe signifies an openness on the part of its members to learn about a foreign jurisdiction and to discuss important issues with Swedish colleagues. I am convinced that the result of your efforts will enhance better understanding, more professional contacts and, ultimately, promotion of the rule of law.

I wish you a very successful conference here in Stockholm. In spite of the rapidly approaching autumn I hope that you will also have opportunity to enjoy some of that which the city called the "Venice of the North" can offer its foreign guests.

Anne Ramberg is the Secretary General of the Swedish Bar Association.

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A New York Loan Agreement with a Brazilian Promissory Note: Can This Cross-Border Marriage Survive?

By Susanna V. Stern and Fabrizio Sasdelli

I. Introduction: Why a Note and a Cross-Border Loan Agreement?

In our international finance practices, we are sometimes asked by lawyers in foreign jurisdictions who are learning about American law and practice why we attach a promissory note to a cross-border loan agreement governed by New York law, particularly when the promissory note refers to the underlying agreement for most of its terms and does not seem to enhance the enforceability of the borrower's obligations in either document. And, when we give helpful answers such as: "that's the way it's always done" or "some banks like to receive notes," the foreign lawyers may ask why, if a New York note is so useless, do we not have it governed by the law of the jurisdiction of the borrower (i.e., "local law") so that the lender might benefit from the summary process that may be available there. And in fact this is what occurs in many cross-border loan agreements: the loan agreement may be governed by New York law (for reasons discussed below) but the promissory note may be governed by local law (in jurisdictions such as Brazil, Mexico and Chile, which have effective summary processes available) where the borrower and all its assets may be located. But, since we are lawyers, we can always see pros and cons to each approach, so it is useful to present them to lenders (and borrowers to whom this has been proposed), who can weigh them before deciding which approach to follow.

II. The Role of the Promissory Note Generally

In lending, a promissory note can stand alone or be used in addition to a loan agreement. The note usually reflects the fundamental terms of the loan: the names of the borrower and the lender, how much principal the borrower owes, the rate of interest to be paid on that principal, the due dates for principal and interest, and the governing law for the promissory note. In a truly simple commercial loan transaction, the promissory note can be the sole evidence of the repayment obligation. In a more complex deal, the note can be piled high with special terms or it can refer to a loan agreement for all of those terms. In the loan agreement, the borrower may make certain representations to the lender that serve as the basis on which the money is lent, agree to fulfill certain covenants while the loan is outstanding, principally to maintain its legal and credit standing, and agree to repay the entire loan early if it fails to fulfill those obligations. Typically, a loan agreement also includes the procedure for the making of loans, the calculation of interest and other amounts that may come due, such as expenses of enforcement and taxes, and provisions to ensure enforcement, such as waivers of jury trial and submission to jurisdiction. So at that point the promissory note is really just a summary of the essential terms of the loan agreement and does not seem to add much.

III. Usefulness of the Promissory Note: Summary Judgment Under CPLR 3213

But if the promissory note could be reduced to its basic elements—an instrument for the payment of money only, with no conditions to payment, and with waivers of defenses by the borrower—without reliance on outside sources for the nature of the payment obligation, then it could benefit from the expedited procedure under Section 3213 of New York's Civil Practice Law & Rules (CPLR). Under this rule, once a judge is satisfied that the note fulfills these requirements and the lender can show non-payment by the borrower, the burden shifts to the borrower to show why the debt is not due, and any such defense must be based on the four corners of the note. If the borrower cannot convince the court that it has any reasonable and relevant defenses, then the court makes a decision in favor of the lender based solely on the law, without presentation of evidence, in what is called a summary judgment. This can be a useful tool for enforcement of a promissory note under New York law and could be a good reason for keeping the note under New York law.

IV. Obstacles to Obtaining Summary Judgment Under CPLR 3213

There are a few reasons that this is not always the case. One is that in practice borrowers may be able to overturn a motion for summary judgment under this rule, in which case the lender will end up presenting the whole loan agreement and complete evidence anyway. The case law includes decisions in favor of borrowers that are based on defenses such as the following: the lender did not liquidate the collateral in a commercially reasonable way; the lender was not the holder of the promissory note in due course (i.e., the lender had taken the note knowing of the defenses available to the borrower); the terms of the promissory note were ambiguous and would require interpretation by the court (so that a summary judgment without further evidence would not be appropriate); or the lender was not justified in accelerating payment under the note. This means that CPLR 3213 is a useful remedy available under New York law, but not a sure thing.

And to qualify for summary judgment under this rule, the note must be stripped down to its barest ele-

ments. A lender may object to a spare note that does not include all of the extra obligations and costs of the borrower such as indemnification, full tax coverage, costs of enforcement and alternative interest rates, which would be available by reference to the underlying loan agreement. Moreover, a borrower may object to a simple note in which it waives all defenses, agrees to pay an all-in amount which it may not feel it owes (for example, principal plus an estimate of all interest payable), and otherwise lose many of the qualifications to its obligations that it may have managed to negotiate in the loan agreement as a result of its long-term relationship with the lender.

V. Notes Governed by "Local Law" as a Substitute for Notes Governed by New York Law

As a consequence, promissory notes governed by New York law may be viewed as not very useful supplements to a full loan agreement and more appropriately, notes governed by local law might be substituted for them since they may offer more practical benefits. In many jurisdictions in Latin America, for example, local law permits promissory notes that satisfy certain formal requirements similar to those of CPLR 3213 to benefit from an expedited summary process.

In Brazil, for example, a promissory note issued for a predetermined amount of money, with no other qualifications to payment, and in accordance with certain other formal requirements, would satisfy the requirement of a *título executivo extra-judicial* (extra judicial execution instrument). Upon non-payment by a borrower, a lender could initiate an *ação de execução* (execution proceeding) instead of an *ação ordinária* (ordinary collection proceeding), in which the borrower is ordered by the Brazilian court to pay its debt within three days or pledge assets to secure its claim pending resolution of the dispute. Unlike an ordinary collection action, in an *ação de execução* a foreign lender does not have to post a bond to cover court costs and eventual defendant's costs (if it loses the suit).

In this way the procedure is similar to that in New York, and there is some evidence of its practical success. For example, a typical enforcement proceeding for a foreign contract in a Brazilian court could take at least six years to reach a conclusion, whereas the time for enforcement of a *título executivo* could be about half that. This is a distinct advantage over normal enforcement procedures, even those in a New York court, which would have to be brought to Brazil for enforcement in any event (and be subject to a ratification process by the Brazilian superior court or Superior Tribunal de Justiça), adding a few extra years until a final result.

There are disadvantages to using a *título executivo*. For example, repayment of principal cannot be made in installments, interest cannot be variable (although lenders may face some resistance from borrowers to establishing a fixed amount for interest due in the future), and late fees cannot be included. Furthermore, the debt evidenced by this instrument cannot be accelerated for reasons other than the bankruptcy of the borrower, so any acceleration of the loan would have to be enforced via the underlying loan agreement. One possible solution to this problem is to leave the maturity date blank in the note and authorize the lender to fill in the date at the time of demand; this is quite common in the market but is of uncertain enforceability.

Similar procedures are available in other civil code countries as well; instruments called *pagarés* are routinely used in cross-border loan agreements with Mexican, Chilean and Argentine borrowers. These instruments benefit from similar processes in those jurisdictions.

It is recommended to check in what currency judges will order payment made, whether in the currency of the promissory note or in that of a foreign judgment. For example, courts such as those in Brazil will order a borrower to pay only in local currency at a rate equivalent to the U.S. dollars that may be owed. In such a case, the lender would then have to convert and transfer the funds out of the country, running the double risks of government interference and devaluation. But these risks would exist even with a New York promissory note, and at least the lender would have funds in hand.

VI. Conclusion: The Best of Both Worlds

In combining a New York loan agreement with a local promissory note, lenders may have the best of both worlds. Many international lending transactions are governed by New York law due to the ease of choosing New York law: the parties simply have to specify the law in writing, the transaction has to be greater than a certain minimum amount, and there can be no public-policy objections to the application of New York law and jurisdiction (the latter being a rarely successful defense).

Moreover, New York law is attractive due to the reputation of its courts as favoring enforcement of the terms of contracts within the four corners of the document (instead of considering all defenses and the broader context, for example), and the availability and expertise of lawyers and judges in that jurisdiction with an understanding of the complexities of cross-border contracts.

Even loan agreements where the borrower and the lender have no contacts with New York may be governed by New York law. The borrower and its assets, however, may all be located in the foreign country. Thus, even armed with a New York judgment, the lender will want to go to that country for enforcement. Therefore, having a promissory note which can be enforced directly in the local jurisdiction from the moment of default might save time and cost. This in turn lowers the risk of non-payment

to the lender, thereby lowering the cost of the deal to the borrower.

The final hurdle to this approach may be the lack of familiarity of lenders and their lawyers with the local law of their borrowers, and a concern that they would be losing control if they entered into this hybrid structure. The lack of familiarity can be addressed by asking local counsel to provide a clear explanation as to the benefits of local law and by the issuance of a legal opinion as to enforceability of the promissory note under local law. The concern about losing control can be addressed by cooperation between the U.S. lawyers and the local lawyers on the deal, allowing them to create a seamless document in which the promissory note and the loan agreement fit together and in which all terms are consistent, even if the note does not cross-reference the loan agreement for certain terms.

So long as counsel has explained to its lender client (or borrower client, as the case may be) the pros and cons of using a promissory note governed by local law together with a loan agreement governed by New York law, the lender can benefit from having one foot in each world and the borrower will get its funds more cheaply and faster.

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Law & Language in the Global World

By James Hope

I. Introduction

English has become a truly global language.[1] While other major languages hold sway in their own particular regions—Spanish in Latin America, Mandarin Chinese in China—the English language spans the globe. Indeed, English is often the cross-border language of choice even where no native English speakers are involved.

Those of us who are lucky enough to come from the English-speaking world can be happy that English is so dominant. We have a natural competitive advantage when we use our mother tongue. Those others of us who (as in Sweden[2]) learned English as children can also feel very confident with this global language.

But beware! The new "global English" is not the same as "native speaker English," and native-speaker norms are becoming less relevant as English becomes a component of basic education in many countries.[3]

In any event, there are, of course, many variations in "native speaker English" across the globe. As an English lawyer who used to be with the London office of a major U.S. law firm, I know from long experience how different U.S.-English and British-English can be. Style,[4] spelling,[5] punctuation,[6] nuances,[7] and often the meanings of words[8] can be very different.[9] These differences can be of great importance in legal writing, since lawyers are often expected to conform to particular styles and conventions.[10]

How should we as lawyers deal with these differences in the global world? First and foremost, we need to be aware of the issue when we are working internationally. "My" English is not "your" English, and my understanding of a word or phrase may not correspond with your understanding.

This article sets out just a few examples of particular words and phrases that can be misunderstood in an international context. Inevitably, these examples are very selective, but it is hoped that they provide a flavor[11] of the sort of problems that can be encountered.

There then follow some suggestions for good practice in the use of international legal English. Perhaps the greatest lesson for the native English speaker is that native English is not always correct or appropriate internationally. The brief writer may need to simplify his or her language in order not to be misunderstood. The speaker or cross-examiner may need to slow down, and he or she may need to explain things that would otherwise be readily understood in a domestic context. The goal is quite simply to understand and to be understood, and our language needs to adapt accordingly.

II. Problematic Words and Phrases in International Legal English—Some Examples

A. "ADR"

To start with a reasonably well-known example, we all know what ADR—or "Alternative Dispute Resolution"—is, but do we agree? Compare the following:

- "Arbitration is one of the oldest forms of ADR."[12]
- "ADR differs from arbitration in that a conclusion can be reached only if all the parties agree."[13]

As *Russell on Arbitration* explains,[14] alternative dispute resolution is regarded by English practitioners as any system of dispute resolution which is non-binding. Conversely, some U.S. definitions regard arbitration as a species of ADR, the latter being an all-embracing term for any form of dispute resolution which is alternative to litigation in court.[15]

B. "Arbitration"

To vary the example slightly, this is a seminar program (or programme!) on international commercial arbitration, and all of us know what arbitration is. But again, do we agree?

An English judge defined arbitration in 1858 as follows:

> An arbitration is a reference to the decision of one or more persons, either with or without an umpire, of some matter or matters in difference between the parties.[16]

Many modern practitioners would regard this definition as being too wide, and they might actually prefer not to give a definition at all. The Departmental Advisory Committee which drafted the bill that became the English Arbitration Act 1996 deliberately refrained from including a definition of arbitration.[17]

One particular issue in this context is whether expert determination qualifies as arbitration. The answer is "no" under English law, since an expert (unlike an arbitrator) is not sitting in a judicial capacity and there is no requirement for him to follow rules of natural justice or due process.[18] The answer is also "no" under Swedish law.[19]

However, the distinction between arbitration and expert determination can be a fine one, and the mere use of the word "arbitrator" or "expert" in the relevant clause is not conclusive.[20]

C. "Without Prejudice"

One of the major linguistic challenges lies in spotting words or phrases which look the same but mean different things in different legal systems. The term "without prejudice" is a good example of this problem, and it is particularly confusing since it is a specialist litigation term in both England and the USA, but with different meanings on each side of the Atlantic.

In English law, "without prejudice" is a term used in correspondence, meaning that the correspondence in question is written for the purposes of settlement only and may not be used or referred to in litigation or arbitration proceedings.[21]

In U.S. law, however, the phrase "without prejudice" is used in the context of the dismissal of a claim, meaning that the plaintiff is not barred from bringing another action on the same claim. The converse is a dismissal "with prejudice," which operates as an adjudication on the merits, where the plaintiff is barred from bringing another action on the same claim.[22]

D. "Consequential or Indirect Loss"

Turning to contractual drafting, it is commonplace to read in commercial contracts that claims for consequential or indirect losses will be excluded, but the phrase is often left undefined. The assumption is that it is quite clear what constitutes consequential or indirect loss.

Consider the following:

- Under English law, consequential loss or damage is generally said to be that which does not result directly and naturally from the breach complained of.[23] Moreover, the authorities suggest that the terms "indirect, special or consequential losses" are largely interchangeable.[24]
- The U.S. Uniform Commercial Code defines "incidental" and "consequential" damages rather differently, as follows:[25]

  > § 2-715. Buyer's Incidental and Consequential Damages.
  >
  > (1) Incidental damages resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.
  >
  > (2) Consequential damages resulting from the seller's breach include
  >
  > (a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and
  >
  > (b) injury to person or property proximately resulting from any breach of warranty.

- The Swedish Sale of Goods Act has a further definition of indirect loss:

  > 76 § (1) Damages on the grounds of breach of contract encompass compensation for expenses, price difference, loss of profit and other direct or indirect loss by reason of the breach of contract. Damages according to this Act do not, however, encompass compensation for loss which the purchaser has suffered by reason of damage to anything other than the good which has been sold.
  >
  > (2) Indirect loss is considered to comprise:
  >
  > 1. loss as a result of a diminution or absence of production or turnover,
  >
  > 2. other loss as a result of the fact that the good cannot be used in the manner intended,
  >
  > 3. loss of profit as a result of the fact that a contract with a third party has fallen away or has not been properly fulfilled, and
  >
  > 4. other similar loss, provided such loss was difficult to foresee.
  >
  > (3) However, indirect loss according to paragraph 76(2) does not include a loss which the party suffering loss has incurred as a result of mitigating a loss of another type than specified in paragraph 76(2).[26]

This is not the place to enter into a comparative law debate on what can often turn out to be a complex issue, turning on both legal and factual considerations. The point to be made here is that lawyers who are trained in different jurisdictions are likely to approach words such as "indirect or consequential loss" differently, depending on their background and legal training.

It is particularly notable that, whereas English lawyers generally assume that "indirect" and "consequential" losses are essentially the same, U.S. lawyers draw a distinction between "incidental" and "consequential" damages.

E. "Equity"

Another common problem with legal English is that the same word can mean different things in different contexts.

Equity is a specific branch of the law in common law systems, but it can also have a less technical meaning of fairness. In particular, and perhaps somewhat confusingly, "equity arbitration" (even in common law countries) does not refer to equity as a branch of law at all, but is generally intended to refer to arbitration clauses which provide for arbitrators to decide disputes according to justice and fairness.[27]

Of course, lawyers also speak of "equity" or shares in a company, which is an entirely different meaning of the word.

What do lawyers mean when they refer to "equity," or "equitable remedies," or "equity arbitration"? There is clear scope for misunderstanding here in the international context.[28]

F. "Supreme Court"

Finally, to conclude with an example of institutional terminology, it might be thought to be obvious that the Supreme Court will be the highest court in any particular jurisdiction. This at least is the situation in the USA, and the U.S. Supreme Court is arguably the most famous supreme court of all.[29]

However, other jurisdictions use different terminology. In Australia, the Supreme Courts are the higher courts of the federal states, and the final federal court is referred to as the High Court.[30] England has somewhat similar terminology, referring to the High Court and the Court of Appeal together as the Supreme Court of England & Wales (although this term is admittedly rarely used), with the highest court being the House of Lords, although this will change in late 2009 when the House of Lords in its judicial capacity will become the Supreme Court of the United Kingdom.[31]

Again, there is clear potential for linguistic confusion.

III. Some Basic Good Practice in the Use of International Legal English

The above examples give a brief indication of the sort of difficulties that can arise. What is the solution? The following is some very general advice for international arbitration practitioners in particular.

A. General Tips

Be clear.

Use short sentences, and clear punctuation.[32] Think about meaning rather than rhetoric, remembering that the reader may not be entirely fluent in English.

Avoid jargon or abbreviations, or if you need to use them, explain what they mean. Lawyers love these, and they can be very useful when all involved know what they mean, but they are often inappropriate internationally.[33]

B. Drafting Contracts

When drafting contracts, always include a choice of law clause, so that it will at least be clear which governing law is intended to be applied for the purposes of contractual interpretation.

However, contract interpretation in an international context is not the same as contract interpretation in a purely national setting. Imagine a contract written in English under Swedish law drafted by lawyers in Northern California. This may seem an unlikely scenario, but such a contract was the subject of a recent SCC arbitration in which I was counsel. Did the parties to this contract intend to use words with a Swedish law meaning or were they (or more likely their lawyers) influenced by U.S. law terminology? The answer may well depend upon whether the arbitrators are Swedish or U.S. lawyers.

C. Writing emails

When writing emails, always double-check your text for ambiguities or other potential miscommunication. Emails are particularly dangerous, since they are often written quickly and can be used in lieu of telephone calls. Yet the inflections and the opportunity for clarifications that arise naturally in spoken communication are missing in emails.

It is well known that dates can be particularly confusing. 5.6.2008, 6.5.2008, 2008-06-05, and 080605 all refer to the same date.[34]

D. Writing Letters

Formal letter writing is becoming less common, but it remains the case that British letter writing styles differ markedly from U.S. letter writing styles. It tends to be the case that English lawyers continue to write in a British style, while U.S. lawyers write in a U.S. style, but international styles of English letter writing can be different again.[35]

E. Drafting Written Submissions

When drafting legal submissions (or briefs) in arbitration, be aware of the different expectations of arbitrators from different legal traditions.

Remember that nuances that might be obvious to U.S. lawyers, or (probably in a different way) to English lawyers, may well be lost on lawyers from other countries.[36] I was recently counsel in an ICC arbitration where my opponent was a U.S. lawyer, and we used various degrees of rhetoric in our respective submissions.[37] However, I sus-

pect that much of this rhetoric may have been lost on the arbitrators, none of whom was a native English speaker.

F. Making Oral Submissions

When making oral submissions, remember that some arbitrators may not speak or understand English perfectly. If you speak too fast, or if you use obscure words, it is quite likely that you will not be understood.

It is also quite likely that no one will admit to you that they do not understand. So you will walk away from the hearing thinking that you have made a particular point, but that point may never have come across. Again, native English speakers need to be careful here. If the tribunal is composed of non-native English speakers, you will need to adapt your speech accordingly.

G. Examining Witnesses

The same point may often be even more important in the context of witness examination, since lay witnesses can sometimes have little understanding of legal language. In the international context, a witness whose grasp of English is less than perfect will often be given the benefit of the doubt. Thus, hesitation or evasiveness which could be seen as evidence of untruthfulness in a native English speaker may come across as being perfectly natural from a Swedish or Russian witness who is searching for the right words.

Problems of miscommunication can be particularly difficult when a witness is giving evidence through an interpreter. An interpreter may take the witness's non-standard, slang-ridden Spanish, and translate it into quite correct, formal English.[38] This may create a different image of the witness than what is really correct.[39] Interpreters also need to understand sometimes quite subtle differences in technical terminology, and it can often be wise to educate the interpreter in advance of the hearing.

Interpreters inevitably also slow down the process of cross-examination, which can require the lawyer to change his or her style of questioning. In particular, long questions (and indeed long answers) will often get "lost in translation."

H. Drafting Arbitration Awards

Finally, arbitrators need to conform to the expectations of the parties when writing their awards.

It is now standard practice for arbitrators to be required to give reasons for their decisions, but the length and style of arbitral awards can vary considerably.[40] While common law lawyers (like common law judges) may tend to be more verbose, lawyers from civil law backgrounds may sometimes give rather less reasoning. The best arbitrators will adapt their style to the needs of each particular case.

IV. Conclusion

English is everywhere. It is a great advantage to have a common language, but it can sometimes also give rise to difficulties.

We can be misled by the fact that so much of modern international business is conducted in English into thinking that all those who speak and write English readily understand each other, but this is not always the case. The problem is confounded by the fact that it is often quite rare for people to admit when they do not understand something.[41]

One of the lawyer's principal goals in an international context should be to understand and to be understood.[42] Lawyers, therefore, need to adapt their language to the particular needs of the international context in which they are working. Native English speakers should remember that "global English" is not the same as their own native English. It may often be necessary for the same lawyer to use different styles, and different forms of language, in different contexts.

This is all part of the tapestry that enriches the work of international business lawyers. We should welcome the challenge.

Endnotes

1. It has been predicted that, by 2050, half the world will be "more or less proficient" in English. See *The Triumph of English*, The Economist, 20 Dec. 2001.
2. Over eighty percent of the Swedish population is estimated to be proficient in English; see D. Graddol, English Next (2006), www.britishcouncil.org/learning-research-english-next.pdf, at p. 93).
3. See D. Graddol, note 2 *supra*, at 14. See also *id*. at 115 (emphasis added):

   > Global English is often compared to Latin, a rare historical parallel to English in the way that it flourished as an international language after the decline of the empire which introduced it. The use of Latin was helped by the demise of its native speakers when it became a shared international resource. *In organisations where English has become the corporate language, meetings sometimes go more smoothly when no native speakers are present. Globally, the same kind of thing may be happening, on a larger scale.*

4. In particular, letter writing style (e.g. "*Yours faithfully*" / "*Very truly yours*") and the art of writing legal briefs / submissions.
5. E.g., "*colour*" / "*color.*"
6. E.g., "… quotation." / "… quotation".

   E.g., "Dear Sir," / "Dear Sir:"
7. Writers of British English use irony far more often than writers of American English.
8. For a striking example of different meanings, see J. Bacon "*American versus British English: Why Translators Need to Know the Difference*" (http://www.proz.com/doc/570):

   > To continue a case in British English means for it to carry on; to continue a case in American English means to postpone it. To table a motion or proposal in British English means to deal with it right away.

The same expression in American English means to shelve it.

Just to confuse matters, I would add that a "continuation" in Scottish litigation procedure means a postponement, although this would generally not be understood by English litigators.

9. American readers of this article, were it to be published in a British journal, would immediately notice my British spelling and punctuation. For a surprisingly good account of some differences in British and U.S. English usage, see http://en.wikipedia.org/wiki/American_and_British_English_differences.
10. Standard forms of writing are perhaps particularly important in U.S. legal circles. It is notable that the "Bluebook" of U.S. legal citation, which is a vital part of U.S. legal education, has no real counterpart in England. The system of citations in England is something that English law students might typically learn about as part of an introductory lecture, and it is quite common for English lawyers (and even judges) to cite cases incorrectly.
11. The British-English word is, of course, "flavour."
12. Roth, Wulff and Cooper, The Alternative Dispute Resolution Practice Guide § 1:2 (1993 with updates).
13. Russell on Arbitration § 1-011 (23d ed. 2007).
14. *Id*. at § 2-035.
15. It is striking to English practitioners that the American Arbitration Association has as its web address www.adr.org.
16. Per Romilly MR in *Collins v. Collins*, (1858) 26 Beav. 306 at 312.
17. See the DAC report para. 18, the text of which can be found in Russell on Arbitration, note 13 *supra*, Appendix 2. Although arbitration itself was not defined, the DAC did expressly stipulate the object of arbitration—see section 1 of the Act.
18. See Russell on Arbitration, note 13 *supra*, section 1-012; and *Bernard Schulte & Ors v Nile Holdings Ltd*, [2004] 2 Lloyd's Rep 352 at 372, per Cooke J.
19. See Heuman, Arbitration law of Sweden: Practice and Procedure § 2.2 (2003); and Lindskog, Skiljeförfarande—En kommentar § 3.2 (2005).
20. There have been many cases on the issue. For some examples, see (for England) Russell on Arbitration, note 13 *supra*, § 2-029, and (for Sweden) Lindskog, note 19 *supra*, § 3.2.3 and in particular footnote 148.
21. See *Walker v Wilsher* (1889) 23 QBD 335, CA, per Lindley LJ, stating that the words "without prejudice" mean "without prejudice to the writer of the letter if the terms he proposes are not accepted." The rule applies to communications of any description which either are expressed to be "without prejudice" or by implication take place in a "without prejudice" situation: see *Rush & Tompkins Ltd v Greater London Council*, [1989] AC 1280.
22. See, for example, the U.S. Federal Rules of Civil Procedure Rule 41(a)(1)(ii).
23. See *Croudace v Cawoods* [1978] 8 BLR 20; *BHP Petroleum Ltd v British Steel PLC*, [1999] 2 Lloyd's Rep 583.
24. See *Hotel Services Limited v Hilton International Hotels (UK) Limited*, [2000] BLR 235. See also *Ferryways NV v Associated British Ports*, [2008] EWHC 225.
25. U.C.C. §2-715. See also U.C.C. § 2A-520.
26. My translation. The Swedish text reads as follows:

"67 § Skadestånd på grund av avtalsbrott omfattar ersättning för utgifter, prisskillnad, utebliven vinst och annan direkt eller indirekt förlust med anledning av avtalsbrottet. Skadestånd enligt denna lag omfattar dock inte ersättning för förlust som köparen tillfogas genom skada på annat än den sålda varan.

Som indirekt förlust anses

1. förlust till följd av minskning eller bortfall av produktion eller omsättning,

2. annan förlust till följd av att varan inte kan utnyttjas på avsett sätt,

3. utebliven vinst till följd av att ett avtal med tredje man har fallit bort eller inte har blivit riktigt uppfyllt, och

4. annan liknande förlust, om den varit svår att förutse.

5. Som indirekt förlust enligt andra stycket anses dock inte en sådan förlust som den skadelidande har haft för att begränsa en förlust av annat slag än som anges i andra stycket."

27. See Redfern & Hunter, Law and Practice of International Commercial Arbitration § 1-96 (2004). Such "equity clauses" are permissible under the Model Law (Article 28(3)) and under many national arbitration laws, including those of England (Redfern & Hunter, loc. cit.) and Sweden (Lindskog, note 19 *supra*, § 2.2.3).
28. Another example is the word "security," which can refer to shares, rights in security, security which is posted in relation to a claim, etc.
29. One notable U.S. exception is the State of New York, where the trial court of the first instance is known as the "Supreme Court" (with the first appellate instance being referred to as the "Supreme Court, Appellate Division") and the ultimate instance of appeal is known as the "Court of Appeals."
30. See http://www.ag.gov.au/www/agd/agd.nsf/Page/Legalsystemandjustice_TheCourts.
31. See http://en.wikipedia.org/wiki/Supreme_Court_of_the_United_Kingdom.
32. The old-fashioned style of English trust deeds, which uses very long sentences with virtually no punctuation, is clearly inappropriate in an international context.
33. As an example, foreign lawyers are unlikely to understand U.S. references to a "TRO" (a Temporary Restraining Order). Equally, English references to the "CPR" (Civil Procedure Rules"), or their predecessor, the "RSC" (the Rules of the Supreme Court), will generally need to be explained.
34. These are British, U.S. and two Swedish styles, respectively.
35. For example, in Swedish letters the opening phrase of a formal letter ("*Dear Sir*") is generally omitted, and this can influence the writing of English letters in Sweden.
36. A common source of friction between English and U.S. lawyers in this context concerns the use of adverbs, which are generally frowned upon in English legal submissions but often regarded as important in U.S. legal briefs.
37. The word "*haleutic*" (meaning "*of or pertaining to fish*") was used at one point in a complaint about a particularly far-reaching request for production of documents.
38. Differences in dialect can also sometimes cause problems. It has been noted that, in one case, someone asked a Cuban man for a loan; he replied in Spanish: "*Hombre, ni tengo diez kilos*." This statement was then used as the basis for a drug charge. However, it later appeared that in the defendant's Cuban Spanish, kilos often refers to money ("*I do not have ten cents*"). (From Peter Tiersma, *Language Rights, Bilingualism, and Official English*, http://www.languageandlaw.org/LANGRTS.HTM.)
39. This problem can also frequently occur with witness statements. I remember an arbitration in which various witness statements were submitted by one party in which each witness stated in the first line, "*I am a peasant*" (the dispute concerned an oil field in Africa).

The other party then contacted the same witnesses and filed rival witness statements, each of which began, "*I am not a peasant*"!

40. See Redfern & Hunter, note 27 *supra*, § 8-65.

41. In some cultures, there can be great reluctance to say "no" or to lose face.

42. See Chaucer's plea at the end of *Troilus and Criseyde* (Book V, lines 1793–1798), written at the end of the 14th Century!—

> And for ther is so greet diversitee
> In English and in wryting of our tonge,
> So preye I god that noon miswryte thee,
> Ne thee mismetre for defaute of tonge.
> And red wher-so thou be, or elles songe,
> That thou be understonde I god beseche! . . .

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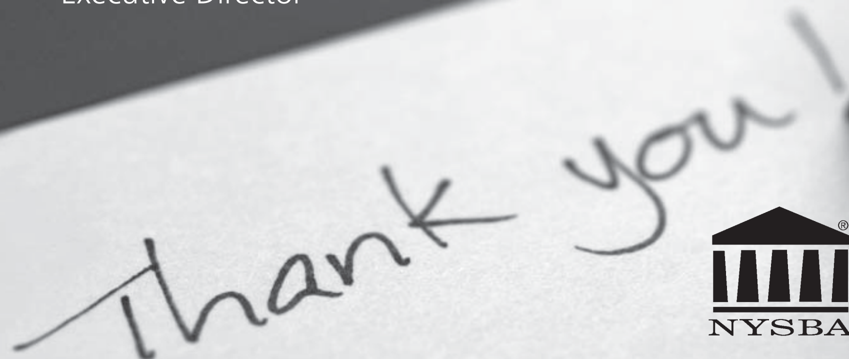

Vietnam in a Nutshell: An Historical, Political and Commercial Overview

By Andrew L. Odell and Marlene F. Castillo

I. Introduction

Vietnam is one of Asia's fastest growing economies, with 2008 GDP expected to grow eight to nine percent after eight years of GDP growth in the range of 6.8 to 8.4 percent.[1]

As a result of Vietnam's low labor costs[2] and the benefits of its 2007 accession to the World Trade Organization, including greater access to foreign markets, increased attractiveness for foreign direct investment, access to international dispute resolution and an acceleration of domestic reforms, many U.S., European and other companies have established or are considering establishing manufacturing or legal, accounting or other service businesses in Vietnam.

This article is intended to provide a sketch of Vietnam's historical, political and economic development as well as of its present legal system and business environment.

II. Historical and Political Setting

For more than one thousand years, until A.D. 938, Vietnam was under Chinese rule. China exerted an influence on Vietnamese administration, law, education, literature, language and culture. During the period of Chinese rule, there were many revolts against Chinese rule, the most important one led by the noble women called the "Trung Sisters," who today continue to be revered as heroines and national symbols of Vietnamese women.[3]

Although nine centuries of independence followed Chinese rule, China's impact on Vietnamese culture was probably greater in the centuries of independence. During those nine centuries, local noble families ruled Vietnam by establishing dynasties, and warfare became prevalent, internally among the different noble families, each seeking to take control of the country, and externally against Chinese and Mongol invaders.

As Vietnamese kingdoms were expanding in the south, resisting the Chinese and Mongolian invaders in the north and conquering the south became major themes of Vietnamese history.[4] During the period A.D. 1010 to A.D. 1527, more sophisticated governments and administrations were developed; a new system of taxation was imposed; a penal system was established; and the country's first university was founded.

Between 1627 and 1775, two powerful Vietnamese families divided the country, the Nguyen Lords in the south and the Trinh Lords in the north.[5] After years of bloody wars, the Nguyen dynasty triumphed over the Trinh Lords, and the Nguyen dynasty was established throughout Vietnam. Initially, Catholicism was tolerated and Europeans were employed in the court as advisors. However, Nguyen kings were conservative Confucians,[6] who resisted "westernization" and perceived the westerners as a threat. Thus, Catholicism was slowly suppressed. At the same time, French diplomats in China began to express the view that France was falling behind the rest of Europe in setting a footprint in Asia; tens of thousands of Vietnamese and foreign (mainly French) Christians were persecuted, and trade with the West slowed; those circumstances provided the French with an excuse to invade Vietnam.

In 1858, under the rule of Napoleon III of France, French troops invaded and took control of the provinces of Vietnam. The southern portion of Vietnam became a French protectorate known as Cochin China, where the Nguyen dynasty ruled. In the north, although it had a French Governor, local governments were run by Vietnamese officials.

In the early twentieth century, two parallel movements of modernization emerged in Vietnam: the Dong Du (Go East) movement, which promoted sending Vietnamese students to Japan to learn modern skills, with a view toward overthrowing the French, and the Duy Tan (Modernization) movement, which promoted the need to educate the masses and modernize the country as well as foster understanding and tolerance among French and Vietnamese to achieve a peaceful transition of power.[7]

The French suppressed both movements and Vietnamese revolutionaries turned to radical paths. Marxism was introduced in Vietnam. Three independent communist parties and a Trotskyist movement emerged, which in 1930, jointly formed the Vietnamese Communist Party.

During World War II, Japan invaded Indochina,[8] keeping the "Vichy" French colonial administration in place.[9] In 1941, Ho Chi Minh arrived from China to northern Vietnam to form a group called "Viet Minh," which started as an umbrella group for all parties fighting for Vietnam's independence as a means of attracting a broad coalition of people.[10] Eventually, the Communist Party dominated Viet Minh.

With the Japanese surrender to the allies in 1945, British forces landed in Saigon (now Ho Chi Minh City) to disarm the Japanese, and French troops followed them, seeking to re-establish their rule. In 1947, war erupted be-

tween the Viet Minh and France. The Geneva Conference of 1954 ended France's colonial presence in Vietnam and temporarily divided the country in two states, pending free elections. However, only France and Viet Minh signed the Geneva Agreement, while the U.S. and South Vietnam refused to abide by the agreement.

In the 1960s, South Vietnam became extremely unstable, and no government could maintain power for long. In 1965, the U.S. sent troops to South Vietnam and bombarded North Vietnam.[11] After a long, bloody war, South Vietnam surrendered in early 1975, and in 1976 Vietnam was officially unified and officially renamed the Socialist Republic of Vietnam ("SRVN"), with Hanoi as its capital. The SRVN consists of the former Democratic Republic of Vietnam (North Vietnam) and the former Republic of Vietnam (South Vietnam).

Although the social order in South Vietnam was relatively well maintained during the post-unification period, many high officials and other important figures of the old South Vietnam were sent to hard labor prison camps. The SRVN government implemented a Stalinist dictatorship, and a security network controlled every aspect of people's life. Censorship was strictly and conservatively applied, and most music, art, and literature prior to 1975 were banned. Many people fled the South via a clandestine network.

III. Vietnam's Legal and Economic Development

A. 1940—"Collectivization"

Historically, Vietnam's legal system is a mixture resulting from its various invaders, including the Chinese, French and Americans, which impacted greatly Vietnam's own ancient tradition of law.[12]

The influence of Confucianism in the Vietnamese legal system and culture is evident in the discussion by some Vietnamese scholars of a "rule of morality" rather than the "rule of law." There was a tendency in Vietnam until recently to rely on morality, custom, kinship or politics, rather than on the formal rule of law. The Chinese Imperial Code also infused Vietnam's legal system with a strong criminal orientation, and a tendency for complex and detailed codification, often making law inaccessible to the common people.[13]

Vietnam's neo-Confucian system did not blend well with the legal system introduced by the French during the colonial period. The French imposed a parallel legal system in Vietnam, consisting mainly in a civil law system that governed French citizens, while the Nguyen Code and customary practice governed the Vietnamese.

From late 1940, Vietnam's political and economical policy was constituted by "collectivization," which included the taking of land by the State. Industry already in place was also brought under State ownership and control, embracing a Soviet-style government-controlled economy.

In 1954, after declaring independence from the French, North Vietnam adopted a highly centralized Soviet-style legal system. In South Vietnam, the French legal system was supplemented when U.S. legal advisors arrived in the early 1960s. U.S. influence was most evident when a new constitutional framework was adopted, consisting of a presidential system and separation of powers between the executive, legislative, and judicial branches.

B. 1975—Rule by Decree

After the withdrawal of U.S. forces in 1975 and the communist assertion of control over the entire country, the legal system dramatically changed. There was an anti-legal and anti-colonialist attitude in the Vietnamese government. The government ruled by decree, and legality was at best a formality. In fact, the Ministry of Justice was eliminated in 1961 and did not re-emerge until 1981.[14]

During the postwar period, the rights of Vietnamese were closely controlled by the State, and any activity, particularly commercial activity, was unlawful unless expressly authorized by law.[15] Legal interpretation was not based on legal precedent, but on the "guiding principles" set forth by the State.

As a result of those restrictive policies, there was an agricultural production crisis, no foreign investment and insufficient domestic financial resources for economic development and job creation. There were shortages of common goods and an annual inflation rate exceeding one hundred percent. To make matters worse, the former Soviet Union began to reduce economic assistance in the early 1970s. By 1975, the Vietnamese economy was dysfunctional: it had no heavy industry, and bureaucracy blocked all market forces, resulting in the emergence of a black market.[16] A desperate measure to improve the situation was the adoption of a limited market-based system and policies to encourage foreign investment and stimulate the economy, which formally occurred at the Sixth Communist Party Congress in 1986.[17]

C. 1986—*Doi Moi*

In 1986, the Sixth Communist Party Congress announced that Vietnam would "virtually" abandon the centralized economy to adopt a market-based economy intended to encourage foreign investment. This movement is known as "*Doi Moi*" (or "renovation" in English). Five years later, the Seventh Communist Party Congress broadened *Doi Moi* to include legal reforms. The Central Committee of the Communist Party called the national legislature to amend the 1980 Constitution and to "improve the skills of lawmakers in promulgating and organizing the implementation of law."[18]

Nonetheless, even with *Doi Moi*, foreign investors still faced many problems, such as the lack of regulations or other guidelines, the absence of effective dispute resolution mechanisms or other measures of forcing Vietnamese officials to comply with the laws, and, perhaps most significantly, a continuing lack of competition in many sectors of the economy. The courts were dominated by officials who were not trained to solve commercial disputes, and were not independent from the executive branch. The Vietnamese Communist Party had its own crisis after the collapse of Communism in the former Soviet Union and Eastern Europe.

In the end, the success of the *Doi Moi* in stimulating investment was mixed, principally as a result of the continued influence of, and favoritism toward, the State sector, together with the fact that the initial package of business legislation maintained too many governmental controls and placed an insufficient emphasis on economic growth.[19]

D. 1992—Transition to a Market Economy

Vietnam's most dramatic legal reform was the adoption in 1992 of a revised Constitution, which, among other things, called for the State to "promote a multi-component commodity economy functioning in accordance with market mechanisms under the management of the State and following a socialist orientation."[20] The 1992 Constitution, in addition to replacing the main political bodies and reforming the government and political structure, was an important ideological change and constituted a shift in the focus of the State. [21]

The 1992 Constitution has a much more open and progressive concept of Vietnam's relations with the rest of the world and capitalism. The Constitution encourages the development of all sectors of Vietnam in an open-market economy, although always led by the action of the State. Private property and private enterprise are acknowledged and permitted. The market opened for foreign investors, granting them legal ownership of their assets as well as guaranteeing that such assets will not be nationalized or condemned by the State.

E. 2001—Bilateral Trade Agreement with the United States

Many reasons led Vietnam to negotiate a Bilateral Trade Agreement with the U.S.: the mixed success of *Doi Moi* and the remnants of failed economic policies; the demise of the former Soviet Union; the Asian financial crisis; the increase in China's exports; and the normalization of its political relations with the U.S. in 1995. The increase in trade between China and the U.S. was likely the most important reason to convince Vietnamese officials to conclude the Vietnam Bilateral Trade Agreement (the "VBTA").[22]

China's policies and influence were critical in shaping Vietnamese economic policies. China, even before its World Trade Organization ("WTO") accession in November 2001, was successful in attracting foreign investment, more so than Vietnam or the other members of the Association of South-East Asian Nations ("ASEAN"). Vietnam had to find a way to compete, and *Doi Moi* proved not to be enough.

Between 1975 and 2001, Vietnam had only limited access to the U.S. market because Vietnam did not benefit from "most favored nation" ("MFN") treatment for its exports to the U.S., making its exports prohibitively expensive. For the reasons mentioned above, concluding a trade agreement with the U.S. was important to Vietnam for economic and political reasons.

From the beginning of its negotiations with Vietnam, the U.S. intended to negotiate a comprehensive agreement which could be an effective tool to open the Vietnamese market and would include not only trade in goods but also trade in services, protection of intellectual property, and investment. After more than five years of negotiations and deliberations by the Vietnamese Government, the VBTA was approved by the Vietnamese National Assembly and the U.S. Congress, and became effective 10 December 2001. The VBTA includes chapters on trade in goods (providing MFN treatment on the part of the U.S.), intellectual property rights, trade in services, investment relations, various business facilitation measures, extensive transparency obligations, and a series of exceptions and general provisions.[23]

F. 2006—Accession to the World Trade Organization

Vietnam's accession to the WTO, like China's, Saudi Arabia's, and Russia's, was long, complex, and frustrating.[24] The application was initially made in 1995, but no progress was made until 2001, after the Vietnamese Government took the political decisions necessary to open its domestic market, initially by signing the VBTA. That decision was motivated, in part, by the anticipated conclusion in late 2000 of China's twenty-year pursuit of WTO membership, which would make it more difficult for Vietnam to compete with China for foreign investment and trade opportunities.

Once the negotiations for the VBTA started, the focus changed to the WTO accession. Vietnam had to enact legislation to implement its accession to the WTO before it was granted. Thus, Vietnam enacted many changes in many laws at the beginning of 2004, which included the Law on Enterprises, the Investment Law and many tax laws.[25]

In addition to the requirements of the VBTA, many of which were incorporated into the WTO accession agreement, the accession package included, among others: the elimination of most tariff quotas; signature by Vietnam of the WTO Information Technology Agreement ("ITA"), allowing the importation of products covered by the ITA

duty-free no later than 2014; the elimination of agricultural export subsidies; and the limitation of trade distorting domestic subsidies of about U.S. $246 million annually.[26]

Major commitments in services, particularly telecommunications and financial services, were also made along with extension of export and import rights to all duly registered persons, including foreign firms and individuals. Vietnam also agreed immediately to comply with WTO disciplines under the agreements on customs valuation, rules of origin, pre-shipment inspection, anti-dumping safeguards, subsidies and trade-related investment measures, technical barriers to trade, sanitary and phytosanitary measures, and trade-related intellectual property.

IV. Vietnam's Current Legal System

Vietnam has experienced a significant development in recent decades, touching all areas of Vietnamese life. Vietnam's legal progress can be seen today in its renovated governmental institutions, and many new and reformed laws that continue to develop, responding to the needs of a modern Vietnam and the enthusiasm of foreign investors.

A. Current Legal and Political Framework

Vietnam is one of the few remaining countries in the world where the Communist Party is dominant and a socialist regime is established. As a communist country, Vietnam has the structure and institutions which are common in socialist countries.

Most of the power, ideology and policy making continues to rest today with the Communist Party of Vietnam (the "CPV"), led by its Politburo and Executive Secretariat. Many of the important executive positions of Vietnam's National Assembly and executive branch of the central government are held by members of the CPV Politburo, and the key positions of the Supreme People's Court, as well as the Chief Procurator General Attorney and chairs of the local administrations, are held by members of CPV Central Secretariat.[27]

The National Assembly is the highest political body of the State, is superior to both the executive and judicial branches and is vested with constitutional and legislative power.

In general, the National Assembly has extremely broad authority including the power to: (i) pass and amend the constitution, make and amend laws; (ii) organize, grant authority and dictate the activities of the National Assembly itself, the State, Presidency, Supreme and Local People's Court, People's Procuracy, and local administrations; (iii) appoint and remove the President, Vice President, Chair and Vice Chair of the National Assembly, Standing Committee of the National Assembly, Prime Minister, Chief Justice and judges of Supreme People's Court and Chief Procurator; (iv) pass economic and social plans, monetary policies and state budgets; and (v) approve and adopt foreign policies, among others.

The President, appointed by the National Assembly, is the head of the State, and represents Vietnam in domestic and foreign affairs. The President has the authority to: (i) enact legislation; (ii) act as chief of armed forces; (iii) propose to the National Assembly the appointment or removal of the Vice President, Prime Minister and other key positions; (iv) appoint and remove ministers and other members of government; (v) appoint and receive ambassadors; and (vi) sign international treaties, among others.

The executive branch of Vietnam's government, consisting of various ministries, is headed by the Prime Minister, who is elected by the National Assembly. The executive branch promulgates decrees and clarifies rules and regulations. Local governments administer laws and control, adopt and develop policies for their localities.

The Vietnamese judicial system is comprised of several levels of courts, tribunals and a Supreme People's Procuracy. The court hierarchy has three principal tiers: Supreme People's Court; Provincial Courts; and District Courts. The Supreme People's Court, the highest court, is headed by a Council of Supreme Court Judges, and supervises the performance of the Provincial Courts and District Courts, which, in turn, supervise the corresponding People's Councils and the Military Tribunals.[28]

The Provincial Courts and the District Courts, together with the People's Procuracy, are also responsible for preserving and protecting the socialist legal system, State assets and collective property, among other things. The Supreme People's Court may act as a trial court in certain circumstances.

B. Recent Legal Developments

As stated earlier, a reform process began in Vietnam with *Doi Moi* and was followed by Vietnam's 1992 Constitution with many new or reformed laws and regulations.

The changes in Vietnam's legal framework since the 1992 Constitution were motivated by a number of things. On one hand, there was the need to renew Vietnam and its economy, but more importantly, there was the desire for the betterment of the country through the opening of its economy by compliance with the VBTA and its membership of the WTO.

In order to comply with the conditions and provisions of the VBTA and the WTO, Vietnam had to make sweeping changes in its legal system. It had to draft new and effective laws, amend existing laws and create a legal framework not only to satisfy the VBTA and the WTO, but to build an open economy demanded by the West and to follow the trend of the other Asian countries, particularly China.[29]

C. Goals and Expectations under the Current Legal Framework

In 2001, the Prime Minister ordered the formation of an agency with the purpose of conducting a needs assessment for the development of Vietnam's legal system for the next ten to fifteen years. The report assessed Vietnam's legal system, and most importantly, it outlined the future goals and strategy to achieve them.[30] Some of the principal goals set forth in the report, which provide insight into the direction of Vietnam, are below.

- New laws to create the necessary framework for Vietnam to accede to all international treaties necessary for the country's economic development and international integration. Laws to promote a market economy with a socialist orientation, to establish clearly the hierarchy of the legal system, and to be comprehensive, consistent and transparent.
- Reforms relating to law implementation and enforcement mechanisms, encouraging State officials to recognize the supremacy of the law and develop a sense of respect for the law, and develop reforms in the judicial system to ensure independence of the courts.
- Criminal procedural laws to assure adversarial hearings and equality among the parties, as well as to improve and complete outside-court dispute resolutions (i.e., arbitration, conciliation and mediation), and to assure that all individuals and organizations in society have ready access to the judicial agencies, legal services and legal aid.
- Procedures to educate and train a sufficient number of judges, prosecutors, investigators and other judicial staff and officials with qualifications and skills and ethical standards equivalent to those of the advanced countries in the region.

V. Business Enterprise in Vietnam

A. General Business Legal Framework

In Vietnam, as in every emerging market, entrepreneurs face challenges when establishing new businesses. Every country differs greatly in its regulation of foreign investment, particularly with regard to key sectors or industries deemed to be of national strategic importance. At this time, Vietnam maintains a policy of encouraging foreign investment and has experienced substantial economic growth in recent years. It offers investors, among other things, low wages, access to foreign markets and, much like China with respect to Hong Kong, access to the financial, professional and communications infrastructure available in Singapore.

Vietnam is currently going through a period of transition from a "state-controlled" economy to a "state-supervised" market economy. As a result, investors will encounter issues related to infrastructure, legal and financial inefficiencies, governmental bureaucracy, land ownership or the hiring of trained staff.[31] As a means of dealing with such impediments and attracting foreign investment and moving to a market economy, Vietnam has enacted an extremely broad range of new laws in recent years, applicable to both foreign and domestic business, which portend, over time, the movement of the country toward a business environment of transparency and efficiency.

These basic laws, which cover a basic and broad range of areas, include the following:

Law	Effective Date	Subject
Investment Law	1 July 2006	Regulates Investments
Law on Enterprises	1 July 2006	Establishes Forms of Legal Entities
Commercial Code	1 January 2006	Regulates All Forms of Profit-Making Activities
Civil Code	1 January 2006	Regulates Commercial, Business and Labor Relations
Code of Civil Procedure	1 January 2005	Dispute Resolution
Law on Bankruptcy	15 October 2004	Insolvency
Intellectual Property Law	1 July 2006	Regulates Rights to Intellectual Property
Securities Law	1 January 2007	Regulates Capital Market Activities
Ordinance on Exchange Law	1 June 2006	Affects Current Transactions, Capital Transactions, Foreign Currency Markets, etc.
Law on Real Estate Business, Land Law, Etc.[32]	1 January 2007	Regulates Rights in and Use of Real Property Rights
Competition Law	1 July 2005	Regulates Competition
Electricity Law	1 July 2005	Regulates Investment in the Electricity Sector

The Investment Law and the Law on Enterprises ("Enterprise Law"), both effective on 1 July 2006, were intended, collectively, to establish a clear legal predicate for doing business in Vietnam applicable to local and foreign parties. The Investment Law regulates investments in Vietnam, establishing or regulating (1) investment guarantees, (2) procedures for investment approval, (3) sectors where investment is sought, conditional or prohibited, and (4) investment incentives applicable to foreign and domestic investors. The Enterprise Law governs business formation, procedures, organization, management and dissolution. Those laws together endeavor to create a transparent and uniform environment for all investors, both domestic and foreign.

Foreign investors may invest "directly" through various business entities discussed below or "indirectly" through the acquisition of shares, bonds and other instruments and investment through intermediary financial institutions without direct participation in management or economic enterprise. Direct investments are regulated by the Investment Law and indirect investments are regulated by the Securities Law and other relevant laws.

B. Business Organizations

To carry out an investment strategy, a foreign investor may do so through a joint venture, sharing capital and profits, or a wholly-owned business ("WFOE"). In either case, the investor must form one of the entities described below and obtain from the government an "Investment Certificate" upon the formation of the entity. The Investment Certificate will constitute government consent for the proposed business. Joint ventures account for a significant portion of foreign investment to date because the local partners bring assistance in dealing with the government and provide access to land or other key assets that can be difficult to obtain.

The different models of business organizations provided in the Enterprise Law (considered methods of "direct investment") are described below.

1. Shareholding or Joint Stock Company

A Shareholding or Joint Stock Company ("JSC") is a corporation which may offer its shares to the public. The Enterprise Law requires a minimum of three shareholders to establish a JSC. JSCs may issue ordinary shares or preferred shares. Shareholders are liable for the obligations of the JSC up to the amount of contributed capital. Founding shareholders may hold preferred shares (upon prior authorization from the government) with greater voting rights than the holders of the ordinary shares. JSCs, in addition to shares, can also issue other forms of securities including bonds, convertible debt, among others, which may be freely assigned.

2. Limited Liability Company

A Limited Liability Company ("LLC") is a privately held company. Except for certain activities, including those relating to real estate, securities and fund management, there is no minimum capital requirement to form an LLC. The members are responsible for the debts and liabilities of the company up to the capital contributed by each member. An LLC must have at least two members, but not more than fifty members, either individuals or entities. LLCs cannot issue shares of any kind. For tax purposes, an LLC is treated as a partnership, and the governance structure is less complicated than that of a JSC.

3. Sole Member Limited Liability Company

Another form of LLC is the Sole Member Limited Liability Company, which may be wholly owned by an entity or an individual. The sole member will be liable for the debts and liabilities of the company up to the amount of its contributed capital.

4. Alternative Approaches

The Business Cooperation Contract, an approach to investment that does not involve the formation of an entity, permits a foreign investor to pursue a business strategy with a local company by a contract, pursuant to which a sharing of capital, profits and losses, similar to a partnership, are agreed upon.

Build-Operate-Transfer Contracts, though not prevalent, constitute another avenue to foreign investment. In these arrangements, a foreign investor agrees typically to build an infrastructure project and to operate the same for an agreed upon time to recover costs and generate profits: after that time the project is transferred to the government. Other arrangements are also permitted, including Build-Transfer projects.

Branch or representative offices are also permissible, but the activities of such offices are extremely limited.

5. Partnership

A partnership under the Enterprise Law must have at all times at least two individual partners. The individual partners must have professional qualifications and will be liable for the debts and liabilities of the partnership without limitation. A partnership may have limited partners. Any limited partners in a Vietnamese partnership only contribute capital to the partnership and will be liable for the debts and liabilities of the partnership up to their actual capital participation in the partnership.

6. Private Company or Enterprise

The Private Company or Enterprise, much like a sole proprietorship, may be owned by one individual, who will be liable for the debts and liabilities of the company with all or his or her own assets.

7. State-Owned Companies

State-Owned Companies, different from business organizations mentioned above, are regulated by the Law On State-Owned Companies. A State-Owned entity is wholly owned by the Vietnamese Government and can be found in the most important sectors and industries. As instrumentalities of the State, they operate with a socialist view. Although foreign investors cannot invest in most of such companies, some of them are being converted into Shareholding or Joint Stock Companies to permit such ownership.

C. Registrations and Governmental Approvals

In general, all Vietnamese companies, whether private or State-owned, must register with the Department of Planning and Investment of the People's Committee in provinces and cities to secure a "Business Registration Certificate," which evidences the good standing of a Vietnamese enterprise. Any modifications regarding the scope of permitted activities, registered capital, location of offices or opening of branch offices will require a registration application with the appropriate committee.

For foreign investors, in lieu of a Business Registration Certificate, the Investment Law requires that a foreign investor investing directly obtain an "Investment Certificate" for the relevant project and as a legally mandated predicate to the formation of the selected business entity. In the case of indirect investment, such certificate is not required, but the investor must comply with the applicable securities and other relevant laws in such regard.

Depending on the sector or industry, there are different permits or registrations issued by different governmental agencies in Vietnam for which investors need to apply. Some of the relevant registrations are, for example:

1. Registration for Import Rights

In general, most goods may be imported into Vietnam.[33] Foreign companies and companies with foreign investment that wish to import products to Vietnam must register with the Ministry of Trade within sixty days from the date of issuance of the "Investment Certificate."

2. Intellectual Property Registration

Industrial Property and Copyright are regulated separately. Industrial property is administered mainly by the Ministry of Science and Technology and copyright by the National Office of Intellectual Property. Registration is required except for copyright.

3. Registration of Pharmaceutical Companies or Products

Foreign pharmaceutical companies that wish to do business in Vietnam must register with Ministry of Health in order to distribute products in Vietnam.

4. Registration of Mortgaged or Pledged Properties

Any pledge or mortgage contract must be recorded with the corresponding authority, depending on the nature of the mortgaged or pledged property. Normally, relevant transactions must be registered with the Center for Registration of Secured Transactions under the National Office of Secured Transaction Registration.

5. Various Permits

There are additional permits or licenses required for foreign investors to carry out business in Vietnam. The most relevant licenses are:

- Work permit for a foreigner working in Vietnam who wishes to work in Vietnam for more than three months. This permit is issued by the Ministry of Labor, War Invalids and Social Affairs or provincial labor departments.
- License for a foreign law firm branch, issued by the Ministry of Justice.
- License to establish an insurance company, issued by the Ministry of Finance.
- License to establish a financial institution with foreign investment, issued by the Central Bank of Vietnam.
- License to establish a securities company or a fund management company, issued by the State Securities Commission.
- Accounting and auditing service permit, issued by the Ministry of Finance.
- Construction permit, issued by the Provincial People's Committee of the Ministry of Construction, depending on the nature, size and location of the construction.
- Foreign company resident representative office license, issued by the Department of Trade with the instruction and guidance of the Ministry of Trade and the Provincial People's Committee.

D. Real Estate

In Vietnam, the State does not grant fee simple ownership of land, but since 1988 the State has granted "land use rights." Rights to use land are evidenced by a land use rights certificate ("LUR Certificate").

There are four different types of LUR Certificates: (i) allocation of land use with payment of a fee; (ii) allocation of land use without payment of a fee; (iii) lease with an annual payment; and (iv) lease with one payment for the entire term.

The "allocation of land" by the State means the grant of an LUR by the State by way of an administrative decision to an entity which has requirements for land use. The

lease of land by the State as lessor means the grant of an LUR by the State on the basis of a contract with an entity which has requirements for land use.

Under the Vietnamese Land Law, only Vietnamese domestic enterprises and Vietnamese residing overseas implementing projects in Vietnam have the option of either an "allocation of land" or "lease of land." Foreign investors implementing investments projects in Vietnam are only entitled to a "lease of land" with payment of annual rent or a single payment for the entire term of the lease.

The entities to which the State allocates land without collection of land use fees do not have the right to exchange, assign, donate or lease the LUR, or to mortgage, guarantee or contribute capital using the LUR. The entities to which the State allocates land with collection of land use fees (provided that the fees paid are not sourced from the State budget) have the right to assign, donate or lease the LUR, or to mortgage, guarantee or contribute capital using the LUR.

The entities to which the State leases land have the right to (i) grant mortgages or issue guarantees using the assets owned by them attached to the leased land with credit institutions authorized to operate in Vietnam, (ii) sell assets or to contribute capital using assets owned by them attached to the leased land, and (iii) sub-lease land on which infrastructure has been completed in those cases as to which they are permitted to invest, construct and operate infrastructure in an Industrial Zone, High-Tech Zone or Economic Zone.

Generally, LUR Certificates are issued by the government for specific uses and may be rescinded in certain circumstances, such as, for example, where the land is not used for its licensed purpose or is not used continuously for a specified period or an investment project is not completed within a specified period.

The term of an LUR Certificate for foreign investors is usually fifty years. However, foreign developers of residential land may obtain seventy-year leases extendible without limitation for consecutive periods of seventy years.

E. Tax Matters

On 1 January 1999 Vietnam enacted significant tax reform. The major changes effected by the reform include a value added tax and a corporate income tax.

As a general matter, the principal taxes in Vietnam currently include: (i) an income tax, consisting of corporate income tax and personal income tax; (ii) a value added tax; (iii) a capital gains tax; (iv) a special consumption tax; (v) a natural resources royalty tax; (vi) an agricultural land use tax; (vii) a land use right transfer tax; and (viii) import and export duties. There are also additional taxes that may apply to foreign investors.

To make tax collection more efficient, a new law on tax administration became effective on 1 July 2007. This new law governs both corporate and personal taxation.

1. Income Tax

The corporate tax rates and regulations were revised substantially in 2004 to unify the tax system for entities formed in Vietnam, regardless of whether they are foreign owned. The changes apply to entities with foreign investors whose Certificates of Investment were issued after 2004.

The corporate income tax in Vietnam has a uniform rate of twenty-eight percent, except for oil and gas businesses (for which the rate may increase to fifty percent). There are incentive rates at ten percent, fifteen percent and twenty percent available for a period of ten years, and in some cases, up to the duration of the project, subject to prior authorization from the government.

Companies or individuals who carry out business in Vietnam outside the permitted forms provided in the law are referred to as Foreign Contractors, and are subject to corporate income tax, value added tax, special sales tax, import and export duties and personal income tax.

The Personal Income Tax rate varies. For foreigners residing in Vietnam, standard rates apply based upon progressive scales and are based on worldwide income. For foreigners residing in Vietnam for less than 183 days, the tax rate is twenty-five percent, based on the number of days the individual actually resides in Vietnam.

All business organizations formed in Vietnam are required to use the Vietnamese Accounting Standards, which are based on the International Accounting Standards established by the International Accounting Standards Board based in London.

2. Value Added Tax

The value added tax is imposed on the supply of goods and services at three rates: ten percent, five percent or zero percent. The zero-percent rate applies to exports goods subject to special sales tax, exports of software, services to firms operating in export-processing zones, and goods processed by sub-contractors, among others. The five-percent rate applies to approximately forty-one types of goods and services. The ten-percent rate applies to sixteen specific categories of goods and services and a seventeenth catch-all group to "any good or services not subject to any of the other two" rates.[34]

There are certain activities exempt from the value added tax, such as export services, banking, finance, insurance, stock exchange activities, certain import activities, technology transfers and registration, and insurance services for international transport.

3. Capital Gains Tax

Gains by foreign companies on the transfer of interests in a Vietnamese company with foreign investment are subject to a flat tax rate of twenty-eight percent. The taxable gain is determined as the excess of the sales proceeds less costs and transfer expenses.

F. Foreign Exchange Controls

The Investment Law provides that foreign investors may purchase foreign currency from financial institutions licensed to trade foreign currency in Vietnam for certain permitted purposes. Banks have the responsibility for foreign exchange compliance with respect to their customers.

The Investment Law provides that, after all local financial obligations have been met, foreign investors may remit the following from Vietnam: (i) dividends and profits from business activities; (ii) payments received from providing technology and intellectual property services; (iii) payments relating to the principal and interest on offshore loans; (iv) invested capital and proceeds from liquidation of investments; and (vi) other certain sums of money and assets owned by investors.

G. Dispute Resolution Mechanisms

Although compromise between the disputing parties constitutes the most common approach to dispute resolution, foreign and domestic parties may resort to Vietnam's judicial system or arbitration. There is a recent tendency to turn to courts or arbitration for commercial or financial disputes.

Economic courts have jurisdiction over business disputes, and administrative courts exist as a forum for review of government action. However, not only is there much skepticism about the transparency of the courts, the independence of the judiciary (many of whose judges are members of the Communist Party) and the ability of the judiciary to promptly render decisions that correctly apply the facts to the applicable law, but the influence of a party against whom a judgment has been rendered can materially impact on judgment enforcement.

For various reasons, including a lengthy appeals process, parties often opt for arbitration as a means of dispute resolution. There are various arbitration forums in Vietnam, but their competence to hear disputes involving foreign parties is not free from doubt. An alternative for foreign investors is the Vietnam International Arbitration Centre ("VIAC"), a non-governmental organization linked to Vietnam's Chamber of Commerce. The VIAC, as to which parties must agree to submit disputes, typically hears cases involving trade and investment and foreign parties. However, many questions remain about the VIAC, including about the use of foreign arbitrators, the applicable arbitral rules, its competence or transparency, and the enforcement of its arbitral awards.

With respect to governing law in arbitration, when a dispute is between Vietnamese parties, the applicable law must be Vietnamese law. However, when the parties are from different countries, the law governing the arbitration may be the law of the country agreed upon by the parties, provided that the application of such law is not contrary to the public policy of Vietnam.

Foreign arbitration is possible involving Vietnamese parties and foreign arbitral awards may be enforced in Vietnam. In this connection, Vietnam acceded in 1995 to the multi-lateral convention known as the Convention On the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention").[35] Under the New York Convention, an arbitral award granted to a party must be enforced by the courts of a New York Convention member country without a review of the merits of a case. Under the New York Convention, an arbitral award may only be set aside or modified on very limited grounds, such as, for example, corruption or fraud in procuring the award or the partiality of an arbitrator. Nonetheless, there have been instances where Vietnam courts have undertaken a review of the commercial dispute underlying a foreign arbitral award on the basis of a narrow interpretation of "commercial activities" under the Vietnamese Commercial Code. This leaves in doubt the ability of a party to enforce a foreign arbitral award in Vietnam.[36] As a consequence, in February 2003 the Vietnamese National Assembly passed the Ordinance on Commercial Arbitration, which was intended to facilitate the enforcement of foreign arbitral awards. The legislation defines "commercial activities" broadly to include a range of commercial activities including, among others, leasing, construction, investment financing, banking, insurance, mining activities and transportation.

Endnotes

1. World Bank data.
2. The law in Vietnam requires the government to set a minimum wage, which is adjusted for inflation, among other considerations. In November 2007 the government raised minimum wages across all categories and locations, in part to account for rising inflation. Effective 1 January 2008, the official monthly minimum wage for unskilled workers at foreign-invested joint ventures and foreign organizations was set to be $62 in the urban districts of Hanoi and Ho Chi Minh City; $56 in the suburban districts of Hanoi, Ho Chi Minh City and several other industrial districts and towns; and $50 elsewhere. United States Department of State, *2007 Country Reports on Human Rights Practices*.
3. Spencer C. Tucker, VIETNAM at 7 (1999).
4. *Id.* at 10.
5. Stanley Karnow, VIETNAM: A HISTORY at 71 (1997).
6. Confucius was a Chinese thinker and philosopher whose teachings of philosophy have deeply influenced Chinese, Korean, Japanese and Vietnamese thought and life.
7. *Id.* at 122.
8. Indochina is the region in Southeast Asia which lies roughly east of India, south of China. French Indochina includes Vietnam, Cambodia and Laos.

9. Karnow, note 5 *supra*, at 131.
10. Tucker, note 3 *supra*, at 50.
11. Karnow, note 5 *supra*, at 151.
12. Carol V. Rose, *The "New" Law and Development Movement in the Post-Cold Era: A Vietnam Case Study*, LAW & SOCIETY REVIEW at 2 (1998).
13. *Id.* at 2.
14. David A. Gantz, *Doi Moi, the VTA and WTO Accession: The Role of Lawyers in Vietnam's No Longer Cautious Embrace of Globalization*, THE INT'L LAW. at 4 (Fall 2007).
15. *Rose*, note 12 *supra*, at 3.
16. Phong Tran, *Vietnam's Economic Liberalization and Outreach: Legal Reform*, 9 LAW & BUS. REV. at 139 (2003).
17. Gantz, note 14 *supra*, at 4.
18. *Id.* at 3.
19. *Id.* at 5.
20. VIETNAMESE CONSTITUTION, art. 15.
21. Encyclopedia Britannica Online, *Vietnam*, at 2.
22. Gantz, note 14 *supra*, at 6.
23. Tilleke & Gibbins Consultants Limited, *2006 Vietnam Law Digest*, at 26 in MARTINDALE-HUBBELL INTERNATIONAL LAW DIGEST (2006).
24. Gantz, note 14 *supra*, at 11.
25. *Id.* at 14.
26. *Id.* at 14.
27. Tilleke & Gibbins Consultants Limited, note 23 *supra*, at 1.
28. Encyclopedia Britannica, note 21 *supra*, at 24.
29. *See*, Part V.A. for a list of recent laws.
30. Inter-Agency Steering Committee, *Report on Comprehensive Needs Assessment for the Development of Vietnam's Legal System to the Year 2010*, Section 3.1.2.1.2.
31. U.S. State Dept. Bulletin, Investment Climate Statement—Vietnam (2007).
32. Initially, effective as of 1 January 2004.
33. With regard to the Trading Rights (the right to import and export goods), Vietnam committed, under its WTO commitments, to grant such trading rights for all goods to all foreign individuals and organizations no later than 1 January 2007, except for various products reserved to "State-Trading" enterprises (e.g., tobacco, crude oil and petroleum products) and products for which the import right was phased in on 1 January 2009 (e.g., pharmaceuticals). Without a distribution license, the importer is not permitted to distribute directly the imported goods in Vietnam.
34. Tilleke & Gibbons Consultants Limited, note 23 *supra*, at 25 and 26.
35. The New York Convention, adopted by diplomatic conference on 10 June 1958, was prepared by the United Nations. The Convention entered into force on 7 June 1959.
36. U.S. State Dept. Bulletin, note 31 *supra*, at 7.

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Investing into a Listed Company in China

By Tianpeng Wang

I. Introduction

The Shanghai Stock Exchange's composite index touched 6,124 points on 16 October 2007, its all-time high, when the average price to earnings ratio (P/E) topped more than 70 based on 2006 earnings. During the last year, private equity investors as well as strategic investors frequently had a hard time negotiating the investment prices and valuations of the target companies. Sellers tended to ask for a price as high as twenty times (or even higher sometimes) P/E ratio—which is very high by any standard for an investment in a private company—and investors were pushed to the difficult position of either accepting the price or letting a competitor get the deal.

Markets are unpredictable, especially the A-share market.[1] The Chinese equity market has experienced an astonishing reversal since last October's peak, and the Shanghai composite index dropped to 2,300 in August 2008, a more than sixty percent decline, while the average P/E ratio on the Shanghai Stock Exchange has dropped to below nineteen times, although the country's economy is still widely believed to be promising.

Facing cheaper public companies, some multinational investors are starting to think about and look closely at potential opportunities on the Shanghai or Shenzhen Stock Exchange. Although it is complicated, acquisition of a public company in China is feasible from the regulatory point of view, so long as rules are followed.

II. General Regulatory Regime for Foreign Investment in China

Before providing a more detailed discussion on acquiring a public company in China, we need to touch upon several general concepts that are important and applicable to all direct investment in China.

A. Government Approvals

As a rule of thumb, all foreign investment in China is subject to the Chinese government's review and approval. The key governmental authority is the Ministry of Commerce (MOC)[2] and its regional branches at provincial and city levels. After its approval, the MOC will issue an approval letter and an investment approval certificate, which records some basic information about the investment such as who the shareholders are, the amount of capital paid-in by the shareholders, and the business to be engaged in by the target company. After the MOC approval, the transaction will be submitted to the State Administration for Industry and Commerce (SAIC) (usually to one of its regional branches) for company registration purposes and issuance of a new business license.[3]

Certain other government agencies may also be involved in the approval process. For example, the National Development and Reform Commission (NDRC) is a supervisor and planner of the national macro-economy and its approval is necessary if the investment will have a material impact on certain manufacturing industries of the country as a whole, such as the machinery, construction, energy, transportation, automobile, civil airplane or some other sectors, which are deemed to be important to the national economy.

As is known by many multinational corporations, China's economy is still heavily in the hands of the state. There are a large number of state-owned enterprises (SOEs) that are under the supervision of the State Assets Supervision and Administration Commission (SASAC) or one of its regional branches. Any disposal of equity interests in or assets of an SOE is subject to review and sometimes approval by the SASAC.

B. Foreign Investment Industry Guideline

The first question a lawyer will ask his or her client considering investing in China is almost always in which industry the investment will be. This is a legitimate question, the answer to which is important. Together with the MOC, the NDRC has issued the *Foreign Investment Guidance Catalogue*[4] (the "Catalogue") and has amended the Catalogue four times so far to adjust the foreign investment guideline to be in line with China's development needs.

The Catalogue classifies foreign investments in different industries into three categories: "encouraged," "restricted" and "prohibited."[5] The classification functions as fundamental principles under which the approval authorities at different levels review applications for foreign investment in Chinese companies. For example, "encouraged" investments are usually those made in the industries the Chinese government deems important and needed in China at the current development stage such as agriculture, alternative energy, high technology and manufacturing with advanced technology. For "encouraged" or "permitted" investments, the foreign investor is generally (with certain exceptions) allowed to be a majority or even one hundred percent shareholder of the target company.

C. The M&A Rules

The *Measures for Foreign Investors' Acquisition of Domestic Enterprises* (the "M&A Rules"), promulgated by six ministry level authorities of the Chinese government in August 2006, is the most important regulation for almost all foreign investments in China. Although some-

times the M&A Rules do not directly govern an acquisition of a public company in China, certain issues such as payment schedules for consideration or the anti-trust filing threshold, which are not governed by the relevant public acquisition rules, are regulated by the M&A Rules.

III. Acquiring a Listed Company

A. Selection of Target

As with investing in a private company, a potential acquirer of a public company should always look at the Catalogue (and sometimes some special policies, such as in respect of the financial industry) before proceeding with a purchase transaction. If the target company is engaged in a business from which a foreign invested company is barred, there will be no need to proceed with further discussions.

Second, a potential target ought not to be a listed company whose shares are not all tradable. Due to historical reasons, certain shares of many listed companies (usually those with shares held by large SOE shareholders) were not tradable until recently, and in many cases only a minority portion of the shares of a listed company could be traded on the stock exchange. From May 2005 to the end of 2006, the China Securities Regulatory Commission (CSRC) enforced a top-down reform of the Chinese capital market and implemented several measures to eliminate the separation of shares. By the end of 2007, it was reported that ninety-eight percent of the listed companies had completed or would be completing the share separation reform and only thirty-three listed companies had yet to start the process,[6] which usually has serious financial or operational issues. As a matter of practice, it is recommended that, to avoid extra pain and cost, a foreign investor only invest in a listed company that has completed the share separation reform.

B. Strategic Investment in a Listed Company

An interested strategic investor needs to be aware of certain important issues in connection with an investment into a public company in China.

1. Approval

Foreign investments in a public company in China are, like investments in private companies, part of a process driven by governmental approval. In principle, the MOC is the key government authority in charge of approving foreign strategic investment in a listed company in China. Since such a transaction needs to be submitted to the central level MOC for approval purposes,[7] it can easily take more than six months or even a year for the parties to receive a green light from the government.

When the MOC reviews an application made pursuant to the *Measures for Foreign Strategic Investment in Listed Companies* (the "Strategic Investment Measures"), it will first make determinations on several issues. First, has the target company completed the share separation reform? Second, is the foreign investment a sincere investment committed for a medium to long term rather than for short-term speculation? Third, is the foreign investment allowed under the Catalogue? Unless the answer to each of these three questions is in the affirmative, the MOC may not move forward with the application review, but rather reject the application.

In terms of governmental approval, foreign investment in some industries is under stricter scrutiny than in other industries. For example, foreign investment in a Chinese financial institution requires prior approval by the China Banking Regulatory Commission, and one single foreign investor may not hold more than twenty percent of a Chinese financial institution,[8] either private or public. In addition, a foreign investment in a public securities firm should be first approved by the CSRC before the MOC's review.[9] Many market players may still recall that last October Bear Sterns and CITIC Securities, China's largest brokerage and listed on the A-share market, agreed to swap stakes in each other. Were that deal to go forward, it would require the approval by the CSRC and some other Chinese government authorities in addition to any applicable approval process in the U.S. If the transferor is an SOE shareholder, the transaction will also be subject to special regulations by the SASAC.[10]

2. Qualified Investor?

Under the Strategic Investment Measures, to be deemed as a qualified investor, an investor (or its parent company, if the investor is a special purpose vehicle) should have at least USD100 million worth of assets or USD500 million worth of assets under its management and should not have had any penalty or fine imposed by the supervisory agency in its home jurisdiction in the past three years.[11] Some other rules governing investment in specific industries, such as financial institutions, have additional requirements for qualifications of a potential investor.

3. New Shares or Existing Shares?

If the strategic investment is made through subscribing for newly issued shares of a listed company, after MOC approval, the new issue of shares needs to be approved by the CSRC. But if the deal is structured as purchase of existing shares, the deal does not require CSRC approval, but rather only needs to be filed with the CSRC for its records, and the transaction can be effected at the securities settlement and clearance house after the relevant stock exchange has confirmed the transfer based on the MOC approval. In both scenarios, whether the issue of new shares or the transfer of existing shares, the MOC will issue the investment approval certificate to convert the listed company into a foreign-invested company only after new shares have been issued or old shares have been transferred, which process is different from the typical process of a private acquisition under the M&A Rules,

where the MOC approval certificate is issued before the shares are actually transferred or issued.

4. Friendly or Hostile

When a potential investor buys into a listed company, it is necessary to assure that the target's board of directors and its largest shareholder (even if it is not a seller) is friendly. In other words, there is no hostile takeover so far in China. First, when the government approves an investment in a listed company, it will insist on seeing a favorable board resolution.[12] Second, no matter whether the investor purchases shares from another shareholder or the company issues new shares to the investor, a favorable shareholders meeting resolution is also required by the government.[13] Furthermore, a share subscription agreement (in a new issue of shares) or a share purchase agreement (in a transfer of existing shares) must be entered into by the investor,[14] and without the support of the board or the largest shareholder of the target, it would be unlikely to get one signed.

5. Minimum Shareholding

There is a minimum amount that an acquirer cannot go below. According to the Strategic Investment Measures, a foreign acquirer cannot buy less than ten percent of the total issued shares of the listed company on a post-money basis.[15] As to the ownership ceiling, the general principle is that, so long as no limitation on foreign ownership imposed by the Catalogue is exceeded and the target's listing status is not affected, a foreign acquirer can purchase as much of a shareholding in a listed company as it desires.

6. Exit

Because the Chinese government wants to foster strategic investment in China and discourage short-term speculation, the government has included a mandatory lock-up requirement in the law. Thus, a strategic investor in a listed company is subject to a three-year lock-up, starting from the issuance of the investment approval certificate by the MOC.[16] This requirement is often a deterrent factor that bothers an investor, who may be a sincere long-term investor but is still, understandably, unwilling to accept such a long lock-up as a legal requirement.

7. Filings

In addition to the required government approval and submission of the necessary transaction documents, when an investor acquires more than five percent of a public company in China, it must make certain required filings[17] to the CSRC within three days after the acquisition. Simultaneously with filing a report on the change of shareholding, the investor should also prepare to make a public announcement of the acquisition.[18] Once an investor has become a five-percent shareholder of a public company, every time that the investor acquires or disposes of five percent of the listed company, it must file to the CSRC a similar report followed by a public announcement.[19]

Depending on the percentage of shares acquired by the investor, it may be required to file a simplified or detailed shareholding-change report. If below twenty percent, a simplified version of the shareholding-change report would be sufficient and the simplified report only includes such basic information of the acquirer as its identity, place of incorporation, principal place of business, purpose of the shareholding and intention to increase its shareholding in the next twelve months, time and method of the acquisition, etc.[20] If the acquirer's shareholdings are above twenty percent (but below thirty percent, when a tender offer is triggered, as discussed below) or if the acquirer becomes the largest or controlling shareholder even if its shareholding is still below twenty percent, the acquirer is required to file a more detailed report, which not only includes the aforementioned information but also its group structure, the source of its funding and payment arrangement, its plan of proposed changes to be made in the listed company's business, asset, human resources or structure and its previous dealings with the listed company in the past twenty-four months, etc.[21] Usually, a financial adviser opinion is also required to be submitted together with the detailed report.

8. Public Tender Offer

When an investor's shareholding in a listed company reaches thirty percent and it plans to increase its shareholding, the investor is required to proceed with a public tender offer (similar to the tender offer under the Williams Act in the U.S.) and offer to purchase all or a certain portion of the shares held by all the shareholders of the listed company.[22] The investor should prepare a tender offer report and engage a financial adviser to submit the report to the CSRC and the relevant stock exchange.[23] The content of the tender offer report is similar to the detailed shareholding-change report.

There are several exemptions from the public tender offer requirement that may be available in an acquisition. For example, after the investor's holding reaches thirty percent and if its shareholding increases by no more than two percent within twelve months after the acquisition, the additional acquisition is called "free increase" by market players, and the additional purchase is exempted from the tender offer requirement.[24] Another frequently seen exception is when the acquirer's shareholding has reached fifty percent and its proposed increase will not affect the listed company's listing status (i.e., it will not cause the company to be delisted), the proposed additional acquisition is exempted.[25] In these situations, the acquirer should still notify the proposed acquisition to the CSRC before the acquisition and, if the CSRC does not dissent, the acquirer can then proceed with the acquisition. Currently, the CSRC is considering amending the

"free increase" exemption so that an application before the acquisition would no longer be required, but rather there would simply be a filing following the acquisition: such a change would give the acquirer more freedom in increasing its shareholding in a listed company.[26]

IV. Conclusion

We have discussed some aspects of acquiring a listed company in China, but a careful reader may have noticed that we have not discussed the direct "open" market purchase of shares of a listed company in China. Actually, direct purchase on the A-share market is still not available to foreign investors unless the purchase is made through a licensed qualified foreign institutional investor (QFII)[27] registered with the CSRC.

Since it is still impossible for foreign buyers to purchase stock directly in the A-share market (except through QFIIs) and, as discussed above, hostile takeovers are still only an academic topic in China, as a matter of practice, the first thing an interested multinational investor needs to do is to find a friendly partner and/or a friendly board which is not against the idea of foreign investment in the listed company and is willing to compromise on certain terms a multinational corporation would usually expect to receive but which are still unusual in China.

Endnotes

1. The Chinese stock market is frequently referred to as an "A-share" market and the shares traded on the market are called "A shares."
2. It is also referred to as MOFCOM, to differentiate it from Ministry of Communications.
3. The SAIC procedure is somewhat similar to the company registry process in some foreign jurisdictions, and the business license is similar to the certificate of incorporation.
4. The Catalogue was first published in June 1995 and later amended in 1997, 2002, 2004 and 2007. The latest version of the Catalogue came into effect on 1 December 2007.
5. In practice, there is a fourth category of "permitted," which covers any other industries not falling under any of the three big categories.
6. See Yu Mu, *Listed Companies Share Separation Reform*, CHINA INDUSTRY ECONOMY NEWS (11 August 2008).
7. *Measures for Foreign Strategic Investment in Listed Companies* art. 3 (hereinafter "Strategic Investment Measures") (31 December 2005).
8. *Measures for the Administration of Investment and Shareholding in Chinese Financial Institutions by Foreign Financial Institutions* art. 8 (8 December 2003).
9. *Rules for Foreign-Invested Securities Companies* art. 10 (1 June 2002, amended 28 December 2007).
10. See, in general, *Interim Measures for State-owned Shareholders Transfer of Their Shares in Listed Companies* (30 June 2007).
11. Strategic Investment Measures, note 7 *supra*, art. 6.
12. *Id*. arts. 7-8.
13. *Id*.
14. *Id*.
15. *Id*. art. 5.
16. Strategic Investment Measures, note 7 *supra*, art. 5.
17. The filing is similar to Schedule 13D filing to the SEC in the U.S.
18. *Measures for the Administration of Takeover of Listed Companies art*. 13 (31 July 2006).
19. *Id*. art. 9.
20. *Id*. art. 16.
21. *Id*. art. 17.
22. *Id*. art. 24.
23. *Id*. art. 28.
24. *Id*. art. 63.
25. *Id*.
26. *Notice Regarding Opinion Solicitation on Amending Article 63 of Measures for the Administration of Takeover of Listed Companies by CSRC* (17 August 2008).
27. Western investors may make indirect investments in the Chinese equity market through certain multinational financial institutions that are licensed by the Chinese Securities Regulatory Commission as Qualified Foreign Institutional Investors (QFIIs). Many securities firms, such as JP Morgan, Morgan Stanley, Citigroup, Goldman Sachs, UBS, HSBC and Merrill Lynch and some big non-profit organizations such as Yale University, Stanford University and Columbia University have been qualified as QFIIs. This article does not address issues related to QFIIs investment.

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Anti-Suit and Anti-Anti-Suit Injunctions in Multi-jurisdictional Proceedings

By Alexander Shaknes

I. Introduction to Anti-Suit Injunctions

A. Anti-Suit Injunctions

An anti-suit injunction is an order issued by a court or arbitral tribunal that prevents an opposing party from commencing or continuing a proceeding in another jurisdiction or forum. If the opposing party contravenes such an order issued by a court, the court may enter a contempt of court order against the violating party. Anti-suit injunctions in international litigation are useful to preclude litigation in a potentially inconvenient or hostile jurisdiction and to prevent forum shopping.[1] Anti-suit injunctions are often sought in the context of international commercial arbitration where one of the parties to the arbitration agreement seeks to avoid the consequences of that agreement by pursing litigation in another jurisdiction.[2]

It is well established that U.S. courts have the authority to issue anti-suit injunctions and enjoin parties within their jurisdiction from pursuing claims in foreign courts.[3] Although anti-suit injunctions are not issued directly against foreign tribunals, most courts acknowledge that such injunctions "effectively restrict the foreign court's ability to exercise its jurisdiction."[4]

> Anti-suit injunctions can be sought in several distinct situations. First, the prevailing party in completed U.S. litigation can seek an injunction preventing the unsuccessful party from re-litigating the parties' dispute in a foreign forum. Second, a party to proceedings in a U.S. forum can seek an injunction against litigation by its adversary of the same dispute in a pending or threatened action in a foreign forum. Third, if related but not identical claims are being pursued in foreign forums, an anti-suit injunction may be sought in order to consolidate all litigation in the moving party's preferred forum.
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> Because anti-suit injunctions interfere with foreign judicial proceedings, U.S. courts typically display considerable hesitation before issuing such orders. If an anti-suit injunction can be obtained, an anti-suit injunction from a local, convenient tribunal may foreclose litigation in a potentially inconvenient or hostile foreign forum. [5]

B. Anti-Anti-Suit Injunctions

The threat of an anti-suit injunction may lead to the filing of anti-anti-suit injunctions as a preemptive attack.[6] Anti-anti-suit injunctions prevent the opposing party from filing an anti-suit injunction in another country to preclude litigation in the issuing court.[7] This in turn may cause litigants to file anti-anti-anti-suit injunctions.[8] The best known U.S. case regarding anti-anti-suit injunction was *Laker Airways Ltd. v. Sabena, Belgian World Airlines*,[9] which affirmed the grant of one such injunction. The Texas state courts have also opined on applications for anti-anti-suit injunctions, granting several.[10] In these cases, the courts considered comity, preservation of jurisdiction and public policy of the forum court when determining whether to grant the injunction.[11]

II. Threshold Criteria for Granting Anti-Suit Injunctions

Courts generally require that the proponent of the anti-suit injunction satisfy two threshold criteria before the court will order the injunction: 1) the U.S. suit and the foreign suit must involve the same parties; and 2) the U.S. suit and the foreign suit must involve the same issues.[12] To involve the "same parties," they need not be identical.[13] "Instead, courts consider whether the parties are sufficiently 'similar,' where the 'real parties in interest are the same in both matters.'"[14] "Thus, a court may issue an injunction even if the nominal parties in the two actions are different, provided that the party seeking the injunction is significantly involved in or affected by the foreign litigation."[15]

Few courts have discussed how to determine whether the suits involve the same issues. However, "the Second Circuit has held that it requires that the 'resolution of the case before the enjoining court be dispositive of the enjoined action.'"[16] "Accordingly, an anti-suit injunction action may satisfy this test even though the two proceedings in fact involve different legal questions."[17]

> For example, when an anti-suit injunction is sought to bar foreign litigation and compel arbitration, the issue before the domestic court is the validity and scope of the arbitration clause, whereas the issue before the foreign court may be the merits of the claims. Even though these two issues are different, they are deemed to be the same for purposes of the anti-suit injunction test because a decision in the domestic court that the foreign claims are subject to arbitration effectively disposes of the foreign action.[18]

III. Three-Way Split Between Circuits Regarding the Standard for Granting Anti-Suit Injunctions

The threshold requirements apply in all federal circuits and are rarely an issue in the majority of cases.[19]

> Rather, U.S. courts deciding anti-suit injunctions hinge their decisions on certain discretionary principles regarding issues of comity, public policy, and other equitable factors. An anti-suit injunction is directed at individual parties, not at the court where the litigation is taking place. Nevertheless, an anti-suit injunction has significant implications for principles of international comity, which encourage courts to respect and restrain from interfering with the laws and decisions of other jurisdictions. Yet, these principles of comity are subject to certain competing interests in protecting the integrity of the court's jurisdiction, discouraging forum shopping and vexatious litigation, and avoiding conflicting decisions.[20]

The U.S. Courts of Appeal are split three ways regarding how much weight comity considerations should be given relative to other factors when considering whether to issue an anti-suit injunction.[21] These three approaches have been called: (1) the conservative standard; (2) the liberal standard; and (3) the intermediate standard.[22] Even within these designations the courts do not completely agree on the specific criteria to consider.

Under the conservative approach, the U.S. court will only issue an anti-suit injunction to bar a non-U.S. suit if the movant demonstrates: (1) the non-U.S. action could prevent U.S. jurisdiction or threaten a vital U.S. policy; and (2) U.S. domestic interests outweigh concerns of international comity. The liberal approach places less emphasis on comity and authorizes anti-suit injunctions where needed to avoid duplicative and vexatious non-U.S. litigation and inconsistent judgments.

A. Restrictive/Conservative Standard

The D.C., Third, Sixth, and Eighth Circuits have each adopted the restrictive/conservative standard when granting anti-suit injunctions.[23] Commentators disagree on whether to characterize the standard adopted by the Second Circuit as a restrictive/conservative standard or intermediate.[24] Under the restrictive standard, "[c]omity dictates that foreign anti-suit injunctions be issued sparingly and only in the rarest of cases."[25] "Accordingly, courts adopting this standard will generally only issue anti-suit injunctions if *res judicata* applies to bar the foreign proceeding or if the foreign litigation threatens an important public policy or the court's jurisdiction."[26]

The Third Circuit took the conservative approach in *General Electric Co. v. Deutz*.[27] General Electric sued Deutz for breach of contract arising out of Deutz's alleged failure to comply with its obligations as guarantor of a joint venture agreement between General Electric and Deutz's subsidiary. The agreement contained an arbitration clause. Deutz moved to compel arbitration and the jury and court found that Deutz was not entitled to arbitration. At the same time, Deutz sought relief in two other forums, the ICC and the High Court in England. The High Court denied the request for an injunction. The U.S. District Court issued an order enjoining Deutz from taking any other action in furtherance of its prosecution of the arbitration. On appeal, the Third Circuit reversed the trial court's decision to issue the anti-suit injunction.[28] The district court applied the standard that an injunction is proper only if *res judicata* applied, or if the foreign proceeding threatened the court's jurisdiction over the matter at hand or conflicted with a strong public policy interest of the United States.[29] The Circuit court analyzed both the issues of *res judicata* and comity and found that neither supported the district court's injunction, specifically noting that the threat to jurisdiction and violation of public policy factors were weak.[30] Thus, the court reversed the order granting the anti-suit injunction.[31]

The leading Second Circuit case on anti-suit injunctions is *China Trade and Dev. Corp v. M.V. Choong Yong*.[32] In *China Trade*, the Second Circuit suggested that courts should consider five additional factors once the party seeking injunction has met the two threshold requirements:

- potential frustration of a policy in the enjoining forum;
- whether the non-U.S. action would be vexatious;
- any threat to the issuing court's *in rem* or *quasi in rem* jurisdiction;
- whether proceedings in the other forum prejudice other equitable considerations; and
- whether adjudication of the same issues in separate actions would result in delay, inconvenience, expense, inconsistency, or a race to judgment.[33]

However, while *China Trade* states that the two most important factors are the potential frustration of a policy in the enjoining forum and threats to the enjoining forum's jurisdiction,[34] other Second Circuit decisions stress the importance of considering all five additional factors set forth in *China Trade*.[35] Because of its emphasis on many factors, some commentators characterize the standard as a middle-ground or intermediate approach—as opposed to a restrictive one.[36]

In *Mastercard Int'l v. Fed'n Internationale de Football Assoc.*, in the Southern District of New York, the defendant commenced arbitration in Switzerland regarding claims that a domestic district court was already considering.[37]

Soon thereafter, the district court rendered a final decision on the merits in favor of the plaintiff and the defendant appealed to the Second Circuit while continuing his Swiss arbitration proceedings.[38] In response, the plaintiff sought injunctive relief in the district court to prevent the relitigation of the same issues in the Swiss proceeding. In its decision to grant the anti-suit injunction, the district court focused primarily on the potential frustration of policy and the threat to its jurisdiction that the Swiss arbitration imposed. The court also noted that "'the standard for enjoining foreign litigation after the domestic court reaches judgment is lower'" than before judgment.[39] The court found that under *China Trade*, the factors weighed in favor of granting an anti-suit injunction.[40]

In another Second Circuit case, *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, a judgment debtor filed a lawsuit in the Cayman Islands seeking to invalidate a foreign arbitral award obtained in Switzerland and enforced in the United States.[41] The District Court issued an anti-suit injunction prohibiting the Cayman Island lawsuit.[42] The judgment debtor appealed to the Second Circuit, asserting that the district court improperly failed to apply the *China Trade* test when determining whether to issue the anti-suit injunction, and instead applied a more lenient standard.[43] The Second Circuit agreed with the judgment debtor that the district court should have applied the *China Trade* test, and explained that *China Trade* applies to an anti-suit injunction even where a judgment has already been rendered in the case, noting that "the discretionary *China Trade* factors will tend to weigh in favor of an anti-suit injunction that is entered to protect a federal judgment compelling arbitration."[44]

In contrast to the Second Circuit's emphasis on several factors in granting an anti-suit injunction, the Sixth Circuit adopted a standard with only the two factors the Second Circuit considered most significant in *China Trade*—threat to the jurisdiction of the United States court and strong public policy of the United States—and refrained from considering the other three factors articulated in *China Trade*.[45] The court noted that policies of avoiding hardships to the parties and promoting economy should be used when deciding *forum non conveniens*, not anti-suit injunctions.[46] The court further explained that, while "evasion of important national policy might outweigh certain principles of international comity," they questioned "whether the public policy of one state could ever outweigh those principles."[47]

The Eleventh Circuit has not expressly adopted the restrictive standard, but it has affirmed without opinion the decision in *Mut. Serv. Cas. Ins. v. Frit Indus., Inc*.[48] of one of its district courts, which adopted the restrictive standard and rejected the liberal standard. However, this decision, without opinion, is not binding.[49]

The conservative approach taken in these cases indicates that the D.C., Third, Sixth, and Eighth Circuits, as well as the Second and Eleventh Circuits, are the least favorable federal forums in which to seek an anti-suit injunction to bar foreign litigation.

B. Liberal Standard

Alternatively, the Fifth and Ninth Circuits have adopted a liberal standard when granting anti-suit injunctions.[50] Under the liberal standard, an anti-suit injunction is appropriate when a non-U.S. proceeding would frustrate a policy of the forum issuing the injunction, be vexatious or oppressive, threaten the issuing court's jurisdiction, or prejudice other equitable considerations.[51] Under the liberal standard the court gives less weight to the issues of international comity.[52]

The Seventh Circuit has not expressly adopted the liberal standard but appears to support it. In *Allendale Mut. Ins. Co. v. Bull Data Sys., Inc.*, the court considered whether a federal district judge could issue an anti-suit injunction to a party before the court where an American subsidiary of a French corporation countersued an American insurer and broker, bringing suit in both American and French courts.[53] The court explained that the "lax" standard toward which it leans demands evidence that comity is likely to be, rather than could be, impaired.[54]

As a result, the Fifth, Ninth and Seventh Circuits currently appear to be the best forums to seek an anti-suit injunction when possible.

C. Intermediate Standard

The First Circuit has created an intermediate standard for considering anti-suit injunctions by merging the restrictive and liberal standards.[55] *Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren* states that, if and only if the suit passes the threshold test, courts should consider "all the facts and circumstances in order to decide whether an injunction is proper."[56] In that case, considerations of international comity must be given substantial weight and generally create a rebuttable presumption against issuing an anti-suit injunction.[57] A court can grant an anti-suit injunction when the interests of comity are outweighed by equitable considerations such as: (1) the nature of the two action; (2) the posture of the proceedings; (3) the conduct of the parties, i.e., good faith; (4) the importance of the policies at stake in the litigation; and (5) the extent to which the foreign action has the potential to undermine the forum court's ability to reach a just and speedy result outweigh the court's interest in comity.[58]

Quaak consolidated multiple allegations of securities fraud by American litigants against a Belgian auditing firm. The case arose when American plaintiffs accused the Belgian auditing firm of securities fraud after one of the firm's American publicly traded clients folded. The Belgian firm eventually sought relief in a Belgian court. The firm asked the Belgian court to sanction any person executing American discovery request. In response, the American plaintiffs requested that the district court enjoin

the Belgian firm from continuing its Belgian proceedings. The district court granted the plaintiffs' request, finding that the two threshold criteria were met and the equities favored the order of injunction.[59]

The cases above make it clear that courts do not apply a single standard when considering anti-suit injunctions. However, it has been noted that they will "generally grant anti-suit injunctions where there is a valid arbitration clause which is binding on the parties."[60]

IV. Anti-Anti-Suit Injunctions

Anti-anti-suit injunctions bar a party from bringing an anti-suit injunction in another forum that would preclude litigation in the preferred forum. Thus, an anti-anti-suit injunction seeks to maintain availability of the preferred forum. Problems may arise when applications for anti-suit injunction are brought without knowledge to the opposing party. However, if one can anticipate that the opponent will file an anti-suit injunction, it is advisable to head them off with an anti-anti-suit injunction of one's own. Even when the opponent obtains an anti-suit injunction against certain parties, it may be possible to obtain an anti-anti-suit injunction against other parties not included in the original anti-suit injunction.[61] For example, when there are multiple plaintiffs seeking to sue in the United States, the defendant may obtain an anti-suit injunction against certain plaintiffs initially. But, if other plaintiffs thereafter join the suit, the plaintiffs may seek anti-anti-suit injunctions immediately upon being joined, to preserve their forum in the United States. This was the case in the several Texas state court decisions discussed below.

There are few court opinions regarding anti-anti-suit injunctions. The leading case on anti-anti-suit injunctions is *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, which affirms the grant of one such injunction.[62] In addition, three Texas Court of Appeals cases surrounding one underlying set of facts upheld anti-anti-suit injunctions.[63]

In these cases, the courts considered the importance of comity but recognized its limitations when the opponent of the anti-anti-suit injunction would seek to evade public policies of the U.S. court.[64] In *Laker* the court based its decision on the premise that these injunctions "are most often necessary to protect the jurisdiction of the enjoining court, or to prevent the litigant's evasion of the important public policies of the forum."[65] The courts evaluated the public policy involved in the case and the threat to its own jurisdiction if it did not grant the injunction.[66] The courts put great weight on the preservation of its own jurisdiction, as "[c]ourts have a duty to protect their legitimately conferred jurisdiction to the extent necessary to provide full justice to litigants."[67]

A. *In the Matter of an Application for Anti-Suit Injunctive Relief Between: Finecroft Ltd. and Lamane Trading Corp.*

In a recent case involving anti-suit injunctions brought in the Eastern Caribbean Supreme Court, in the High Court of Justice, British Virgin Islands ("BVI"), our opponent brought an *ex parte* anti-suit injunction case in the British Virgin Islands to prevent Lamane, our client, from seeking an anti-anti-suit injunction in New York.

Prior to the BVI proceeding, Lamane commenced proceedings against Finecroft in London, Russia and Cyprus as well as New York. Finecroft made an *ex parte* application for interim anti-suit injunction to restrain Lamane from continuing proceedings, claiming they were brought in breach of agreement to arbitrate in London. The New York suit was brought against several parties, the parties applying for the anti-suit injunction in BVI and several non-parties to a trust agreement at issue, which contained an arbitration provision.

Lamane attempted to effect service on Finecroft in the New York proceeding on 2 November 2005. Thereafter, Finecroft sought the *ex parte* injunction to restrain Lamane from applying to the New York court or elsewhere for an anti-anti-suit injunction. Finecroft supported its application for an *ex parte* injunctions based on a fear that Lamane would seek and receive an anti-anti-suit injunction in New York if it knew of the application for anti-suit injunction in the BVI.[68] To support its contention that the *ex parte* order was necessary, Finecroft cited a New York case where the opinion mentioned that the New York State court had granted an anti-anti-suit injunction.[69] The New York opinion, however, did not discuss the anti-anti-suit injunction. Finecroft allegedly brought the application *ex parte* to preserve the status quo until Finecroft's anti-suit application could be heard on an urgent basis when all parties would have an opportunity to be heard.[70]

To support their application for anti-suit injunction in the BVI, Finecroft claimed that Lamane's proceedings in New York, Cyprus and Russia were vexatious and oppressive.[71] In a U.S. court this argument would only be relevant if the court applied the liberal standards in granting anti-suit injunctions.[72]

After learning of the temporary order granting the anti-suit injunction, we, as Lamane's counsel, sought to lift and dismiss the temporary injunction from the BVI because the claims asserted in the New York proceedings (and other jurisdictions) might not have been covered by the agreement to arbitrate. Specifically, the New York proceeding asserted tort claims against individuals who were the real parties in interest and other parties. Therefore, Lamane might not have been able to bring the claims asserted in the New York proceeding, in the London arbitration. We believed New York was the only forum that would have jurisdiction over those claims. Therefore, Lamane would have been denied the opportunity to pursue these claims if the BVI anti-suit injunction was not dismissed.

Ultimately Lamane was unable to procure an anti-anti-suit injunction to stop the BVI injunction and the BVI court issued the anti-suit injunction against Lamane to

stop the New York proceedings. This case illustrates the importance of obtaining anti-anti-suit injunctions as soon as possible, to secure the favored forum before an opponent acts to block the suit.

B. Federal Application of Anti-Anti-Suit Injunctions

In *Laker Airways Ltd. v. Sabena, Belgian World Airlines*,[73] Laker Airways Ltd., a British corporation in liquidation, filed an antitrust action in the D.C. District Court against several defendants, including American, British and other foreign airlines. Laker alleged conspiracies to destroy its business of providing low-fare transatlantic air services. The foreign airlines obtained an injunction in the British Court of Appeal preventing Laker from litigating its antitrust claims against them in U.S. courts.

Laker filed a second antitrust suit in the U.S. district court, naming as defendants KLM, Royal Dutch Airlines, and Sabena, Belgian World Airlines. On Laker's motion, the district court entered a preliminary injunction to prevent the remaining defendants from taking part in the British action designed to preclude prosecution of Laker's antitrust claims.

On appeal, Sabena and KLM argued that the district court's order was an abuse of discretion, violated international principles of comity, and disregarded Britain's paramount right to apply British law to a British subject, Laker. The D.C. Court of Appeals affirmed the injunction and held that the anti-suit injunction was justified to defend the legitimate exercise of U.S. prescriptive jurisdiction.

First, the Court of Appeals examined territoriality and nationality, the two bases of prescriptive jurisdiction.[74] The Court found that both the U.S. and the U.K. had legitimate grounds to assert jurisdiction to prescribe law relevant to the conduct in question.[75] The "territorial effects doctrine" provided the basis for U.S. jurisdiction, since the economic effects of the alleged conspiracies impaired significant American interests.[76] These included the interests of American consumers in affordable transatlantic fares, of Laker's American creditors in the satisfaction of outstanding debts, and of the U.S. in the regulation of the conduct of persons doing business within its territory.[77] The basis for British jurisdiction, on the other hand, rested primarily on the British nationality of several parties to the suit.[78] The Court concluded that these overlapping interests gave rise to concurrent jurisdiction.[79]

The Court found that where concurrent jurisdiction results in parallel proceedings in the courts of two nations, both are free to proceed simultaneously without interference.[80] In this case, the Court found that the District Court's injunction was justified because such injunctions are appropriate when necessary to preserve the court's jurisdiction and to prevent the evasion of important public policies of the forum.[81]

Because the sole purpose of the British proceeding was to terminate the American antitrust action, the two actions were "*not* parallel proceedings in the sense the term is normally used."[82] Instead, the U.S. court was the only forum in which any party sought to adjudicate the claims on the merits.[83] In addition, to acquiesce to the British court's attempt "to carve out exclusive jurisdiction" would permit Sabena and KLM to evade liability under important statutes of the United States on which Laker and others doing business in the United States had the right to rely.[84]

The Court also considered Sabena and KLM's argument that the District Court was obligated to defer to British jurisdiction by virtue of Laker's nationality. The Court rejected this concept of "paramount nationality" proposed by the defendants, finding that this "entirely novel rule" is "unknown in national and international law."[85] The Court found that a rule based purely on nationality for resolving jurisdictional conflicts would infringe upon policies of the forum, "encourage chauvinism and discrimination," and be impractical to administer in light of competing methods of determining a corporation's nationality. [86]

Next, the Court addressed the principle of international comity. It found that the obligation of comity, which requires deference to and recognition of the acts of foreign courts, is limited by the domestic forum's right not to enforce foreign judgments that are fundamentally prejudicial to public policies of the forum.[87] Accordingly, the British injunctions, since they were deliberately designed to interfere with Laker's U.S. suit, were not entitled to comity.[88] The court observed that the failure of the U.K. court to recognize comity (by refusing to permit the United States to vindicate its own policies) burdened the claims of Sabena and KLM comity claims.[89] The Court accordingly decided to affirm the D.C. District Court's injunction and to permit Laker's suit to go forward.[90]

The Court recognized that, when a court's jurisdiction is proper, "the court's ability to render a just and final judgment [should be] protected absent clear evidence that the foreign action could fully consider the litigant's claims."[91]

The Middle District of Alabama relied on *Laker* when it granted an injunction to prohibit one party from "pursuing its claim for injunctive relief" from an alternate court, to the extent the party sought an injunction prohibiting litigation before the U.S. court.[92] The Court similarly evaluated the threat to its jurisdiction and the public policies that would be frustrated by a foreign anti-suit injunction while noting the general importance of comity.[93]

C. State Application of Anti-Anti-Suit Injunctions

Texas courts have also addressed international anti-anti-suit injunctions. In *Owens-Corning Fiberglass Corp. v. Webb*,[94] the Court of Appeals affirmed an anti-anti-suit injunction to prevent parties from obtaining an anti-suit

injunction in British Columbia, Canada. The underlying action involved Canadian plaintiffs in an asbestosis tort claim against Texas corporate defendants (asbestos manufacturers and distributors), for injuries arising in Canada.

Two subsequent cases, *Pittsburg-Corning Corp. v. Askewe* and *Owens-Corning Fiberglas Corp. v. Baker*, stemmed from the same underlying tort claim. In each case appellant-defendants raised various arguments on appeal for reversal of the anti-anti-suit injunction and in all cases, the Texas Court of Appeals rejected their arguments and affirmed the injunctions.

1. *Owens-Illinois, Inc. v. Webb*

In *Owens-Illinois, Inc., v. Webb,* the Texas Court of Appeals upheld a Texas District Court's order enjoining defendant companies from pursing injunctions in a Canadian court that would prohibit Canadian citizens from pursuing a Texas asbestos suit.

The underlying suit was a tort claim against Texas defendants who were asbestos manufacturers and distributors for injuries caused to Canadian citizens.[95] Two hundred sixteen Canadian plaintiffs filed a suit against the defendant corporations in the 71st District Court of Marshall, Texas.[96] All injuries occurred in Canada.[97]

The defendant Texas corporation filed a parallel action in British Columbia, Canada, seeking to enjoin the Canadian plaintiffs from pursuing the Texas action.[98] Their request for this anti-suit injunction was granted.[99] In response to the Canadian court's injunction, the Texas district court issued an anti-anti-suit injunction prohibiting the Texas corporations from seeking injunctions against other plaintiffs in provinces other than British Columbia.[100] The Texas asbestos manufacturers and distributors appealed the District Court's grant of the anti-anti-suit injunction to the Canadian plaintiffs.

The Texas Court of Appeals affirmed the grant of injunction, holding that this injunction against the Texas corporation did not violate the rule of international comity, despite the Canadian court's attempt, in a companion case, "to carve out exclusive jurisdiction by enjoining further proceedings" on a Texas case.[101] The court recognized Texas's power to regulate its own corporate citizens' conduct outside of Texas territory.[102] The "court stated that injunctions [can be] issued to: 1) protect a court's jurisdiction; 2) prevent the parties from evading important public policies of the domestic forum; 3) prevent a multiplicity of suits; and 4) protect a party from vexatious and harassing litigation."[103]

After the *Webb* decision, two more appeals were brought by the Texas defendants which dealt with new groups of Canadian plaintiffs from the same underlying tort claim.

2. *Pittsburg-Corning Corp. v. Askewe*

In *Pittsburg-Corning Corp. v. Askewe*,[104] the Texas Court of Appeals also upheld the injunction granted by a the District Court preventing defendants from asking a Canadian court for an anti-suit injunction against the plaintiffs. This case protected a group of additional Canadian plaintiffs brought in after the ruling in the prior decision.[105]

The appellant-defendants maintained that issuing the anti-anti-suit injunction was a violation of the act of state doctrine and an unconstitutional violation of the separation of powers of the United States government.[106] The Court of Appeals rejected both arguments.[107]

The act of state doctrine prevents federal and state courts from inquiring into the validity of governmental acts of a recognized foreign sovereign committed within its own territory.[108] In order to have a violation of the act of state doctrine, the federal or state court in the United States must have declared the official act of a foreign sovereign performed within its own territory invalid.[109] The Court found that the Texas injunction did not enjoin any Canadian court or governmental body from taking action, since it only prevented its own corporate citizens from stripping it of jurisdiction.[110]

Secondly, the Court found that the injunction did not unconstitutionally infringe upon the power of the federal executive branch to conduct foreign policy because the Texas court did not enjoin an arm of the Canadian government from taking some action or prevent the defendant corporation from pursuing a substantive remedy in Canada.[111] Instead, the District Court merely protected its own jurisdiction.[112]

Finally, the Court followed its ruling in *Webb* and rejected defendants' arguments that comity should prevent the action taken by the district court.[113]

3. *Owens-Corning Fiberglas Corp. v. Baker*

In *Owens-Corning Fiberglas Corp. v. Baker*,[114] the Texas Court of Appeals again upheld the injunction granted by a District Court preventing defendants from petitioning the Canadian courts for an anti-suit injunction against the plaintiffs. This case, like *Pittsburg*, protected groups of additional Canadian plaintiffs who were brought in after the ruling in the *Webb* decision.

The Court found that the plaintiffs met the general burden for obtaining an injunction in that they would suffer irreparable injuries sufficient to warrant an injunction, including trial delays, inadequate recoveries, and litigation costs due to a potential Canadian anti-suit injunction.[115]

The Court rejected the argument that the public interest did not favor an injunction. It held that public interest is a factor the court must consider in reviewing a temporary injunction, and that in this case public interest is satis-

fied because the state of Texas has a legitimate interest in the extraterritorial acts of its corporate residents.[116]

The Court also rejected defendants' argument that the injunction infringed on their rights of speech, due process and access to the U.S. and Texas constitutions. The Court held that the freedom of speech arguments are "to no avail" against injunctions to prevent vexatious litigation and that restrictions on speech are constitutional if they serve substantial government interests, such as a state's jurisdiction over its own corporate residents.[117] In addition, the defendants were still free to litigate in the Texas trial court.[118]

With regard to the defendants' arguments that comity should prevent the action taken by the district court, and that the district court's interpretation and application of Texas statute created an unnecessary conflict between Texas and Canadian law, the Court adopted its rulings from *Owens–Corning v. Webb* and *Pittsburg-Corning Corp. v. Askewe*.[119]

These cases give interesting examples of several arguments that have been used in an attempt to oppose an anti-anti-suit injunction and shows the extent to which a party will go to attempt to overcome such a restraint. In the face of opposition to the injunction, the courts affirmed grants of anti-anti-suit injunction that protected U.S. jurisdiction over what they saw as a legitimate claim before it.

Based on the preceding case, U.S. courts likely will grant an anti-anti-suit injunction when a foreign anti-suit injunction would threaten its jurisdiction and seeks to evade important public policies of the U.S. jurisdiction. While the courts consistently mention the importance of comity in their decisions to grant anti-anti-suit injunctions, they also find that preservation of its own jurisdiction to prevail.

V. Conclusion

Anti-suit injunctions can be very helpful when one is seeking to preclude a proceeding in an unfavorable forum. However, one must be alert to the possibility that an opponent may also seek an anti-suit injunction to stop litigation in a favorable forum. The ability of an opponent to apply *ex parte* for an anti-suit injunction, precluding proceedings in your favorable forum, is an important threat in multi-national disputes. However, proactive application for anti-anti-suit injunctions can preserve a client's jurisdiction in the favorable forum.

Endnotes

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3. *Quaak v. Klynvled Peat Marwick Goerdeler Bedrijfsrevisoren*, 361 F.3d 11 (1st Cir. 2004); *Kaepa Inc. v. Achilles Corp*. 76 F.3d 624, 626 (5th Cir. 1996); *China Trade and Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33, 35 (2d Cir. 1987).
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5. *Id.*
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8. *Id.*
9. *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 926-34 (D.C. Cir. 1984).
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11. *See* Part IV. *infra*.
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13. *Id.*
14. *Id.*
15. *Id. See also Storm LLC v. Telenor Mobile Commc'ns AS*, 2006 WL 3735657 at *6 (S.D.N.Y. 15 Dec. 2006).
16. Ali, Nesbitt, and Wessel, note 2 *supra*, at 12. S*ee also China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33, 36 (2d Cir. 1987).
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23. *Id.* See, *e.g.*, *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984); *Stonington Partners, Inc. v. Lernout & Hauspie Speech Prod.*, N.V., 310 F.3d 118 (3d Cir. 2002); *Gau Shan Co. v. Bankers Trust Co.*, 956 F.2d 1349 (6th Cir. 1992); *Goss Intern. Corp v. MAN Roland Druckmaschinen Aktiengesellschaft*, 491 F.3d 355 (8th Cir. 2007).
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25. *Goss Int'l Corp v. MAN Roland Druckmaschinen Aktiengesellschaft*, 491 F.3d 355, 359 (8th Cir. 2007), *quoting Gau Shan Co. v. Bankers Trust Co*, 956 F.2d 1349, 1354 (6th Cir. 1992).
26. Ali, Nesbitt, and Wessel, note 2 *supra*, at 12.
27. *General Electric Co. v. Deutz AG*, 270 F.3d 144 (3d Cir. 2001).
28. *Id.* at 149.
29. *Id.* at 157.
30. *Id.* at 158-61.
31. *Id.* at 162.
32. *China Trade and Dev. Corp. v. M.V. Choong Young*, 837 F.2d 33 (2d. Cir. 1987).
33. *Id.* at 35-36.
34. *Id.* at 36.
35. *See, e.g.*, *Mastercard Int'l Inc. v. Fed'n Internationale de Football Assoc.*, 2007 WL 631312 (S.D.N.Y. 28 Feb. 2007); *Ibeto Petrochemical Indus. Ltd. v. M/T Beffen,* 475 F.3d 56, 64 (2d Cir. 2007).
36. Ali, Nesbitt, and Wessel., note 2 *supra*, at 15.

37. *Mastercard Int'l Inc.,* note 35 *supra*, at 2007 WL 631312 at * 3.
38. *Id.* at *2-3.
39. *Id.* at *7.
40. *Id.* at *9.
41. *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 500 F.3d 111, 112 (2d Cir. 2007).
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43. *Id.*
44. *Id.* at 120.
45. *Gau Shan Co. v. Bankers Trust Co.*, 956 F.2d 1349, 1354 (6th Cir. 1992).
46. *Id.* at 1355.
47. *Id.*
48. *Mut. Serv. Cas. Ins. v. Frit Indus., Inc.*, 805 F. Supp. 919, 923 (M.D. Ala. 1992), *aff'd*, 3 F.3d 442 (11th Cir. 1993).
49. *See Canon Latin Am., Inc. v. Lantech*, 453 F. Supp. 2d 1357, 1362 (S.D. Fla. 2006) (applying the liberal standard instead of the restrictive standard in *Mut. Serv. Cas. Ins.*'s).
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55. *Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren*, 361 F.3d 11, 19 (1st Cir. 2004).
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57. *Id.*
58. *Id.* at 19.
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104. *Pittsburg-Corning Corp. v. Askewe*, 823 S.W.2d at 761.
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A Primer on Italian Commercial Agency Law

By Marco Amorese and Casey W. Halladay

I. Introduction

Agency is one of the most time-honored ways to promote business. In Italy, the use of commercial agents may be traced back at least to the medieval Genoese and Venetian maritime republics, whose extensive networks of foreign agents assisted these republics in expanding beyond their boundaries as small city-states to dominate commerce and trade throughout the Mediterranean.[1] Over the years, the practice of using an independent intermediary to negotiate the sale or purchase of goods on behalf (and at times in the name) of a principal who would pay such intermediary proportionally to the success of his or her activities has become one of the most common ways to promote new business, open markets to foreign players, and generally drive sales growth.

The agency relationship involves mutual investments of labor (and perhaps capital) by both agent and principal, which in turn create a mix of obligations, duties, and expectations for the parties. The agent invests his or her time and labor to promote the products of the principal and develop a network of customers and brand goodwill within his or her territory, thus relying on the quality of the principal's products and services in order to earn his or her commission, which commission incentivizes the agent to enlarge the principal's client portfolio and sales volume. The principal relies on the efforts of the agent to drive sales of the products, pays the agent commissions, and grants the agent other benefits, such as exclusivity within a defined territory. As the owner and controller of the product, however, the principal retains an advantage over the agent, in that the principal may attempt at any time to sell directly to customers, thus trading on the brand goodwill and client network the agent has developed without having to pay the agent a commission.

Recognizing this power imbalance, most European countries began to regulate agency relationships in the late 19th and early 20th centuries with the partial intention of introducing greater clarity and predictability in the marketplace while protecting agents from unfair dismissal.[2] With the drive towards an integrated European market in the 1980s came a desire to unify the inconsistent patchwork of agency laws across the Member States of the European Economic Community (as it then was known) ("EEC"). Hence, in 1986 the EEC, proclaiming that "the differences in national laws" were "detrimental both to the protection available to commercial agents . . . and to the security of commercial transactions," adopted Directive 86/653/EEC "*on the coordination of the laws of the Member States relating to self-employed commercial agents*" (the "Agency Directive").[3]

II. The European Agency Directive

The decision to use a directive rather than a regulation was intended to allow the Member States to determine the best way to implement the objectives of the Agency Directive, while still ensuring a common framework for all national agency laws. Rather than tinkering with the provisions of the Agency Directive, Italy chose, for the most part, to amend its laws in strict conformity with the text adopted by the EEC. The key provisions of the Agency Directive, and thus of most of Italian agency law, are described below.

A. Application

The Agency Directive broadly defines an agent as a "self-employed intermediary who has continuing authority to negotiate the sale or the purchase of goods on behalf of another person, hereinafter called the 'principal,' or to negotiate and conclude such transactions on behalf of and in the name of that principal" and specifically excludes from the definition company officers (and partners in a partnership) who have the power to enter into commitments binding the entity with which they work, as well as receivers, managers, liquidators, or trustees acting in respect of a bankruptcy. The activities of unpaid commercial agents, or agents who operate on commodity exchanges or in the commodity markets, also fall outside the Agency Directive.

B. Binding Principles

The overriding goal of the Agency Directive is to provide certain basic levels of protection for commercial agents while at the same time harmonizing the agency laws of the Member States. Importantly, the Agency Directive is comprised of both binding principles and non-compulsory guidelines that are intended to act as default rules in the event that the parties to an agency relationship have not otherwise addressed the issues by contract. It is critical to an understanding of Italian—and European—agency law to appreciate that the Agency Directive's binding principles cannot be altered by contract unless the contract provides for more favorable treatment for the agent. These binding principles are discussed below.

1. Parties' Duties

The Agency Directive prescribes certain core duties of agents and principals. According to paragraph 2 of Article 3, an agent is required to do the following:

- "look after his principal's interests and act dutifully and in good faith";

- "make proper efforts to negotiate and, where appropriate, conclude the transactions he is instructed to take care of";
- "communicate to his principal all the necessary[4] information available to him"; and
- "comply with reasonable instructions given by his principal."

Paragraph 1 of Article 3 provides that a principal must "act dutifully and in good faith" in all relations with his or her commercial agent. In addition, paragraph 2 of Article 4 provides that a principal do the following:

- "provide his commercial agent with the necessary documentation relating to the goods concerned";
- "obtain for his commercial agent the information necessary for the performance of the agency contract, and in particular notify the commercial agent within a reasonable period once he anticipates that the volume of commercial transactions will be significantly lower than that which the commercial agent could normally have expected"; and
- "inform the commercial agent within a reasonable period of his acceptance, refusal, and of any non-execution of a commercial transaction which the commercial agent has procured for the principal."

Both the principal and the agent have the right to request a signed written agreement setting out the terms of the agency relationship. In addition, Member States may require that any agency contract be evidenced in writing.

2. Remuneration

An agent's remuneration is treated extensively in the Agency Directive. Both binding and guideline provisions are used. (The nonbinding provisions are identified as such below.) Under Article 7, an agent is entitled to commissions on commercial transactions concluded during the period covered by the agency contract where:

- "the transaction has been concluded as a result of his action"; or
- "the transaction is concluded with a third party whom he has previously acquired as a customer for transactions of the same kind"; or
- he has "an exclusive right to" or has "been entrusted with" a "specific geographical area or group of customers," and a transaction is concluded with a customer from that group or area (regardless of whether the agent was personally involved in securing the transaction).

The parties are free to determine the level of commissions or other remuneration to be paid to the agent; however, in the absence of express terms as to payment, the Agency Directive's guidelines stipulate that the agent must receive a level of remuneration consistent with what other agents are "customarily allowed in the place where he carries on his activities" or, where the local custom cannot be established, "reasonable remuneration taking into account all the aspects of the transaction."

Agent commissions become due and payable when the principal or the third party has executed his or her part of the transaction or when the principal should have executed his or her part of the transaction under the terms of the contract. Once due, the commission must be paid no later than the last day of the month following the quarter in which the payment became due. The principal must also provide the agent with a written accounting showing the amount of the commission due and the calculation of such amount. An agent has the right to demand access to the principal's books and records in order to verify the amount.

Importantly, the agent's right to the commission is extinguished (and, if already paid to the agent, must be refunded) only where it is established that the contract between the third party and the principal will not be executed and the principal is not to blame.

3. Termination

Under the Agency Directive, termination of an agent entails significant consequences, the most important of which is the payment of an indemnity to the agent. Instead of the common law's complicated weighing analysis of good faith or reasonableness in terminating an agent, the Agency Directive explicitly recognizes the value that an agent may bring to a principal by developing the latter's customer network, brand recognition, goodwill, and the like, and paragraph 2 of Article 17 stipulates that an agent shall be entitled to an indemnity upon termination (including where the relationship is terminated by the agent's death) if and to the extent that:

- "he has brought the principal new customers or has significantly increased the volume of business with existing customers and the principal continues to derive substantial benefits from the business with such customers"; and
- "the payment of this indemnity is equitable having regard to all the circumstances and, in particular, the commission lost by the commercial agent on the business transacted with such customers."

Determining the amount of indemnity owed can be a matter of negotiation between the parties, although Article 17(2)(b) of the Agency Directive states that the indemnity "may not exceed a figure equivalent to an indemnity for one year calculated from the commercial agent's average annual remuneration over the preceding five years." If the relationship is less than five years old, the indemnity is calculated on the average remuneration for the life of the agency. The agent also retains his or her right to sue the principal for damages, with paragraph 3

of Article 17 of the Agency Directive specifically noting that damages "shall be deemed to occur particularly" if the termination:

- deprives the agent of a commission he should have earned while "providing the principal with substantial benefits linked to the commercial agent's activities"; or
- where the timing of the termination does not allow the agent to "amortize the costs and expenses that he had incurred for the performance of the agency contract on the principal's advice."

Article 18 of the Agency Directive also specifies the following limited circumstances in which an indemnity will not be payable upon termination:

- where the principal terminated the agency contract due to a fault of the agent that would justify immediate termination of the agency contract under national law; or
- where the agent voluntarily terminates the agency contract, unless such termination is justified based on the conduct of the principal or on the grounds that the agent cannot reasonably continue his activities because of age, infirmity, or illness; or
- where the agent assigns his or her rights and duties under the agency contract to another person, with the agreement of the principal.

Moreover, paragraph 5 of Article 17 provides that the agent loses any entitlement to the indemnity if the agent, within one year following termination of the contract, has not notified the principal that he or she intends to claim his or her indemnity.

Finally, it should be noted that, in addition to an indemnity, the agent may be entitled to additional commissions following termination under Article 8 if "the order of the third party reached the principal or the commercial agent before the agency contract [was] terminated" or if the principal enters into a transaction that is "mainly attributable to the commercial agent's efforts during the period covered by the agency contract and . . . entered into within a reasonable period after that contract terminated."

III. Agency Law in Italy

In 1991, the Italian Legislature implemented the Agency Directive with Legislative Decree 303/91, which amended the Italian Civil Code to effectively mirror the language of the Agency Directive.[5] The analysis provided in Section II above therefore also fairly describes Italian agency law. Italian jurisprudence and practice, however, have provided some additional layers of analysis concerning termination (particularly as regards the payment of indemnities and use of noncompetition clauses) and agent registration.

A. Termination Indemnities

The implementation of the Agency Directive touched off a series of cases in which the Italian and European courts were asked to examine the relationship between the Agency Directive and preexisting Italian legislation dealing with posttermination indemnities and other payments in respect of commercial agents' social security. Italian law requires that all principals (regardless of whether they maintain an office in Italy) with agents active in Italy must register and open a social security account with the ENASARCO Foundation,[6] a quasi-governmental agency that is responsible for providing retirement plans to commercial agents. The collective agreements previously drafted by the leading association of principals and agents had also entrusted ENASARCO with the task of collecting further contributions from principals in respect of termination indemnities. The funds were to be held and accrued in an accumulation fund and released to the agent after termination of the agency as a form of indemnity. A debate arose as to whether such collective agreements, using different indemnity criteria, could exist alongside the indemnity provisions of the Agency Directive, as adopted in the Civil Code in 1991.[7]

The issue was eventually resolved by the European Court of Justice ("ECJ"), which held that the criteria set forth in the Agency Directive can be modified pursuant to an agreement between the parties, or pursuant to a collective agreement, if the modification provides for more favorable treatment of the agent.[8] The ECJ considered this issue at some length and ruled that the favorability analysis must be undertaken by the parties *ex ante* and that the treatment set forth by the collective agreement must be more favorable in each and every aspect of the agency relationship (i.e., not simply more favorable on balance than under the Agency Directive).

Several subsequent Italian cases did not follow the ECJ's approach, favoring instead a more conservative interpretation of the conflict of laws. The Corte di Cassazione ("CC") stated on numerous occasions that in termination cases the favorability analysis should be conducted based on an *ex post* analysis of all of the facts of the particular agency relationship.[9] Following a debate in the Italian legal community about the inconsistency of the CC's decision with that of the ECJ, the CC adopted the ECJ's *ex ante* approach in later cases.[10] Thus, the current state of the Italian law requires that any contractual deviation from the indemnity provisions in the Agency Directive must, on an *ex ante* analysis, be more favorable to the agent in each instance in which the contract deviates from the Agency Directive. It is highly likely that, by analogy, this rule applies to any deviation from the other mandatory terms of the Agency Directive.

It is also important to note, however, that the CC has ruled that the agency provisions of the Italian Civil Code shall be applied only to bona fide agents and not to brokers or so-called "deal-hunters" (*procacciatori d'affari*).[11]

The court specified that an agent is different from a broker in that the relationship between an agent and a principal is characterized by continuity, that is, it is based on stability and is not episodic. In an agency relationship, the agent commits to promote on a continuous basis the business of the principal and to follow the principal's instructions, whereas the broker procures contracts for the principal on an ad-hoc basis, solely on his or her own initiative and without any commitment to the principal. Given the significant responsibilities that a true agency relationship imposes under Italian law, particularly for principals, it is essential that the true nature of any potential agency relationship be clearly stated in writing to avoid disputes and potential litigation over the characterization of a relationship as an agency or a brokerage.

B. Noncompetition Clauses

It is common for principals to include in agency contracts a noncompetition clause by which the agent is prohibited from competing in the same market and territory following termination of the agency relationship. Given his or her knowledge of the principal's product characteristics, pricing, and other terms of trade, and especially the principal's client portfolio, a terminated agent could be an extremely valuable resource for any of the principal's competitors. Thus, while European Community ("EC") law vigorously promotes competition as a tool for breaking down national barriers and integrating the common market, EC and Italian agency law also recognizes the need to preserve some right of noncompetition if the institution of agency is to remain effective. Barring such recognition, it is possible that vendors would abandon the agency model to avoid the loss of customers and/or business secrets following an agent's termination.

In Italy, the compromise between these competing interests has led to the following treatment of noncompetition clauses: an agreement limiting an agent's competition after termination of the agency shall be valid only if

– it is concluded in writing;

– it relates only to the geographic area, or the group of customers and the geographic area, previously entrusted to the agent, and to the kind of goods formerly covered by the agency contract; and

– the term of the agreement does not exceed two years following the termination of the agency contract.[12]

If an agent enters into a valid noncompetition agreement, he or she is entitled to be paid an indemnity that is to be calculated with reference to the length of the agreement, the nature of the former agency relationship, and the indemnity given for the termination of the agency contract.[13]

C. Agent Registration

Unlike most other countries, Italy has adopted the professional regulation of agents.[14] According to Italian law, all agents who promote, on a continuous basis and within a defined territory, the conclusion of contracts for one or more principals must be inscribed in a Register kept by the local Chamber of Commerce. Failure to adhere to this requirement may trigger administrative fines against the agent and also against any principal dealing with an unregistered agent.[15]

Perhaps more significantly, failure to register had once been considered to void an agency contract concluded with an unregistered agent,[16] leaving unregistered agents with few legal protections. The compatibility of this view with the Agency Directive was referred for a preliminary ruling to the ECJ in the *Bellone* case.[17] The court reiterated that the Agency Directive was designed to protect commercial agents, and it noted that, although the notion of a register of agents had been proposed by the Economic and Social Committee during the preparation of the Agency Directive, the final text did not address the issue (but referred only to the ability of Member States to require that the contract be in writing). As a consequence, the ECJ concluded that Member States could not impose any condition on the validity of agency contracts other than that they be evidenced in writing.

In the subsequent *Caprini* case,[18] the ECJ was asked to answer, by preliminary ruling, whether the registration requirement itself violated the Agency Directive. The court held that national legislation requiring agent registration would be permissible so long as the consequences of nonregistration did not adversely affect the protection that the Agency Directive confers upon agents in their relations with their principals. The Italian registration requirement thus still stands, although reforms are expected in this sector, since the requirement has become toothless in the aftermath of *Caprini*.

IV. Conclusion

The law of commercial agency in Italy and throughout the European Union is highly regulated, especially when compared with the corresponding position in common-law jurisdictions. A sound understanding of the law of agency is essential for both agents and principals, particularly as it may entail substantial payments and indemnities for the latter. While it is clear that the Agency Directive is substantially "the law of the land" in Italy on nearly all matters of commercial agency, it is equally clear that the Italian courts have consistently taken an independent approach to judicial interpretation of the Agency Directive. An understanding of Italian agency law thus begins, but does not end, with the text of the Agency Directive, and developments in Italian agency law and practice should thus bear careful watching by those with an interest in this market.

Endnotes

1. *See* L. Goldschmidt, Storia universale del diritto commerciale, 206 (1913), which notes that provisions governing agency commissions on sales were included in the Genoese *Chartae* of 1153 and that detailed regulations on the subject were later adopted in the Genoese City Charter of 1588-89.
2. For example, Germany introduced a regulation for commercial agents in 1897, and other countries soon followed, e.g., Sweden (1914), Norway (1916), Denmark (1917), Austria (1921). Italy drafted an agency bill in 1920 that was the spur for a 1935 collective agreement; legislative provisions were introduced in Italy with the Civil Code of 1942.
3. 1986 O.J. [L 382] 17 (EEC).
4. The somewhat awkward terminology "all the necessary information" is also used in the French- and Italian-language texts of the Agency Directive. Presumably this was intended as a reference to market information that comes into the possession of the agent and that is reasonably necessary to the carrying on of the principal's business.
5. Legislative Decree 10 Sept. 1991 n. 303 implemented Directive 86/653/CEE concerning the coordination of the laws of the Member States related to self-employed commercial agents, modified articles 1742, 1748, 1750, 1751, and added article 1751*bis* to the Italian civil code.
6. For more information about ENASARCO, including filing requirements available in English, see http://www.enasarco.it.
7. The issue was particularly controversial, as the 1992 collective agreement, despite having been signed after the adoption of the Agency Directive in the Italian Civil Code, did not take into consideration the criteria set forth by the Agency Directive for determining an indemnity.
8. Case C-465/04, *Honyvem Informazioni Commerciali S.r.l. v. De Zotti*, 2006 E.C.R.
9. *See*, *e.g.*, *Mencaraglia v. Kenwood Electronics Italia S.p.A.*, Cass. Civ. Labour sez. 29 July 2002 n. 11189; *N.M. v. Cantine Leonardo da Vinci*, Cass. Civ. Labour sez. 3 Oct. 2006 n. 21309; *Simeto Docks S.r.l. v. Com. Catania*, Cass. Civ. sez. V 17 May 2005 n. 10308.
10. *See*, *e.g.*, *Francesia Riccardo v. Filtrauto Italia S.r.l.*, Cass. Civ. sez. II, 9 Oct. 2007 n. 21088; Honyvem - Informazioni Commerciali S.r.l. v. D.Z.M, Cass. Civ. Labour sez. 24 July 2007 n. 16347.
11. *Oblett v. 3elle Scarl*, Cass. Civ. Labour sez. 24 June 2005 n. 13629.
12. *See* art. 1751*bis* of the Civil Code.
13. *See* art. 1751 of the Civil Code.
14. Law 3 May 1985, n.204.
15. According to Article 9 of Law 3 May 1985 n.204, these fines may range in amount from €516.45 to €2,065.82.
16. *See Fallimento Soc. Tanit v. Fallimento Soc. Selpa*, Cass., sez. un., 12 Nov. 1983, n.6729, RV431441; *Buongiovanni v. Soc. Conc. Subalp.*, Cass., sez un., 12 Nov. 1983, n.6730, RV 431442; and *Cuomo v. Soc. Camste. Int.*, Cass., sez un., 3 Apr. 1989, n.1613, RV462399 (all cases determined under the 1968 predecessor law to L. 204/95).
17. Case C-215/97, *Bellone v. Yokohama S.p.A.*, 1998 E.C.R. I-2191.
18. Case C-485/01, *Caprini v. Conservatore Camera di Commercio*, 2003 E.C.R.

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An Introduction to Enforcement in Russia of Foreign Arbitral Awards, and Barriers to Entry to American Courts

By Daniel J. Rothstein

I. Introduction

Since the large-scale entry of foreign businesses into the Russian market in the early 1990s, the normal practice for foreign parties to international business deals in Russia has been to provide, when possible, for dispute resolution to take place outside of Russia and to be governed by other than Russian law. The main reasons for this are fears that Russian commercial law is undeveloped, and that Russian legal institutions are inexperienced in commercial matters, biased in favor of local parties, susceptible to political influence, or corrupt.[1]

In recent years, a similar trend has emerged among Russian businesses, i.e., entities owned by Russian citizens. Russian participants often prefer dispute resolution forums outside of Russia[2] because of the same fears of unpredictability mentioned above. Other factors that have moved many Russian disputes abroad include (i) Russian citizens' frequent use of foreign companies in order to hold Russia-based assets for tax reasons or to shield the ultimate owners' identity from competitors or the public;[3] and (ii) the involvement of foreign lenders and foreign law firms in many significant transactions among Russian parties.

Because of Russia's explosive economic growth in recent years, the number of Russia-related disputes decided abroad has also grown rapidly. This trend has begun to attract considerable attention from lawyers specializing in international dispute resolution. For example, the cover story of the April 2008 issue of *Global Arbitration Review* was devoted to Russia.[4]

The following discussion will introduce two main points of intersection between the Russian legal system and non-Russian forums (in particular the United States) regarding predominantly Russian commercial disputes: (i) enforcement in Russia of foreign court judgments and arbitral awards; and (ii) jurisdictional and similar barriers to entry to courts in the United States.

II. Enforcement in Russia

A. Enforcement in Russia of Foreign Court Judgments

Under Russian legislation, foreign court judgments can be enforced in Russia only if a treaty so provides. As of 2007, Russia had such treaties with only thirty-six countries, including ten members of the Commonwealth of Independent States. However, in some recent cases, even in the absence of a treaty, Russian courts have enforced foreign court judgments under the international law principle of comity. It has been argued that there is little legal basis for using this general norm to support enforcement of a foreign court order.[5] Thus, there are no grounds for confidence that a court judgment from a non-treaty country will be enforced in Russia.

B. Enforcement in Russia of Foreign Arbitral Awards

Russia is a member of the 1958 New York Convention on Recognition and Enforcement of Arbitral Awards by virtue of the USSR's accession to the Convention in 1960 and post-Soviet Russia's assumption of the USSR's international treaty rights and obligations. In 2002, the Russian courts with jurisdiction over most commercial disputes, called the "state arbitrazh courts," were given responsibility for enforcement of international arbitration awards. The state arbitrazh courts' treatment of requests to enforce international arbitral awards has given rise to considerable controversy in recent years, in particular in connection with (1) the application of public policy grounds for non-enforcement of awards, and (2) the exclusion of major areas of commercial law from arbitral competence, in particular in cases involving non-Russian parties.[6]

1. Non-Enforcement of Arbitral Awards on Public Policy Grounds

The most authoritative and comprehensive source of guidance on enforcement of arbitral awards in Russia is the Supreme Arbitrazh Court's *Information Letter No. 96*, issued in December 2005. The Letter consists of summaries and comments on thirty-one cases decided by the arbitrazh courts of various levels, including the Supreme Arbitrazh Court itself, and recommendations to lower courts on deciding future cases.[7] According to one commentator, the choice of cases selected for review, and the manner of presenting them (for example, tendentious presentation of facts in some instances), reveal the Supreme Arbitrazh Court's ambivalence and inconsistency in enforcing international arbitral awards and a greater reluctance to enforce than in the lower courts with the most experience in the area—the courts in Moscow and St. Petersburg.[8]

One case in particular from the Supreme Arbitrazh Court's survey illustrates the Court's strong interventionist tendency and its elastic view of public policy grounds for non-enforcement. In that case, presented in Section 29 of the Court's *Information Letter No. 96*, the arbitration

award provided that a Russian joint venture and one of its founders (apparently also a Russian entity) should pay $20 million to a foreign founder in connection with its withdrawal from the joint venture. The $20 million represented the value of the foreign partner's contribution to the joint venture's charter capital. The Supreme Arbitrazh Court denied enforcement, and noted that the arbitral tribunal's award did not take into consideration the fact that the charter capital contribution, in the form of equipment, had not been imported to Russia by the time the award was rendered. The Supreme Arbitrazh Court remanded the case to the lower court with instructions to consider, among other issues, whether public policy is consistent with "the possibility of returning to a founder its property contribution to the charter capital of a joint venture . . . while also imposing damages in the form of the contribution upon the joint venture itself, as well as one of its founders." The Supreme Arbitrazh Court further instructed the lower court to examine this issue with consideration for "the litigants' equal right to judicial protection." On remand, the lower court refused enforcement, because, as the Supreme Arbitrazh Court reported, the award contradicted Russian public policy, which is "based on the principles of equality of parties to civil-law relations, their good-faith behavior, and the proportionality of civil-law liability to the effects of the breach of duty, taking into account fault." [9]

The Supreme Arbitrazh Court's discussion of this case, which is only three pages long, does not consider how the arbitral award could be justified (for example, the foreign party's position on the asserted deficiencies in the award). Thus, it is difficult to evaluate whether the arbitration award was incorrect under the law governing the arbitration, and, assuming the award was incorrect under the governing law, how the Supreme Arbitrazh Court distinguishes between an award that is incorrect and one that violates Russian public policy. Moreover, as the commentator referred to above points out, the Supreme Arbitrazh Court's imposition of "equality of parties to civil law relations, their good-faith behavior, and proportionality of civil law liability" as guidelines for applying the public policy exception creates wide possibilities, inconsistent with international norms, for substantive review of arbitral decisions.[10]

More recently, another commentator has asserted that "there is no evidence that this 'broad' term in approach to the public policy issue [as presented in Section 29 of *Information Letter No. 96*] has been followed by judges, including at the level of the Supreme Arbitrazh Court. Indeed in several recent cases the Supreme Arbitrazh Court has adopted a narrower interpretation for the public policy ground."[11] In one case cited by this commentator, *Joy-Lud Distributors International Inc. v. JSC Moscow Oil Refinery*, the Supreme Arbitrazh Court ruled, in two decisions in 2006 and 2008, that a $28 million contractual penalty award in favor of Joy-Lud (a New York corporation) in a Stockholm arbitration under Swedish law did not violate Russian public policy. A review of the *Joy-Lud* decisions, however, suggests a less arbitration-friendly stance than that commentator discerns.

In the 2006 decision in *Joy-Lud*, the Supreme Arbitrazh Court rejected the Russian party's argument that the award violated public policy because it was improperly punitive. One of the Court's primary grounds for rejecting this argument was that Russian law allowed for the same kind of penalty as the arbitral tribunal had granted under Swedish law. Thus, the Court stated, citing Section 29 of its *Information Letter No. 96*:

> [Russian] civil law proceeds from the principle of equal rights and obligations of Russian and foreign legal and physical persons and contemplates imposition of a penalty as a possible measure of liability for nonperformance or inadequate performance of contractual obligations. Therefore, this measure is part of the legal system of the Russian Federation, and its imposition does not violate the public policy of the Russian Federation.[12]

The Court also noted that the penalty was not disproportionate to the effects of the breach.[13]

In the 2008 decision in the same case, the Russian party argued that it had new evidence that the claimant had misrepresented its identity to the arbitrators and the courts. Thus, the Russian party argued that enforcement of the award, resulting in enrichment of an entity that was not a party to the transaction, would violate public policy. The Supreme Arbitrazh Court rejected the assertion that the evidence was new, and pointed out that it could have been presented to the Stockholm arbitration tribunal. But the Court also evaluated the evidence presented by the Russian party—that various documents referred to the claimant alternatively as "Joy-Lud" and "Joy Lud" (i.e., with and without a hyphen). On the basis of other evidence, including a declaration from the New York company registration authorities, the Supreme Arbitrazh Court found that Joy-Lud and Joy Lud were one and the same company.[14]

Although the Supreme Arbitrazh Court ultimately upheld the arbitral award in *Joy-Lud*, the Court's repeated, in-depth examination of the substance of the award does not send a clearly pro-arbitration message. In its 2006 decision, the Court's reliance on the similarity between Swedish and Russian law governing contractual penalties raises a question as to whether the Court would have refused to enforce the award on public policy grounds (i) if Swedish and Russian law were not similar, or (ii) if the Court had considered the penalty disproportionate to the breach of contract. (As noted above, the Court found the penalty proportionate.) Also, the 2006 decision's reference

to the equality of Russian and foreign litigants sounds gratuitous, creating the impression that upholding an award for a foreign party is an important occasion, and by implication perhaps an exception.

Similarly, in the 2008 decision, after the Supreme Arbitrazh Court ruled that the Russian party could have presented the evidence of confusion of Joy-Lud's identity to the arbitrators, the discussion of whether there was confusion was unnecessary. Even if the arbitrators had seen the evidence and wrongly concluded that there was no confusion, this would hardly be grounds for invoking the public policy exception. As in the joint venture withdrawal case in Section 29 of *Information Letter No. 96*, the Supreme Arbitrazh Court did not explain the distinction between an erroneous arbitral award and one that violates public policy. Thus, the *Joy-Lud* decisions blur the distinction between error and a violation of public policy, and leave wide room for invoking the public policy exception in future cases.

2. Exclusion of Subject Matter from Arbitral Jurisdiction

Under Russia's Law on International Arbitration, the subject matter of international commercial arbitration is limited to "disputes resulting from contractual and other civil law relations."[15] Russia's law on domestic arbitration contains a similar limitation.[16] Also, Article 248 of the Arbitrazh Procedure Code reserves certain disputes involving foreign parties for the "exclusive jurisdiction" of the state arbitrazh courts, including disputes involving real property located in Russia.[17]

The Supreme Arbitrazh Court has interpreted these provisions as excluding disputes over real estate rights from arbitral jurisdiction. For example, *Information Letter No. 96* discussed a domestic arbitral award that upheld the claimant's contractual right to purchase a building. Specifically, the award "recognized the [claimant's] ownership right" and "required the state registration agency to register that right." The claimant's application to enforce the award was denied, because replacing the owner of real estate in the state registry is a matter of "public and administrative law relations," and thus not the subject of "contractual and other civil law relationships," which are the only permissible subject matter of arbitration, as noted above.[18] In a later case that applied these Supreme Arbitrazh Court guidelines and likewise held that a dispute over real estate rights was beyond arbitral jurisdiction, an intermediate-level appeals court rejected without explanation the argument that the arbitral award required only the parties, not the state registration agency, to take action, i.e., to submit a lease extension agreement to the agency.[19]

Similarly, in another case discussed in *Information Letter No. 96*, the prevailing party was a foreign company, and the arbitral award in its favor included money damages, but also a levy on a building at a price provided for in the award. The Supreme Arbitrazh Court set aside the arbitral award insofar as it concerned the rights to the building. The Court noted that one of the parties was a foreign entity, and upheld the lower court's holding that under Article 248 of the Arbitrazh Procedure Code, the claim involving real estate "could not be reviewed by the arbitral tribunal."[20]

In a recent case involving a lease of a prime Moscow retail site, the state arbitrazh court set aside an award rendered by the International Commercial Arbitration Court at the Russian Federation Chamber of Commerce and Industry. The claimant, a Russian subsidiary of the Finnish department store chain Stockmann, obtained an arbitral award requiring its landlord to renew the lease or pay damages of $27 million. The court set aside the award, because lease rights are established by registration of a lease agreement with the state registration agency, and the issue of whether such rights should be registered is a matter of "public and administrative law relations" and cannot be the subject of arbitral jurisdiction.[21]

A controversial question in Russia is whether a foreign choice of law or forum clause in a shareholders' agreement concerning the operation of a Russian company is valid. In one case involving a contest for control of a major Russian telecommunications company, an appellate court held that a provision in a shareholders' agreement, which called for foreign arbitration under foreign law of challenges to corporate decisions, was invalid. An editorial note in Russia's leading international arbitration periodical agreed with the court's decision, while disagreeing with the court's "public policy" basis for the decision. The editorial note stated that shareholder agreements concerning Russian companies must be governed only by Russian law, and suggested that shareholders in Russian companies should not be "led astray by lawyers in international law firms, who prefer to subject their clients' agreements not to Russian law, but to foreign law, with which they are more familiar."[22] The parties in the telecommunications dispute who challenged the choice of law and forum clause relied on various provisions of Russian corporate, civil, and constitutional law.[23] Parties taking this position could also cite Article 248 of the Arbitrazh Procedure Code, which provides that the state arbitrazh courts have "exclusive jurisdiction" over disputes connected with "the foundation, liquidation, or registration in the Russian Federation of legal entities," and with "challenging the decisions of organs of such legal entities."[24]

Russian law's ambivalence toward international arbitration has been attributed in part to "the short time that has passed since our country rejected a policy of isolationism" and also to a traditional suspicion of a "conspiracy of the West against Russia."[25] Suspicion toward international arbitration is most clearly misplaced when both sides to the dispute are Russian-owned companies. As

Russia's integration into the world economy continues, and Russian companies continue to have their disputes decided in foreign forums, it will be more difficult to identify who is a "Russian" party, and national considerations in enforcement of foreign decisions should play a smaller role.

In light of the resistance of the Russian courts toward foreign arbitration, it is not surprising that anecdotal evidence and empirical data suggest that "Russian courts enforce foreign arbitration awards less often than most signatory states of the New York Convention."[26] However, as discussed below, while courts in the United States, for example, cede jurisdiction to foreign forums quite liberally, this openness cannot be taken for granted, and the Russian courts' more reluctant posture is not as anachronistic as it might seem.

In its 1972 decision in *M/S Bremen v. Zapata Off-Shore Co.*,[27] the U.S. Supreme Court laid down the modern American rule that a forum selection clause calling for litigation in a foreign court should generally be upheld in the context of "a freely negotiated private international agreement, unaffected by fraud, undue influence, or overweening."[28] The Supreme Court noted that traditionally, "many courts, federal and state, . . . declined to enforce such clauses on the ground that they were 'contrary to public policy,' or that their effect was to 'oust the jurisdiction' of the court." The Supreme Court rejected this view and stated, "The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts."[29]

Although *Bremen* eliminated any remaining general tendency of American courts to reject forum selection clauses in arm's-length international commercial transactions, the courts still examine closely whether a forum selection clause covers all of the plaintiff's claims, whether the foreign forum was unfairly imposed, and whether the plaintiff will be unfairly deprived of a remedy in the foreign forum.[30] In particular, the courts examine whether application of foreign law will result in the loss of a remedy that furthers an important public policy, such as treble damages under the antitrust laws or RICO, [31] or remedies under the securities laws.[32] Similarly, the courts scrutinize the public policy ramifications when consent to domestic arbitration entails waiver of a substantive or procedural remedy, such as treble damages, the class action, or certain pre-trial disclosure.[33]

The pre-*Bremen* resistance of American courts to forum selection clauses is similar to the resistance of Russian courts toward international arbitral awards today. While the *Bremen* approach seems obviously correct today, the pre-*Bremen* era in American courts was not long ago. This perspective on recent American legal history suggests that it is too early to give up hope that the isolation that can be seen in some Russian court decisions on enforcement of international arbitral awards will relax and that Russia will continue to adapt to modern international legal practices.

III. Jurisdictional and Related Barriers to Entry to Courts in the United States

A plaintiff who tries to sue a Russian defendant in the United States over events in Russia will encounter well-established barriers to entry to the courts: limitations on personal and subject-matter jurisdiction; and the doctrine of *forum non conveniens*. Since 1992, when free private enterprise in modern Russia began, there have been about two dozen reported decisions of American courts (including federal appellate courts and two state high courts) dealing with jurisdiction over a Russian defendant or the convenience of the forum for litigating a Russia-based dispute. Several of these decisions involve major Russian companies and illustrate typical circumstances that may lead an American court to keep or dismiss a case.

Personal jurisdiction, subject-matter jurisdiction, and *forum non conveniens* are discussed separately below, but there is substantial overlap among them, and defendants often raise more than one as a reason for dismissing a foreign-centered dispute. For example, in *Norex Petroleum Ltd. v. Access Industries, Inc*., a dispute over control of a Russian oil company, the case was first dismissed under *forum non conveniens*,[34] remanded by the appellate court for reconsideration of the *forum non conveniens* issue,[35] and dismissed by the trial court for lack of subject-matter jurisdiction,[36] while motions were pending for dismissal for lack of personal jurisdiction.

A. Personal Jurisdiction

Under the U.S. Supreme Court's interpretation of constitutional due process limitations on judicial power, a court will not exercise personal jurisdiction over a nonresident defendant unless (i) the defendant has "continuous and systematic general business contacts" with the forum,[37] or (ii) "the defendant has purposefully directed his activities at residents of the forum, and the litigation results from alleged injuries that arise out of or relate to those activities."[38] Personal jurisdiction based on "continuous and systematic general business contacts" does not require that the claim relate to those contacts, and is called "general jurisdiction." Personal jurisdiction based on the connection between a claim and the defendant's forum-directed activities is called "specific jurisdiction."[39] In deciding whether there is personal jurisdiction, the court may also consider other factors, such as the forum state's interest in the case and the parties' burdens or interests in litigating in the forum.[40]

1. "General" Personal Jurisdiction

In *Archangel Diamond Corp. v. Lukoil*,[41] the Colorado Supreme Court held that Lukoil's ownership of gasoline

stations in Colorado and elsewhere in the United States and the display of its logo on the gas stations supported a finding of general jurisdiction. Thus the claim, which involved a Russian diamond mining venture, was allowed to proceed even though it was unrelated to Lukoil's U.S. activities.

An assertion of general jurisdiction based on incidental property located in the United States was rejected in *Base Metal Trading, Ltd. v. OJSC "Novokuznetsky Aluminum Factory*."[42] The plaintiff in that case, a Channel Islands trading company, sought to confirm a Russian arbitral award, and in related proceedings sought to satisfy the award through seizure of a shipment of aluminum produced by the defendant. The court held that a single shipment of aluminum to the United States (assuming it belonged to the defendant), together with other occasional activities there (purchase of materials, business negotiations, attendance at trade conferences), did not amount to "continuous and systematic" contacts. The court also noted that the defendant did not have a subsidiary, office, or sales agent in the United States, and did not contract directly with American purchasers.

2. "Specific" Personal Jurisdiction

Minor or incidental business communications with a plaintiff located in the forum do not usually create personal jurisdiction over a foreign defendant for claims arising out of the transaction ("specific personal jurisdiction," defined above). Thus, in the *Archangel Diamond v. Lukoil* case mentioned above, the plaintiff, a Canadian company, asserted specific personal jurisdiction against a second Russian defendant (besides Lukoil) based on its communications directed at the plaintiff's Colorado office. The court declined to exercise jurisdiction over that defendant, because the communications concerned only attempts to resolve the dispute, not negotiation of the original transaction. Similarly, in *Montcrief Oil International Inc. v. OAO Gazprom*,[43] which involved a claim for breach of agreements to cooperate in developing a gas field in Russia, the court held that a defendant's visit to Texas, which was at Montcrief's invitation and during which the agreement was not concluded, did not establish personal jurisdiction.

The place of performance of a contract can be an important factor in exercising specific personal jurisdiction in an action for breach of the contract. In *Indosuez International Finance B.V. v. National Reserve Bank*,[44] a Netherlands plaintiff sued a Russian defendant for failure to pay under a series of forward currency exchange contracts. Although the contracts were not executed in New York, the state's high court upheld specific personal jurisdiction over the defendant because (i) several of the contracts specified performance by payment to New York bank accounts, (ii) in several of the contracts New York was chosen as the forum for dispute resolution, and (iii) prior similar transactions between the parties involved performance by payment in New York.

B. Subject-Matter Jurisdiction

While the inappropriateness of a U.S. forum for a dispute arising abroad is usually argued on grounds of lack of personal jurisdiction (see above) or *forum non conveniens* (see below), occasionally an issue of subject-matter jurisdiction is presented. When a common-law claim (for example, fraud or breach of contract) is brought in a court of general jurisdiction, there are generally no grounds for arguing lack of subject-matter jurisdiction. However, when the claims are statutory, a question of subject-matter jurisdiction question arises: did the legislature intend to apply the statute to conduct abroad?

The complaint in the *Norex Petroleum* case mentioned above was dismissed before any disclosure proceedings were allowed, even on jurisdictional issues. The *Norex* plaintiffs alleged that an oil company was taken over through various illegal acts (for example, fraud, extortion, bribery) under RICO. In dismissing the complaint, the court noted that RICO can apply to a "predominantly foreign transaction" when (i) "material conduct" in the United States directly injures the plaintiff, (ii) the transaction has "substantial effects" in the United States, or (iii) the conduct abroad is intended to and does affect U.S. exports or imports.[45]

The court held that the requirement of showing "material conduct" in the United States, resulting in the takeover, could not be satisfied by evidence that it was "masterminded, operated and directed" from the United States, that money used for bribes was wired from the United States, or that the defendants traveled between the U.S. and Russia in connection with the takeover.

The court also held that the "effects" test could not be satisfied by evidence of harm to U.S. portfolio investments in Russian companies involved in or affected by the takeover, because the harm alleged was not to the plaintiff. Further, the court held that the fact that the plaintiff itself (the victim of the takeover) was a subsidiary of an American corporation did not create subject-matter jurisdiction, because the plaintiff's ultimate owner was a Canadian citizen. Finally, the court held that the cancellation of $10 million in service contracts in Russia and unspecified effects on the world oil market as a result of the takeover were not a significant effect on U.S. commerce. The court noted that U.S. commerce can be affected by almost any limitation on the supply of goods abroad, and that in light of "the international complications" in applying extraterritorial jurisdiction, more serious effects need to be alleged in order to create jurisdiction.[46]

C. *Forum Non Conveniens*

Under the doctrine of *forum non conveniens*, the courts have broad discretion to dismiss a case where despite having jurisdiction, the court finds, upon weighing various private and public interests, that the case should be

decided in another forum. The main factors considered are usually (1) the case's connection to the forum and to another available forum, (2) the availability of evidence in the different forums, (3) the convenience of the parties and witnesses, and (4) the adequacy of the alternative forum.[47] The federal and state courts apply *forum non conveniens* basically the same.[48]

A nonresident plaintiff must overcome an initial barrier in defending its choice of forum. "When the home forum has been chosen, it is reasonable to assume that this choice is convenient. When the plaintiff is foreign, however, this assumption is much less reasonable."[49] The reason for this distinction is that a foreign plaintiff "sometimes is under temptation to resort to a strategy of forcing the trial at a most inconvenient place for an adversary, even at some inconvenience to himself."[50]

Furthermore, in a predominantly foreign dispute, the first three *forum non conveniens* factors listed above usually point strongly to dismissal. Thus, for example, in two cases that were essentially disputes among Russian and other non-U.S. parties for control of major Russian industrial groups, those three factors were the main reasons for dismissal of the cases in favor of a Russian forum. The two cases were the earlier *Norex Petroleum* decision discussed above, and a second *Base Metal Trading v. Russian Aluminum* case.[51] Furthermore, the *Base Metal* court noted that, while three of the plaintiffs were American corporations, they were not entitled to deference in their choice of forum because they were special-purpose vehicles with no U.S. operations. Thus, the court stated that the record "points to nothing but forum shopping by the plaintiffs."[52]

As for the adequacy of the alternative forum, the lack of procedures available in a foreign forum that would be available in U.S. courts (such as broad pretrial disclosure) will generally not prevent dismissal under *forum non conveniens*, because the plaintiff chose to do business in the other forum and presumably understood the risks of litigating there.[53]

Parties opposing a *forum non conveniens* motion often argue, and almost always without success, that the alternative forum is inadequate because it is corrupt. In the *Base Metal* forum decision, the court commented that the plaintiffs sought to uphold certain Russian judicial decisions but challenged others. In this connection, the court referred to the doctrine of comity and stated: "This Court is not a court of appeals for the Russian legal system and will not act as such …. It is not the business of our courts to assume the responsibility for supervising the integrity of the judicial system of another sovereign nation."[54]

One court has observed that in *forum non conveniens* decisions, the argument that the alternative forum is corrupt "does not enjoy a particularly impressive track record."[55] The court in that case was "unable to locate any published opinion fully accepting" the corruption argument. However, the decision in that case was a notable exception to the court's general observation. Although the court found that all other factors pointed to dismissal under *forum non conveniens*, the court kept the case, finding Bolivia an inadequate forum on the basis of public statements by the country's Minister of Justice about pervasive corruption in the courts.

Recent statements by President Medvedev (both before and after his election) are similar to the statements that led to the finding that Bolivia was an inadequate forum. Thus, Mr. Medvedev has criticized Russia's "legal nihilism."[56] He has stated that courts make "unjust decisions" as a result of "different kinds of pressure, like telephone calls and—there's no point in denying it—offers of money,"[57] and that corruption has become a "way of life" in Russia.[58] Similarly, in May 2008, a Supreme Arbitrazh Court judge testified in a libel trial that an official in the Presidential administration had pressured her to change a ruling in a dispute over control of a major Russian chemicals company.[59] Such statements might help future litigants keep some Russia-related disputes in U.S. courts. However, as the *Base Metal* case indicates, strong but general evidence of corruption will not necessarily keep a foreign dispute in an American court.

D. Restraint in Exercising Jurisdiction Over Bankruptcy-Related Matters

The restraint of American courts, under the various doctrines discussed above, in exercising jurisdiction over predominantly foreign disputes is well illustrated when the U.S. litigation can affect foreign bankruptcy proceedings.

In a case arising out of Russia's 1998 financial crisis and moratorium on payment of foreign private debt, *Credit Agricole Indosuez v. Rossiyskiy Kredit Bank*,[60] New York's high court had occasion to review American rules governing the preservation of assets to secure a future judgment. The defendant, one of Russia's largest banks at the time, did not contest liability for its default on $30 million of debt instruments that called for resolution of disputes in the New York courts. The plaintiffs requested a preliminary injunction forbidding the transfer of assets that would be needed to satisfy a judgment, and alleged that the defendant was insolvent and had already transferred its main assets to another Russian bank.

Although the trial court granted the preliminary injunction, and the intermediate appellate court affirmed, the Court of Appeals reversed under the longstanding American rule that, "in a pure contract money action, there is no right of the plaintiff in some specific *subject* of the action; hence no prejudgment right to interfere in the use of the defendant's property." Declining to follow the example of the English courts, which since 1975 have granted prejudgment relief to prevent frustration

of a money judgment, the Court of Appeals stated: "the widespread use of this remedy would . . . substantially interfere with the sovereignty and debtor/creditor/bankruptcy laws of . . . foreign countries."[61]

In a recent case of great notoriety, which the Texas bankruptcy court where it was brought called "the largest bankruptcy case ever filed in the United States," the Russian oil company Yukos filed for reorganization by creating a Texas subsidiary and transferring several million dollars to it for the admitted purpose of creating U.S. bankruptcy jurisdiction. The court surmised that Yukos's apparent goal in filing for bankruptcy in the United States was to "alter the creditor priorities that would be applicable" to its tax debt in Russia and in other jurisdictions where Yukos could seek relief or was already seeking relief.[62]

Ruling on a motion to dismiss the case, the court held that it had exclusive jurisdiction over the case by statute, and that this grant of jurisdiction prevented dismissal under *forum non conveniens.* Although the court held that neither comity nor the act of state doctrine provided an independent basis for dismissal of the case, the court noted that these doctrines contributed to its decision to dismiss the case under a judicially created "totality of the circumstances" test, considered together with a statutory basis for dismissal: Yukos's "inability to effectuate" a bankruptcy plan. In this regard, the court stated: "since most of Yukos' assets are oil and gas within Russia, its ability to effectuate a reorganization without the cooperation of the Russian government [the relevant taxing authority and regulator of Yukos's oil production] is extremely limited." This factor "weighed heavily" in the court's decision because of Yukos's "sheer size" (being responsible for twenty percent of Russia's oil and gas production) and its "impact on the entirety of the Russian economy." Finally, the court stated that it was not "uniquely qualified, or more able than the other forums," to interpret the laws of those jurisdictions under which Yukos would be seeking relief.[63]

Yukos did not pursue an appeal of the dismissal of the bankruptcy case.

IV. Summary and Conclusion

Russian courts have shown ambivalence toward foreign arbitration of Russia-based disputes. Because Russia only recently opened itself to private enterprise and international commerce, this ambivalence is not surprising and has parallels in recent American legal history. The ambivalence should diminish with time and experience, especially in light of the frequent choice of foreign arbitration in Russia-based transactions, including those involving only Russian parties.

During this early period (approximately the past fifteen years) of coalescence of holdings of Russian industrial property, disputes over control of several major companies have found their way to American courts because the plaintiffs hoped to find a more favorable forum than Russia. Those cases had little connection to the United States, and the courts dismissed them under settled rules of jurisdiction and *forum non conveniens.*

Endnotes

1. On political influence and corruption in the Russian courts, *see* Part III.C. at the text accompanying notes 57 through 59, *infra*.
2. Vaneev, *Recognition and Enforcement of Decisions of Foreign Courts in Russia* (in Russian) Korporativnyi Iurist, No. 3, at 39 (2007).
3. Cyprus, the Netherlands, and Luxembourg are consistently among the top sources of investment into Russia, and "most of this is Russian capital 'round tripping.'" Vinhas de Souza, *Foreign Investment in Russia*, ECFIN Country Focus, Vol. 5, No. 1, Table 1 & n. 5.
4. *Inside Russia's Arbitration Bar*, Global Arbitration Review, Vol. 3, Issue 2 (2008).
5. Vaneev, note 2 *supra*, at 40-41.
6. *See* Tapola, *Enforcement of Foreign Arbitral Awards: Application of the Public Policy Rule in Russia,* 22 Arbitration Int'l 151 (2006).
7. (*Information Letter of the Russian Federation Supreme Arbitrazh Court No. 96* (hereinafter "*Information Letter No. 96*"), 22 December 2005, available in Russian at www.arbitr.ru). For comprehensive discussions of practice before *Information Letter No. 96*, see Spiegelberger, *The Enforcement of Foreign Arbitral Awards in Russia: An Analysis of the Relevant Treaties, Laws, and Cases*, 16 Am. Rev. Int'l Arb. 261 (2005); and K. Hobér, Enforcing Foreign Arbitral Awards against Russian Entities (1994).
8. Karabelnikov, *The Supreme Arbitrazh Court of the Russian Federation Does Not Trust Foreign Arbitration* (Parts I and II) (in Russian), *Korporativnyi Iurist*, Nos. 4-5 (2006).
9. *Information Letter No. 96,* Section 29. An English translation of this Section of *Information Letter No. 96* is provided as an appendix to this article.
10. Karabelnikov, note 8 *supra*, Part II, at 43-46.
11. Rachevsky, *Public Policy, Arbitrability, and Enforcement*, in 3 Global Arb. Rev., Issue 2, at 29 (2008).
12. *Decree of Presidium, Supreme Arbitrazh Court*, Case No. 5243/06, at 5 (19 September 2006).
13. *Id.*
14. *Decree of Presidium, Supreme Arbitrazh Court*, No. 5243/06, at 6-8 (22 January 2008).
15. Russian Federation Law on International Commercial Arbitration, art. 1.2.
16. Russian Federation Law on Arbitral Tribunals in the Russian Federation, art. 2.
17. Arbitrazh Procedure Code, art. 248.2. *See generally* Hertzfeld & Ivanov, *Disputes Regarding Immovable Property (Real Estate) in the Russian Federation: the Competence of Arbitral Tribunals*, Stockholm Chamber of Commerce Arb. Inst. Newsletter (Jan. 2009).
18. *Information Letter No. 96,* Section 27.
19. *OAO Moskva-Krasnye Kholmy v. ZAO Hewlitt Packard,* Case No. KG-A40/83370-07 (Federal Arbitrazh Court, Moscow Circuit, 3 Sept. 2007), *reported in Mezhdunarodnyi Kommercheskii Arbitrazh*, No. 1/2008, pp. 158-64.
20. *Information Letter No. 96,* Section 28.
21. *ZAO Kalinka-Stockmann v. OOO Smolenskii Passazh,*Case No. A40-28757/08-25-228 (Moscow City Arbitrazh Court, 14 Aug. 2008).
22. *Mezhdunarodnyi Kommercheskii Arbitrazh*, No. 3/2007, p. 98.

23. *Janow Properties Ltd. v. IPOC Int'l Growth Fund Ltd.*, Case No. F04-2109/2005 (14105-A75-11), 31 March 2006 (Federal Arbitrazh Court, Western Siberia Circuit, 31 March 2006).
24. Arbitrazh Procedure Code, Art. 248.5.
25. Davydenko and Muranov, *Issues of Recognition and/or Enforcement of Foreign Decisions in Russia* (in Russian), *Korporativnyi Iurist*, No. 3 at 42, 46 (2007).
26. Spiegelberger, note 7 *supra*, 16 Am. Rev. Int'l Arb. at 263.
27. 407 U.S. 1 (1972).
28. 407 U.S. at 12-13.
29. 407 U.S. at 6, 9-10.
30. *See*, *e.g*., *Phillips v. Audio Active Ltd*., 740 F.2d 378 (2d Cir. 2007); *Palmco Corp. v. JSC Techsnabexport*, 448 F. Supp. 2d 1194 (C.D. Cal. 2006); *CFirstclass Corp. v. Silverjet PLC*, 560 F. Supp. 2d 324 (S.D.N.Y. 2008). For a collection of modern cases refusing to apply forum selection clauses for various reasons, see Dougherty, *Validity of Contractual Provision Limiting Place or Court in Which Action May Be Brought*, 31 A.L.R.4th 404, section 4[c].
31. "RICO": the Federal Racketeer Influenced and Corrupt Organizations Act.
32. For a historical survey of American hostility to choice of foreign forums, foreign law, and arbitration, and a discussion of post-*Bremen* treatment of public policy objections to application of foreign law, see Brittain, *Foreign Forum Selection Clauses in the Federal Courts: All in the Name of International Comity*, 23 Houston J. Int'l L. 305 (2001).
33. See *Kristian v. Comcast Corp*., 446 F.3d 25 (1st Cir. 2006).
34. 304 F. Supp. 2d 570 (S.D.N.Y. 2004).
35. 416 F.3d 146 (2d Cir. 2005).
36. 540 F. Supp. 2d 438 (S.D.N.Y. 2007).
37. *Metropolitan Life Insurance Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 567 (2d Cir. 1996).
38. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985).
39. Moore's Federal Practice and Procedure, Sec. 6.01.
40. Burger King, note 38 *supra*, 471 U.S. at 477.
41. 123 P.3d 1187 (Colo. 2005).
42. 283 F.3d 208 (4th Cir. 2002).
43. 481 F.3d 309 (5th Cir. 2007).
44. 98 N.Y.2d 238 (2002).
45. *Norex Petroleum Ltd. v. Access Industries, Inc*., note 36 *supra*, 540 F. Supp. 2d at 442.
46. 540 F. Supp. 2d at 448-49. By contrast, in another case, the takeover of an area where ninety percent of Nigeria's oil was produced was a significant effect on U.S. commerce for jurisdictional purposes, because forty percent of Nigerian oil was exported to the U.S. *Wiwa v. Royal Dutch Petroleum Co.*, 2002 WL 319887 (S.D.N.Y. 2002).
47. *See, e.g., Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947); *Islamic Republic of Iran v. Pahlavi*, 62 N.Y.2d 474 (1984).
48. *See*, *e.g*., 3 Weinstein, Korn, Miller, New York Civil Practice, Section 327.02; *Kinney Sys., Inc. v. Continental Ins. Co*., 674 So.2d 86 (Fla.1996).
49. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255-56 (1981).
50. *Gilbert*, note 47 *supra*, 330 U.S. at 507.
51. 253 F. Supp. 2d 681 (S.D.N.Y. 2003) (i.e., the same parties as in the 2002 personal jurisdiction decision).
52. 253 F. Supp. 2d at 696.
53. *Mercier v. Sheraton Int'l, Inc.*, 981 F.2d 1345 (1st Cir. 1992).
54. 253 F. Supp. 2d at 708-09.
55. *Eastman Kodak Co. v. Kavlin*, 978 F. Supp. 1078, 1084 (S.D. Fla. 1997).
56. Prime-Tass, 22 January 2008 (in Russian), http://www.vedomosti.ru/newsline/index.shtml?2008/01/22/536208.
57. *Medvedev Orders Cleanup of Courts*, The Moscow Times, 21 May 2008.
58. *Kremlin to Cede Power to Fight Graft*, The Moscow Times, 3 July 2008.
59. *A Litmus Test for the Rule of Law*, The Moscow Times, 7 June 2008.
60. 94 N.Y.2d 541, 708 N.Y.S. 2d 26, 729 N.E.2d 683 (2000).
61. *Id*. at 551, 708 N.Y.S. 2d at 32, 729 N.E.2d at 69.
62. *In re Yukos Oil Co.*, 321 B.R. 396, 399, 411 (Bankruptcy Ct., S.D. Tex. 2005). For a discussion of the Texas bankruptcy case and other Yukos proceedings, see Gololobov and Tanega, *Yukos Risk: The Double-Edged Sword—A Case Note on International Bankruptcy Litigation and the Transnational Limits of Corporate Governance*, 3 N.Y.U. J. Law & Bus. 557 (2007). Dmitry Gololobov is the former Yukos general counsel.
63. *In re Yukos Oil*, note 62 *supra*, 321 B.R. at 411.

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Appendix

Excerpt from *Information Letter No. 96,* Russian Federation Supreme Arbitrazh Court, 22 December 2005 (translation by Daniel J. Rothstein)

Section 29. The arbitrazh court shall refuse to recognize and enforce a foreign commercial arbitral award if it determines that the consequences of enforcement of such award contradict the public order of the Russian Federation.

A Russian open joint stock company (hereafter—the joint stock company) and a foreign firm (hereafter—the firm) applied to the arbitrazh court for recognition and enforcement of an award rendered abroad by an international commercial arbitration tribunal (hereafter—the arbitration tribunal) requiring a Russian joint venture and one of its founders to pay damages in the amount of US$20 million.

By decision of the arbitrazh court, the application was granted.

The respondents applied to the Supreme Arbitrazh Court of the Russian Federation with a request to vacate the decision and refuse recognition and enforcement of the arbitration tribunal's award in the territory of the Russian Federation.

The Supreme Arbitrazh Court of the Russian Federation vacated the above-mentioned judicial act and remanded the case for further consideration, proceeding from the following.

The competence of the arbitration tribunal was based on an arbitration clause contained in an agreement on the procedure for reorganization of the joint venture and on the exit of the joint stock company and the firm from participation in the joint venture as founders.

The arbitration clause provided that disputes connected with reorganization of the joint venture into a limited liability company and cession by the joint stock company and the firm of their shares to founders of the limited liability company, as well as the founders' payment for such cession in the form of property, were subject to adjudication in the arbitration tribunal.

In its award, the arbitration tribunal did not address the fate of the shares in the joint venture's charter capital. At the same time, the arbitration tribunal held the joint venture and the joint stock company liable to pay the foreign firm the cost of its contribution to the charter capital. Furthermore, it was not taken into account that the foreign firm made its contribution to the joint venture's charter capital in the form of property, as equipment that was not imported to the territory of the Russian Federation and was located in Bremen (FRG) at the time of adjudication of the dispute.

In addition, a dispute over an agreement between the joint stock company and the joint venture on storage of the equipment had been previously heard by an arbitrazh court of the Russian Federation, which required the [joint stock] company to return the above-mentioned property to the founder.

Thus, the foreign founders did not make their contribution to the joint venture's charter capital. Furthermore, enforcement of the arbitration tribunal's award, requiring payment of the cost of the charter capital contribution without deciding the question of the fate of the shares issued for payment of such contribution, or the question of the fate of the property located outside of the Russian Federation, contradicts the public order of the Russian Federation, which contemplates the good faith and equality of parties entering into private relations, as well as proportionality of civil law liability to the breach of duty.

The Presidium of the Supreme Arbitrazh Court of the Russian Federation instructed that on reconsideration of the application for recognition and enforcement of the arbitral award, the court should examine, taking into account the litigants' equal right to judicial protection, a series of questions: is the agreement submitted to the arbitration tribunal for review consistent with the award; is the issue of redistribution of shares in the joint venture consistent with the damages provided for in the award; is reorganization of the joint venture practicable, and what is the value of the property contributed to its charter capital but stored in Bremen (FRG); to what extent does the possibility of returning to a founder its property contribution to the charter capital of a joint venture created on the territory of the Russian Federation, while also imposing damages in the form of the contribution upon the joint venture itself, as well as one of its founders, comport with the public order of the Russian Federation. Only after clarifying these questions should the arbitrazh court decide the issue of whether the award or part of it should be enforced.

After considering the case and examining the questions posed above, the arbitrazh court denied recognition and enforcement of the arbitral award, because the consequences of enforcing such an award contradict the public order of the Russian Federation, which is based on the principles of equality of parties to civil-law relations, their good-faith behavior, and the proportionality of civil-law liability to the effects of the breach of duty, taking into account fault.

Obtaining Evidence from U.S. Courts for Use in Cross-Border Disputes

By Mark H. Alcott

I. Introduction

Almost every major commercial transaction today has an international component—be it the buyer, seller or lender. If the transaction generates a dispute, counsel is faced with the problem of obtaining evidence across international borders. How can lawyers handling such disputes obtain evidence through a United States court? We will examine the strengths and weaknesses of several methods.

For example, 28 U.S.C. § 1782 is a good tool, though persons engaged in private arbitration wishing to use the statute may have their applications denied by U.S. courts. The Federal Arbitration Act has limited utility for arbitrations seated outside the U.S., although it may occasionally be useful. Federal Rule of Civil Procedure 27 is a tool that parties can use in emergency situations, although it requires that at least one expected adverse party reside in a U.S. District. Finally, the Hague Convention is another alternative for lawyers handling many types of cross-border disputes.

II. 28 U.S.C. § 1782

Under 28 U.S.C. § 1782, federal courts may provide assistance in obtaining evidence from persons in the United States for use in connection with foreign and international disputes. The statute lays out several requirements for obtaining assistance, and the Supreme Court interpreted and clarified certain of these requirements in *Intel Corp. v. Advanced Micro Devices, Inc.*[1]

A. Background and Language of § 1782

In 1855, Congress passed the Act of 2 March 1855, which provided authority to federal courts to give aid to foreign tribunals.[2] Congress has over time broadened the scope of assistance that federal courts can give to foreign proceedings, by eliminating requirements, expanding the category of persons that can ask for aid, and broadening the type of proceeding the aid can be used for. Congress most recently revised the provision in 1996. The relevant text of the current § 1782 reads as follows:

> § 1782. Assistance to foreign and international tribunals and to litigants before such tribunals
>
> (a) The district court of the district in which a person resides or is found *may* order him to give his testimony or statement or to produce a document or other thing for *use* in a *proceeding* in a *foreign or international tribunal*, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of *any interested person* and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. . . (Emphasis added.)
>
> A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.

B. The *Intel* Case

In 2004, the Supreme Court decided *Intel Corporation v. Advanced Micro Devices, Inc*. Advanced Micro Devices (AMD) had filed an antitrust complaint against Intel with the Directorate-General for Competition of the Commission of the European Communities. AMD then applied to a U.S. District Court for an order requiring Intel to produce relevant documents. The Supreme Court held that the District Court had authority under § 1782(a) to entertain AMD's discovery request. In doing so, it issued several other important holdings.

1. AMD qualifies as "any interested person"

The Court held that a complainant before the European Commission, although not a private litigant or a sovereign agent, qualifies as an interested person under § 1782(a).[3] The Court read the term "any interested person" fairly broadly.[4]

2. The evidence is for use in a "foreign or international tribunal"

The Court held that the European Commission is a tribunal "when it acts as a first-instance decisionmaker."[5] The Court noted that the Commission's ruling was reviewable by the European courts.[6] Again, the Court read the relevant term fairly broadly, noting that foreign and international tribunals can include administrative and quasi-judicial agencies.[7]

3. Timing of proceeding—"in reasonable contemplation"

The Court held that the proceeding for which discovery is sought must be "in reasonable contemplation," but

need not be "pending" or "imminent."[8] The Court noted that, when Congress amended § 1782(a) in 1964, it deleted the requirement that a proceeding be "pending."[9]

4. Foreign discoverability requirement

Finally, the Court held that § 1782(a) does not have a requirement that evidence sought in the federal District Court would be discoverable under the law governing the foreign proceeding.[10] Until this case, there had been a split among the Circuits on the question of whether § 1782(a) had a foreign discoverability requirement. The Court found no indication that Congress intended to impose a categorical rule of no foreign discoverability.[11] It also rejected Intel's policy argument that allowing such discovery would offend foreign governments, noting its doubt that foreign governments would indeed be offended, because a foreign nation may have reasons to limit discovery within its own legal system without objecting to aid from United States courts.[12] The Court also held that an applicant requesting aid need not show that United States law would allow the discovery in a domestic litigation analogous to the foreign proceeding, because U.S. courts generally should not engage in determinations of whether the U.S. has an analogous proceeding to the relevant proceeding abroad.[13]

5. District courts have discretion under § 1782

The Court also held that § 1782(a) authorizes but does not require District Courts to provide assistance—the courts may exercise their discretion.[14] The Court suggested several factors that District Courts may consider in making their determinations.[15] First, when the person from whom discovery is sought is a participant in the proceeding, there is less need for § 1782(a) assistance, since the foreign tribunal has jurisdiction over the participants and can order them to produce evidence.[16] Second, the nature of the foreign tribunal, the character of the proceeding, and the receptivity of the foreign government to U.S. assistance are all relevant considerations.[17] Third and fourth, a District Court can consider whether the request is an attempt to get around foreign restrictions or policies, and whether the discovery would be "unduly intrusive or burdensome."[18] A court can reject or reduce the request for aid.[19]

C. The Current Analytical Framework

Since *Intel*, courts have approached a § 1782 request by posing two inquiries: first, the court determines whether the applicant has met the threshold requirements of the statute, in which case the District Court is authorized to grant the § 1782 request; second, if the threshold requirements are met, the court considers whether it should exercise its discretion to grant the request.[20]

Under the first inquiry, there are three threshold requirements an applicant must meet. First, the person or entity from whom discovery is sought must reside or be found in the district. Second, the discovery must be for use in a proceeding before a foreign tribunal.[21] Third, the application must be made by a foreign or international tribunal or "any interested person."[22] If a court determines the threshold requirements are met, it then looks to the four factors outlined in *Intel*, described above in Part B5. Many courts also note as important considerations the "twin aims" of the statute: "providing efficient means of assistance to participants in international litigation" and "encouraging foreign countries by example to provide similar means of assistance to our courts."[23]

D. Post-*Intel*: Questions Left Unresolved

While *Intel* cleared up several questions relating to § 1782, it left others unresolved. Two are of particular interest. First, what exactly constitutes a tribunal for purposes of § 1782, and, in particular, does the term "foreign and international tribunal" include arbitral tribunals? Second, does the location of the documents that are sought for discovery have a bearing on the discovery application?

1. Is an arbitral tribunal covered under § 1782?

The Supreme Court in *Intel* did not directly address the issue of whether private international arbitral tribunals may use § 1782. In dictum, the Court quoted Professor Hans Smit, who helped write the final version of the statute: "the term 'tribunal'. . . includes investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies, as well as conventional civil, commercial, criminal and administrative courts."[24]

While several courts acknowledge that § 1782 covers governmental or intergovernmental tribunals, courts and commentators appear to disagree over whether § 1782 assistance is available for use in international commercial arbitrations. One attorney commentator writes that "international commercial arbitration . . . was within the scope of the language chosen by Congress" for § 1782.[25] Another commentator and law professor believes that § 1782 should not cover international arbitral tribunals.[26]

Before 2004, case law on the issue appears to go only one way, holding that private commercial arbitrations are not covered by § 1782.[27]

Post-*Intel*, a few cases have interpreted "tribunal" more broadly than courts had previously, and one case expressly held that a private arbitration tribunal in Vienna, Austria, is a tribunal within the scope of § 1782.[28] The District Judge relied on *Intel*, stating that, although the Supreme Court did not directly address the issue of whether private arbitral panels are tribunals, a finding that a private arbitral tribunal was within § 1782 was "consistent with the reasoning in *Intel*."[29] The Court relied on *Intel* to argue that the holdings in *N.B.C.* and *Biedermann* were incorrect.[30]

A second case, *In re Oxus Gold PLC*, held that an international arbitration conducted by the United Nations Commission on International Law was a tribunal under § 1782.[31] The Magistrate Judge emphasized that the arbitration body operated under the United Nations and was established by its member states, that the proceedings were authorized by sovereign states (the U.K. and the Kyrgyzstan Republic), and that the arbitration was not the result of a contract or agreement between private parties as in *N.B.C.*[32] Conley believes that the judge in essence decided that the "proceedings were sufficiently governmental to be characterized as a 'tribunal.'"[33] The Chief Judge of the New Jersey District Court affirmed the Magistrate Judge's opinion.[34] In disagreeing over whether the tribunal fell within § 1782, the parties emphasized respectively the private and public aspects of the tribunal—one side emphasized that the arbitration was between private litigants and was not governmental, while the other side reiterated the points the magistrate judge had emphasized. The Chief Judge, after referencing the holdings of *Biedermann* and *N.B.C.* that private international arbitrations were not under the scope of § 1782, stated that "[t]he Arbitration at issue in this case, between two admittedly private litigants, is thus being conducted within a framework defined by two nations and is governed by . . . the 'UNCITRAL rules'," and "[I]n light of these facts, the Magistrate Judge's holding was not clearly erroneous or contrary to law."[35] Thus although the Court held the arbitral tribunal to be under the scope of § 1782, it did not reject the basic premises of the pre-*Intel* cases or deviate too far from the view that § 1782 does not encompass private arbitration tribunals.

A third case, *In re Hallmark Capital Corporation*, ordered § 1782 assistance for applicant Hallmark Capital Corporation for use in an Israeli arbitration.[36] The Magistrate Judge did not provide any reasoning for qualifying the Israeli arbitration as a tribunal (nor did she explain what kind of tribunal it was); she simply held that it did qualify, and cited *In re Roz Trading Ltd.*[37]

Based on these cases, there appears to be a minor trend post-*Intel* towards including arbitral tribunals with private litigants within the scope of § 1782. However, the Second and Fifth Circuit cases remain valid law. It is not clear yet how far the courts will go in allowing private international arbitrations into the scope of § 1782.

Some commentators believe that including private arbitral tribunals within the scope of § 1782 will negatively affect arbitration by undermining its policies of reduced cost, efficiency, and the arbitrator's ability to control discovery.[38]

2. Location of documents

Intel did not address the issue of whether § 1782 can be used to compel discovery of documents located abroad. Cases since *Intel* have come out both ways.

In *Schottdorf*, Judge Barbara Jones refused to impose a restriction that § 1782 not be applied to documents located abroad.[39] Judge Jones stated that there is no such express requirement in the language of the statute, and she would not "engraft one onto it."[40] Jones also applied *Intel*'s reasoning regarding the foreign discoverability requirement to the issue of a document-locale requirement: "If Congress had intended to impose . . . a sweeping restriction on the district court's discretion . . . it would have included statutory language to that effect."[41] She noted that the location of the documents should at most be a discretionary consideration, and considered it in the context of the unduly burdensome factor.[42]

In *In re Godfrey*, Judge Rakoff squarely disagreed with Judge Jones, and held that discovery under § 1782(a) was not appropriate because the documents were located in Russia; a witness "cannot be compelled to produce documents located outside the U.S."[43] He noted that both the bulk of authority, and the legislative history of the statute, support the conclusion that the statute was only intended to aid persons in obtaining evidence located in the United States. He cited Hans Smit's opinion that § 1782 was not intended to reach documents located outside of U.S. borders, because using § 1782 solely for evidence located within the U.S. creates a harmonious scheme where evidence in each country may be obtained through proceedings within that country, does not interfere with international courts, and limits the use of § 1782.[44] Judge Rakoff also disagreed that *Intel* compelled a different result, and he argued that *Intel* implicitly assumed that evidence discoverable under § 1782(a) would be located in the U.S.[45]

In *Norex Petroleum Ltd. v. Chubb Insurance Co. of Canada*, Judge Kollar-Kotelly found that the existing body of case law suggested that "extraterritorial application" of § 1782 would not be appropriate.[46] She cited approvingly a case noting that, although the language of the statute does not expressly restrict courts from using § 1782 to compel discovery of documents abroad, the intent of Congress does.[47] She also found that *Intel* did not compel a different result, noting that *Intel* did not address the specific issue, and did not reject all categorical limitations on § 1782, but only specific limitations at issue in that case.[48]

III. Obtaining Evidence in U.S. Courts in the Context of International Arbitration

Since many U.S. courts may prevent parties to private arbitrations from using § 1782 to obtain evidence within the U.S., lawyers engaged in private international arbitrations should look for alternative ways to obtain evidence through U.S. courts.

In general, arbitrations have limited discovery as compared to United States litigation.[49] How much discovery is permitted by an arbitration may depend on the institution administering the arbitration, as well as the person against whom discovery is directed.[50]

A. Federal Arbitration Act

The Federal Arbitration Act [hereinafter "FAA"] provides a role for federal courts in private arbitration proceedings. Section 7, in particular, allows arbitrators to summon witnesses and ask the witnesses to bring documents or other evidence with them. If the witnesses do not comply, the federal district court can compel compliance.[51] Courts have held that § 7 empowers arbitrators to issue subpoenas.[52] Two attorneys at White & Case, LLP note that whether an arbitrator issues an arbitral order versus a subpoena makes little to no difference in practice.[53]

The threshold issue is whether the FAA applies to tribunals seated outside of the United States. While the FAA applies largely to arbitrations in the U.S., it appears possible that arbitral tribunals in at least some countries outside the U.S. could make use of the FAA. Judge Cabranes of the Second Circuit stated in *N.B.C. v. Bear Stearns & Co.* that the FAA applies to arbitrations in "certain foreign countries by virtue of legislation implementing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the Inter-American Convention on International Commercial Arbitration."[54] N.B.C. was involved in an arbitration proceeding in Mexico, and was attempting to compel depositions from Bear Stearns and other investment banks. Bear Stearns argued that § 1782 was not available because the FAA was the only available means for obtaining evidence from non-parties in connection with private arbitration proceedings. The court did not answer this issue, because it decided § 1782 was not applicable to private arbitrations. However, the court did discuss the FAA, and it did not question the possibility that an arbitration in a foreign country could use the FAA to obtain evidence in the U.S.[55]

However, the court did note that Section 7 confers enforcement authority only upon the "district court for the district in which such arbitrators, or a majority of them, are sitting."[56] Thus it appears that in the case of a foreign tribunal, even where an arbitrator could order a witness, if the witness did not comply, there would be no District Court to enforce the order, thus limiting the utility of Section 7 for tribunals seated outside the U.S. The two White & Case attorneys wrote that, in practice, "potentially unenforceable arbitral subpoenas are often not challenged in court."[57] This statement is based on an assumption that the unenforceable subpoena has been ordered by an arbitrator seated within the U.S.[58] However, it is possible that the same would be true for an arbitrator outside U.S. borders.

Since there may be situations where arbitrators outside the U.S. can use Section 7 of the FAA, it is useful to briefly outline one open question. An issue, on which federal courts disagree, is whether an arbitrator can order pre-hearing document discovery from non-parties. The Sixth Circuit has allowed an arbitrator to compel documents in these circumstances; the Third Circuit does not.[59] The Fourth Circuit allows such pre-hearing discovery only in "exceptional circumstances."[60]

B. F.R.C.P. 27

In general, federal discovery rules do not apply to disputes governed by arbitration provisions.[61] However, some courts have allowed discovery in aid of arbitration where the movant (generally a party to the arbitration) can demonstrate extraordinary circumstances.[62] Special circumstances implies a special hardship, or compelling reason that the discovery is needed.[63] To prove extraordinary circumstances, the party must demonstrate at a minimum that the information it seeks is otherwise unavailable.[64]

In emergency situations, a party to an arbitration may be able to invoke Rule 27 where evidence will otherwise become unavailable. To obtain discovery under Rule 27, the applicant must: (1) show that it expects to be a party in an action that may be cognizable in any U.S. court, but the action is unable to be brought presently; (2) file a petition in the U.S. District Court in the district of the residence of any expected adverse party; (3) set forth the subject matter of the expected action and the interest in such action; (4) present facts the applicant wants to establish and give reasons for wanting to perpetuate the testimony at the current time; (5) provide names or descriptions of expected adverse parties; and (6) include the names and addresses of witnesses to be examined and the substance of the testimony the applicant wants.[65] The rule can be used under limited circumstances. One notable limit for parties engaged in cross-border disputes is the requirement that an expected adverse party reside within the U.S.

In *M/V Allegra*, the Fourth Circuit granted a party's petition to perpetuate testimony pursuant to F.R.C.P. 27 where the party expected to file an arbitration action in London.[66] While the Court did not directly address whether a party from an arbitration with its seat outside the U.S. could request discovery in the U.S., it apparently assumed that one may do so.

C. Relation to the FAA?

Thomas Webster, a lawyer in France and author of an article published in *Arbitration International*, writes that *M/V Allegra*, along with *Comsat Corporation v. National Science Foundation*, "provide guidelines as to when third party discovery is consistent with section 7 of the FAA" and that "there appears to be no reason why an arbitral tribunal with its seat outside of the United States could not" invoke section 7.[67]

IV. Hague Convention on the Taking of Evidence

The *Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters* is another

tool for lawyers in cross-border disputes to potentially obtain evidence from U.S. courts.

The Convention establishes a standardized procedure between States for obtaining evidence in foreign countries. It applies only between States that are parties to the Convention.[68] It allows one State Party to obtain evidence from another State Party either by using letters of request (Articles 1–14), a notice to appear before a consular officer (Articles 15–16), or through the designation of a commissioner (Article 17). The notice and commission methods are designed for situations where the testimony or documents are sought from a voluntary witness. The letters of request are available where a witness is being uncooperative; they can be used to secure evidence "through the compulsory powers of a foreign court."[69]

Letters of request allow a judicial authority within one State (the requesting state) to request a competent authority of another State to obtain evidence which is intended for use in judicial proceedings in the requesting State, commenced or contemplated.[70] It is not entirely clear from the Convention's language, or from secondary sources or case law, who exactly can make use of the Hague Convention. It is clear that any "judicial authority" can write a letter of request. It also appears that many other persons can make a request, as long as the judicial authority signs off on the request. Different countries will vary to some extent in terms of from whom they will accept a request. The State Department website states that local, state or government officials wishing to obtain evidence abroad should contact the relevant U.S. authority—this indicates that many government officials may have the authority to make a request, at least in the U.S.[71]

With regard to whether arbitral tribunals may initiate requests, there is no mention of arbitration within the text of the Convention, and practice varies from country to country. Some countries will refuse a request from an arbitration panel because they view it as a non-judicial authority or they view the evidence as not for use in a judicial proceeding, as Article 1 requires. Others might be more willing to entertain the request, particularly if it comes through a traditional court, or is signed off by a judge.

One article, by Michael Penny, addresses whether Canadian courts will enforce a letter of request received from an arbitral tribunal.[72] Penny writes that Canadian courts have a history of being hostile to requests from international arbitral tribunals, but that in recent years they have taken a more liberal approach.[73] He notes three reasons for this relaxation: "1. The indirect enforcement through the courts of the foreign jurisdiction by means of traditional letters of request; 2. the relaxing of the reciprocity requirement; and 3. comity."[74] Thus, where an arbitral tribunal makes a request to Canada *through a traditional court*, the Canadian court will typically enforce the request.[75] Penny encourages parties to administrative proceedings or arbitral tribunals desiring to write letters of request to go through traditional courts.[76]

Note that the letters of request discussed by Penny are not under the Hague Convention, to which Canada is not a party. Rather, he explains that many countries have their own laws regarding letters of request.[77] The relevant law in the U.S. is § 1782. As discussed, § 1782 is often interpreted as being not hospitable to requests from parties to arbitrations. However, this does not necessarily foreclose the possibility that a party to an arbitration could use the Hague Convention rather than § 1782. The Convention is largely a vehicle for getting a request to a country. Where a specific court denies a § 1782 request, one alternative for a lawyer is to present a broader request through the Hague Convention, which will go to a central authority.

Endnotes

1. 542 U.S. 241 (2004).
2. Act of March 2, 1855, ch. 140, § 2, 10 Stat. 630.
3. *Intel Corporation v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 246-47 (2004).
4. *See id.* at 256: ("'any interested person' is 'intended to include not only litigants, but foreign and international officials' and any other person who possesses a reasonable interest in obtaining the assistance" (*citing* Hans Smit, *International Litigation Under the United States Code*, 65 Colum. L. Rev. 1015, 1027 (1965)).
5. *Id.* at 246-47.
6. *Id.* at 254.
7. *See id.* at 258.
8. *Id.* at 247.
9. *Id.* at 258-59.
10. *Id.* at 247.
11. *Id.* at 260-61.
12. *Id.* at 261.
13. *Id.* at 263.
14. *Id.* at 247.
15. *Id.* at 264.
16. *Id.*
17. *Id.*
18. *Id.* at 265.
19. *Id.*
20. *See, e.g.*, *Norex Petroleum Ltd. v. Chubb Ins. Co.*, 384 F. Supp. 2d 45, 49 (D.D.C. 2005); *In re Gemeinschaftspraxis Dr. Med. Schottdorf*, 2006 U.S. Dist. LEXIS 94161, *11 (S.D.N.Y. 2007).
21. This second requirement to some extent collapses two requirements—that the evidence be "for use in" a proceeding, and that the evidence be used in a "proceeding before a foreign tribunal." *See* Wessel and Eyre, *US Discovery in Aid of Foreign International Proceedings: The Rise of 28 USC, s 1782*, 1 Disp. Resol. Int'l 23, 26 (2007).
22. *See, e.g.*, *Schottdorf*, note 20 *supra*, 2006 U.S. Dist. LEXIS 94161 at *13.

    Note that courts before *Intel* often considered both of the inquiries listed, and often distilled the three requirements for the first inquiry from the language of the statute. *See, e.g.*, *Esses*

v. Hanania, 101 F.3d 873, 875-76 (2d Cir. 1996). Since *Intel*, this framework has become well established; *Intel* made it clear that the District Court has discretion to not grant the request, even where the requirements are met. 542 U.S. at 247. *Intel* also established that certain other requirements courts were imposing upon a § 1782 applicant were not mandated by the statute. For example, before *Intel*, several courts had a foreign discoverability requirement. This meant that 1782 was used quite infrequently. Wessel and Eyre, note 21 *supra*, 1 DISP. RESOL. INT'L at 25. Other courts imposed a requirement that the proceeding for which the discovery was sought be pending or imminent. *See, e.g. Ishihara Chem. Co. v. Shipley Co., L.L.C.*, 251 F.3d 120, 125 (2d Cir. 2001).

23. *Schmitz v. Bernstein Liebhard & Lifshitz, LLP*, 376 F.3d 79, 83 (2d. Cir. 2004); *Norex*, note 20 *supra*, 384 F. Supp. 2d at 49; *Schottdorf*, note 20 *supra*, 2006 U.S. Dist. LEXIS 94161 at *11-12.
24. 542 U.S. at 258, *citing* H. Smit, note 4 *supra*, 65 COLUM. L. REV. at 1026-27.
25. Wessel and Eyre, note 21 *supra*, 1 DISP. RESOL. INT'L at 30.
26. Conley, *A New World of Discovery: The Ramifications of Two Recent Federal Courts' Decisions Granting Judicial Assistance to Arbitral Tribunals Pursuant to 28 U.S.C. § 1782*, 17 AM. REV. INT'L ARB. 43, 45-46 (2006).
27. *See, e.g.*, *N.B.C v. Bear Stearns & Co.*, 165 F.3d 184, 185 (2d Cir. 1999); *Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3d 880, 881 (5th Cir. 1999). *See also* Conley, note 26 *supra*, 17 AM. REV. INT'L ARB. at 45.
28. *In re Roz Trading Ltd.*, 469 F. Supp. 2d 1221, 1224 (N.D. Ga. 2006).
29. *Id.* at 1225.
30. *Id.* at 1227.
31. 2006 U.S. Dist. LEXIS 74118, *14 (D.N.J. 2006).
32. *Id.* at *15-16.
33. Conley, note 26 *supra*, 17 AM. REV. INT'L ARB. at 60.
34. 2007 U.S. Dist. LEXIS 24061 (D.N.J. 2007) (unpublished opinion).
35. 2007 U.S. Dist. LEXIS 24061 at *14.
36. 534 F. Supp. 2d 951, 952 (D. Minn. 2007).
37. 534 F. Supp. 2d at 952.
38. *See, e.g.*, Conley, note 26 *supra*, 17 AM. REV. INT'L ARB. at 46.
39. 2006 U.S. Dist. LEXIS 94161 at *13.
40. *Id.* at *15.
41. *Id.* at *16.
42. *Id.* at *16, 26-27.
43. 526 F. Supp. 2d 417, 423 (S.D.N.Y. 2007).
44. *Id.* at 423, *citing* Hans Smit, *American Assistance to Litigation in Foreign and International Tribunals: Section 1782 of Title 28 of the U.S.C. Revisited*, 25 SYRACUSE J. INT'L. L. & COM. 1, 11 (1998).
45. *Id.* at 423-24, *citing Intel*, 542 U.S. at 264) ("nonparticipants in the foreign proceeding may be outside the foreign tribunal's jurisdictional reach; *hence, their evidence, available in the United States*, may be unobtainable absent 1782(a) aid") (emphasis added).
46. 384 F. Supp. 2d 45, 50 (D.D.C. 2005).
47. *Id.* at 50.
48. *Id.* at 55.
49. Simpson & Kesikli, *The Contours of Arbitration Discovery*, 67 ALA. LAW. 280, 280 (2006).
50. *Id.*
51. 9 U.S.C.S. § 7.
52. *See, e.g.*, *Stolt-Nielsen Transp. Group, Inc. v. Celanese AG*, 430 F.3d 567, 577 (2d Cir. 2005), *Suratt v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 18 Fla. L. Weekly Fed. D 748, *3 (S.D. Fla. 2003).
53. Friedland & Martinez, *Arbitral Subpoenas under U.S. Law and Practice*, 14 AM. REV. INT'L ARB. 197, 199 (2003).
54. *N.B.C. v. Bear Sterns & Co.*, note 27 *supra*, 165 F.3d at 187 (citations omitted).
55. *See id.* at 187.
56. *Id.* at 187.
57. Friedland & Martinez, note 53 *supra*, 17 AM. REV. INT'L ARB. at 225.
58. S*ee id.*
59. *Compare American Fed'n of Television and Radio Artists, AFL-CIO v. WJBK-TV*, 164 F.3d 1004, 1009 (6th Cir. 1999); *with Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 406 (3d Cir. 2004).
60. *Comsat Corp. v. Nat'l Sci. Found.*, 190 F.3d 269, 278 (4th Cir. 1999).
61. *Deiulemar Compagnia di Navigazione S.P.A. v. M/V Allegra*, 198 F.3d 473, 479 (4th Cir. 1999).
62. *M/V Allegra*, note 61 *supra*, 198 F.3d at 479. *See also ImClone Sys., Inc. v. Waksal*, 802 N.Y.S.2d 653, 654 (N.Y. App. Div. 2005).
63. *Id.* at 479.
64. *Id.* at 480.
65. F.R.C.P. 27(a)(1). *See also In re Petition of Compania Chilena de Navegacion*, 2004 U.S. Dist. LEXIS 6408, *4 (E.D.N.Y. 2004).
66. *M/V Allegra*, note 61 *supra*, 198 F.3d at 476.
67. Webster, *Obtaining Evidence from Third Parties in International Arbitration*, 17 ARB. INT'L 71, 85 (2001).
68. *See* http://www.hcch.net/upload/outline20e.pdf.
69. *Philadelphia Gear Corp. v. American Pfauter Corp.*, 100 F.R.D. 58, 60 (E.D. Pa. 1983).
70. *See Hague Convention of 18 March 1970* Article 1.
71. *See* http://travel.state.gov/law/info/judicial/judicial_689.html.
72. Penny, *Letter of Request: Will a Canadian Court Enforce a Letter of Request from an International Arbitral Tribunal?*, 12 AM. REV. INT'L ARB. 249 (2001).
73. *Id.* at 253-57.
74. *Id.* at 255.
75. *Id.*
76. *Id.*
77. *Id.* at 250.

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Transborder Law: Application of the European Union Data Privacy Law to Multinational Corporations

By Elizabeth I. Hook, Cécile Martin, and Suzette Ivanova

I. Introduction

Every business must collect, process and store personal data about its employees and, very often, also about customers and other business partners. With the growing globalization of enterprises comes the need to also move human resources information across borders. Technologically, data processing and the movement of data across borders are simple and routine. Legally, however, these simple actions run up against complex data privacy law restrictions. To avoid the risk of exposure to liability and potentially heavy sanctions, multinational corporations need to familiarize themselves with the issues involved in the processing and transfer of personal information.

The European Union (EU) has an especially robust data privacy law, and, given the region's importance in multinational commerce, one that must be well understood by any multinational employer. In this article, we will review the EU data privacy restrictions and penalties, and the permissible ways to process personal data and transfer personal data out of an EU country.

II. EU Data Privacy Directive

A. Generally

The EU Data Privacy Directive[1] reaches all types of data. It is not limited to data that is stored or transmitted electronically, but also covers written and even oral communications. Furthermore, the EU Directive forbids the sending of data outside Europe to any country without a "level of [data] protection considered 'adequate' by EU standards."[2]

There are several key terms defined in the Directive, including:

(1) "**Data Subject**": An "identified or identifiable natural person."[3]

(2) "**Identified/Identifiable Natural Person**": Anyone "who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity."[4]

(3) "**Personal Data**": Information about any "identified or identifiable natural person."[5]

(4) "**Processing of Personal Data**": "Any operation or set of operations . . . performed upon personal data," electronically or otherwise, including the following:

(a) Collection;

(b) Recording;

(c) Organization;

(d) Storage;

(e) Retrieval;

(f) Use;`

(g) Disclosure by Transmission; and

(h) Dissemination.[6]

(5) "**Data Controller**": Anyone who determines the "purposes and means of processing of the personal data."[7]

(6) "**Data Processor**": Anyone who processes personal data for the controller.[8]

(7) "**Third Party**": Anyone who processes data under "the direct authority" of a controller or processor.[9]

III. Domestic Data Processing Rules

The EU Directive sets forth several rules governing the Processing of Personal Data.

First, all Processing of Personal Data is prohibited, except that which is "fai[r] and lawfu[l]," and conducted for "specified, explicit and legitimate reasons." Data Controllers must therefore process Personal Data in accordance with the following data quality principles:

(1) ***Fairness*****—**process data "fairly and lawfully."[10]

(2) ***Specific Purpose*****—**process/store data "for specified, explicit, and legitimate purposes and [do] not further process[] in a way incompatible with those purposes."[11]

(3) ***Restricted*****—**ensure that data are "adequate and relevant, and not excessive in relation to" the purposes for which they are collected.[12]

(4) ***Accurate*****—**ensure that data are "accurate and, where necessary, kept up-to-date" so that "every reasonable step [is] taken to ensure errors are erased or rectified."[13]

(5) ***Destroyed When Obsolete*****—**maintain Personal Data "no longer than necessary" for the purposes for which the data were collected and processed.[14]

(6) ***Security*****—**data must be processed with adequate "security," meaning that a "controller must implement appropriate technical and organizational measures to protect personal data against . . . destruction or . . . loss, alteration, unauthorized disclosure or access, in particular where the processing involves the transmission of data over a network."[15]

(7) ***Automated Decisions Prohibited*****—**significant decisions concerning an individual may not be "based solely on automated processing of data intended to evaluate certain personal aspects relating to" the Data Subject, "such as his performance at work, creditworthiness, reliability, conduct, etc."[16]

Additionally, Processing of Personal Data is prohibited unless the Data Subject has "unambiguously" consented to such processing,[17] or the processing is "necessary" (not merely convenient) to accomplish one of five objectives:

(i) "Perfor[m] a contract to which the Data Subject is a party."[18]

(ii) "Compl[y]" with a law.[19]

(iii) "Protect" the Data Subject's "vital interests."[20]

(iv) Advance the "public interest" or facilitate "the exercise of official authority" of the controller or a third party to whom data are disclosed.[21]

(v) Further the Data Controller's (or some other "disclosed" party's) "legitimate interests" without infringing the Data Subject's "fundamental rights and freedoms."[22]

The EU Directive sets forth additional rules that specifically govern the Processing of Personal Data that disclose "racial or ethnic origin, political opinions, religious and philosophical beliefs, trade-union membership, [or] . . . health or sex life."[23] Processing of this data is ***strictly prohibited***, unless an express exception applies, including but not limited to explicit consent that is freely given.[24]

As a general matter, the EU Directive prohibits processing personal data in secret. European data subjects, therefore, have the right to review information others have on file about them, and learn what is being done with that information.[25] Additionally, notice must be given to data subjects that explains the reason the information is being collected, who is collecting it, and who has access to it.[26]

Access must be given to information "without constraint at reasonable intervals and without excessive delay or expense."[27] If there are errors, a Data Subject can offer corrections, or ask that the information be purged.[28]

A Data Subject may object "on request and free of charge, to the processing of personal data relating to him which the controller anticipates being processed for the purposes of direct marketing, or to be informed before personal data are disclosed for the first time to third parties . . . and to be expressly offered the right to object free of charge to such disclosures or uses."[29]

An additional requirement that the EU Directive imposes on each Member State is the obligation to establish its own "Supervisory Authority" or "Data Protection Authority" for the administration of the data protection law.[30] Some EU Member States specifically mandate annual summaries filed by Data Controllers regarding all Processing of Personal Data. The following information is generally required to be included in such a summary: the controller's name; the purpose and description of the processing; recipients of the data; any anticipated cross-border transfers of data to third countries. In the United Kingdom, the Data Protection Authority demands quite thorough annual disclosures. In France, the Data Protection Authority has the right to affirmatively approve some types of proposed data processing schemes before they may legitimately be implemented.

IV. International Data Transfers

According to the EU Directive, no Personal Data may be sent from an EU member country to a nonmember country unless the destination country is one that "ensures an adequate level of protection."[31] Countries that have been designated by the EU Commission as meeting this standard are: Argentina, Canada, Guernsey, Isle of Man, and Switzerland. These countries, plus the European Economic Area (the EU plus Iceland, Norway and Lichtenstein), make up a sort of "EU data zone" in which data may be freely transferred.

There are, however, several key exceptions to this prohibition, which enable multinational corporations to transfer Personal Data to the United States (and other non-EU countries). These include the exceptions discussed below in this Part IV.

A. Safe Harbor[32]

The EU Commission has come to embrace ways for individual overseas data processors to bind their institutions so as to authorize transfers company-by-company, as opposed to country-by-country. The Safe Harbor is unique to the U.S. and is not available elsewhere. It is a voluntary self-certification system that authorizes the transfer of data from the EU to the U.S., but *not* beyond. U.S. data processors are permitted to be the recipients of personal data from Europe on the condition that they agree to treat that data as if it were still in Europe and subject to the EU Directive. A Safe Harbor company is

not, however, under any obligation to extend EU-style data protections to other employees (e.g., Americans). Safe Harbor restrictions need only apply to Personal Data about European data subjects.

There are three ways to qualify for Safe Harbor:

- Developing an in-house privacy policy (covering at least personal data received from Europe) that complies with Safe Harbor principles is the standard option.
- Joining a self-regulatory privacy program that complies is a less commonly used way to qualify.
- Being subject to a statutory, regulatory, administrative, or other body of law (or rules) that effectively protects personal privacy might also theoretically qualify.

The requirements of Safe Harbor include the following:

– Publicly committing to comply with the seven Safe Harbor principles (which essentially mirror the EU Directive's seven data-quality principles and are noted below);

– Disclosing privacy policies publicly;

– Accepting jurisdiction of (i) The U.S. Federal Trade Commission (FTC) under Section 5 of the FTC Act (which prohibits unfair or deceptive practices affecting commerce), or (ii) the U.S. Department of Transportation under 49 U.S.C. § 41712; and

– Notifying the U.S. Department of Commerce of the self-certification.

Self-certification involves completing a short form on the Department of Commerce's Web site, certifying that the corporation has already implemented fully compliant data processing systems and protections.

The seven Safe Harbor principles to which a Safe Harbor company must adhere include the following:

- **The notice principle**—European Data Subjects must be informed as to: (a) the reason a U.S. entity is processing their data, (b) the identity and contact information (for the purpose of filing inquiries or complaints) of the processor in the U.S., and (c) their right to limit use, disclosure, and transmission of their data, and the means by which to exercise that right. These communications must be clear, conspicuous, and communicated as soon as European Data Subjects are asked to disclose information that will be sent to the U.S.
- **The choice principle**—European Data Subjects must be offered the opportunity to opt out of having their personal information revealed to independent third parties (as opposed to an agent) or used for a purpose other than the one that motivated the collection of the information in the first place. The opt-out choice must be clear, conspicuous, readily available, affordable, and the choice must remain open continuously. When sensitive information is involved, Data Subjects are required to opt into Safe Harbor transfers of that information. (Sensitive information includes information pertaining to medical/health condition, racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership, and sex life.) Exceptions to this opt-in policy include situations where the processing is in the vital interests of the Data Subject or another person; necessary to establish legal claims or defenses; required to provide medical care or diagnosis; carried out in the course of legitimate activity by a foundation, association, or any non-profit in pursuit of political, philosophical, religious or trade union purposes; and (under the condition that data is not disclosed to third parties without consent) necessary to carry out an organization's employment law obligations, or related to data manifestly made public by individuals.
- **Principle pertaining to onward transfers**—Before forwarding information to any third-party agent in the U.S. or abroad, the employer must first confirm that the third-party agent adheres to Safe Harbor principles, is governed by the EU Directive or another adequacy finding, or signs a "written agreement" in which it agrees to be bound by the privacy protection standards of the Safe Harbor. Assuming the third party satisfies one of these conditions, the Safe Harbor party has a viable defense if that third party violates the Safe Harbor rules. The Safe Harbor party loses that defense, however, if it should have known of the potential problem but made no reasonable efforts to address it.
- **The security principle**. Safe Harbor processors are required to take reasonable precautions to protect personal data from loss, misuse, unauthorized access, disclosure, alteration, and destruction.
- **The data integrity principle**—Personal information that is kept on file must correspond to the purposes for which an entity anticipates using it. That is to say, processed data must be reliable with respect to the use for which it is intended, accurate, complete, and current.
- **The access principle**—Data Subjects must be permitted to access their information and must be provided with a means by which to correct, amend, or delete inaccurate information. A Safe Harbor company may, however, charge a reasonable fee commensurate with the cost of providing access and, in the same vein, may set reasonable limitations on access. A Safe Harbor company is permitted to deny

access altogether to Personal Data transmitted to the U.S. when:

(1) The burden (or expense) associated with providing access outweighs any risks involved to individual privacy.

(2) Providing one Data Subject access to the information would pose a threat to others' privacy rights.

(3) "Proportionality" and reasonableness outweigh the privacy interest and warrant restricting access.

(4) Disclosure is likely to jeopardize significant public interests, e.g., national security, defense or public security.

(5) Research and statistical purposes are the sole reasons for which the personal information in question is published.

(6) Disclosure would jeopardize law enforcement efforts, e.g., prevention, investigation or detection of crimes or the right to a fair trial.

(7) Disclosure would compromise private causes of action or a fair trial.

(8) Disclosure would involve breaching a legal or professional privilege or obligation.

(9) Disclosure would require breaching confidentiality of future or ongoing negotiations, e.g., to acquire a publicly traded company.

(10) Revealing such information could prejudice employer security investigations or grievance proceedings.

(11) Revealing such information could prejudice confidentiality required for employee succession planning or corporate reorganization.

(12) Disclosure would involve breaching confidentiality necessary to monitor, inspect or regulate issues of economic/financial management.

It bears noting, however, that the Safe Harbor company seeking to assert one of these exceptions has the burden of proving the application of that exception to its situation.

- **Lastly, the enforcement principle**—Each European Data Subject must be provided with readily available access to affordable procedures for protecting and enforcing his or her rights under Safe Harbor. A Safe Harbor company must develop a dispute-resolution procedure for European Data Subjects. This procedure must, at the very least, include:

  (a) a means by which data subjects may post complaints, which are then investigated and resolved, potentially by awarding damages or providing for other real remedies in the event of a violation; (b) follow-up procedures (either administered in-house or through an outside compliance review agency) to confirm that the privacy policies a Safe Harbor company asserts that it adheres to are actually being implemented at the company; (c) methods for addressing problems that arise with the operation of the procedure itself; and (d) meaningful sanctions. A Safe Harbor company can satisfy the foregoing enforcement requirements by participating in a pre-packaged privacy enforcement program which is based on Safe Harbor principles, or submitting to legal or regulatory supervisory authorities (e.g., European data protection authorities), that have already implemented dispute-resolution procedures.

Procedurally, acquiring Safe Harbor status is not particularly complicated. It requires logging onto the Department of Commerce website and completing a one-page form, or sending a letter self-certifying that the company has already established and is currently implementing adequate procedures and protections, and including the following information: (a) the name of the organization, together with mailing address, email address, and telephone and fax numbers; (b) an explanation of how the organization will process data; and (c) an outline of the policy for processing EU Personal Data. Safe Harbor status must be renewed each year with a short re-filing. Original self-certifications and annual re-filings are available on the U.S. Department of Commerce Web site.[33]

B. Model (Binding/Standard) Contractual Clauses

The text of the EU Directive permits the EU Commission to allow transfers of Personal Data to third countries that lack an "adequate level of protection" if the company involved implements "sufficient safeguards" by means of "certain standard contractual clauses" consistent with a "Commission's decision."[34] The EU Commission has issued three separate decisions—one in each of 2001, 2002, and 2004—designating three different boilerplate contracts for use in authorizing an EU Data Controller (the "data exporter") to send Personal Data to "data importers." The data exporter and data importer may not negotiate or alter any terms in the contract. The only negotiation allowed between the parties is regarding which of the three forms to use. However, the parties must list in an appendix the specific categories of data involved and the types of processing to be conducted. Parties must also indicate whether any sensitive data will be processed, must agree to respond to reasonable inquiries from data subjects and supervisory authorities, and are required to submit to data audits by data exporters or independent inspection bodies.

There are different forms of liability clauses in the Model Contracts, including joint and several liability (unless the exporter and importer agree to indemnify one another) and liability proportional to respective breaches of the contract.

C. Binding Corporate Rules (BCRs)

Binding Corporate Rules (BCRs) were outlined in June 2003 by the "Article 29 Data Protection Working Party," an EU data protection advisory body established under the EU Directive. Unlike Safe Harbor and Model Contracts, BCRs accommodate multifaceted international data transfers (as opposed to one-to-one transfers).

BCRs are corporate codes of conduct that set forth company-specific, EU-compliant data handling systems by which all entities of a conglomerate are bound. Once approved, BCRs authorize the multinational corporation to transfer Personal Data relating to EU Data Subjects globally from one affiliate to another. This largely untested tool requires corporations to develop quite comprehensive global data protection systems and subjects those corporations to significantly intrusive Data Protection Authority (DPA) scrutiny and approvals.

The procedure for establishing BCRs is outlined in another Article 29 Working Party paper, issued in April 2005.[35] The first step is to apply to the most "appropriate" DPA. The DPA to which the corporation actually applies may itself decide if it is the most "appropriate" one to receive the application. The analysis depends on several factors, the most significant of which is the location of the corporation's European headquarters. If the DPA to which a corporation applied concludes it is not the most "appropriate" one to process the application, then it transfers the application to the correct DPA. The list of all Member States from which personal data will be transferred must be provided in the application. This information serves to put the DPA on notice as to which other DPAs may need to authorize the BCR application. If the main DPA approves the package, it will then forward it to every other relevant member state DPA, all of which also have to approve the package for a company to be authorized to proceed with the BCRs.

For the BCR application, the corporation must prove its data protection systems are binding internally and externally. Internally, BCRs would bind all applicants, including: the subsidiary, the affiliates, the partners, and the subcontractors. Externally, "individuals covered by the scope of the binding corporate rules [i.e., EU Data Subjects] must be able to enforce compliance with the rules both via the data protection authorities and the courts."[36] The corporation must demonstrate that its internal dispute resolution procedures, remedies, and compliance mechanisms have been made available to aggrieved data subjects.

Notably, there is a fairly new model application for approval of binding corporate rules.[37] On 10 January 2007 the Article 29 Data Protection Working Party announced the adoption of a new Model Application for the submission of a company's BCRs to any European Union DPA. The EU's approval of the Model Application is long-awaited and a welcome addition to help make BCRs a truly viable alternative to Safe Harbor and model contractual clauses.

D. Consent

Consent[38] is another exception to the prohibition on cross-border data transfers. To be enforceable, consent must be unambiguous and freely given. EU data protection authorities maintain that a consent must specifically list the categories of data involved and the purposes for the processing of that data outside the EU. In the employment context, the general presumption is that a consent given by an employee is *not* freely given, largely because of the power imbalance inherent in the employer-employee relationship.

E. Necessary (Not Merely Convenient) Transfer

To qualify for this exception to the prohibition on cross-border transfers of data, the transfer must be "necessary," not merely convenient, i.e., it must fall within one of the following categories:

(1) ***Contract Between Data Subject and Controller*—** i.e., it must be "for the performance of a contract between the data subject and the controller or [for] the implementation of precontractual measures taken in response to the data subject's request."[39]

(2) ***Contract in the Interest of Data Subject*—**i.e., it must be "for the conclusion or performance of a contract concluded in the interest of the data subject between the controller and a third party."[40]

(3) ***Public Interest/Defense of Claims*—**i.e., it must be "legally required on important public interest grounds, or for the establishment, exercise, or defense of legal claims."[41]

(4) ***Vital Interests of Data Subject*—**i.e., it must be needed "in order to protect the vital interests of the data subject."[42]

F. Public Register

Also permissible are transfers "made from a register which according to laws or regulations is intended to provide information to the public and which is open to consultation either by the public in general or by any person who can demonstrate legitimate interest, to the extent the conditions laid down in law for consultation are fulfilled in the particular case."[43]

G. Anonymized Data

Transmitting data that has been stripped of all identifying information connecting it to the Data Subject is not prohibited by the EU Directive.

V. European Country-Specific Statutes/ Regulations

The EU Directive sets the standard for data privacy law in each Member State. The Directive, however, is only an advisory document. For the principles to actually be enforceable, each Member State is required to "transpose" (i.e., "adopt") a data privacy law of its own that reflects the principles and protections of the EU Directive. The data protection laws vary greatly from one Member State to another. Below is a sampling of some of the provisions of data privacy laws in Sweden, France, Germany, and the United Kingdom.

A. Sweden—"Personal Data Act 1998"

Sweden has been at the forefront of data protection legislation, having been the first country in Europe to pass data privacy legislation in the early 1970s by enacting the Data Act 1973. Later, in 1998, after the EU Directive was passed, Sweden transposed it into law with the Personal Data Act (PDA).

The Swedish Data Inspection Board is the agency that administers the PDA. Under Section 36 of the PDA, a controller of personal data is required to provide written notification to the Data Inspection Board of any complete or partial automated processing of personal data. Additionally, the controller of personal data must notify the Data Inspection Board if the controller appoints a personal data representative.[44] The function of a personal data representative is to "independently ensur[e] that the controller of personal data processes personal data in a lawful and correct manner and in accordance with good practice and [to] also point[] out any inadequacies to him or her."[45] The personal data representative is required to notify the Data Inspection Board if he or she has any reason to suspect that the controller has violated the PDA and has not rectified such violation after the personal data representative has notified him or her of the violation.[46]

Penalties for violations of the DPA include a fine, as well as imprisonment of up to six months "or, if the offence is grave, . . . imprisonment of at most two years," although the statute does note that "[a] sentence shall not be imposed in petty cases."[47] Furthermore, the controller of personal data may be required to "compensate the registered person [i.e., data subject] for damages and the violation of personal integrity that the processing of personal data in contravention of th[e] Act has caused."[48]

B. France—"French Data Protection Act"

While France had a broad data protection law well before the EU Directive, it was not until the "French Data Protection Act," which was passed in 2004,[49] that France transposed the EU Directive into French law. The *Commission nationale de l'informatique et des libertés* (known by the acronym CNIL)[50] is the entity that administers French data protection law. In France, to process personal data legally, a data controller must do the following:

(1) Inform the CNIL when data files are opened, and explain what information those files contain.

(2) Inform data subjects of their rights, which include, among other provisions, the right to correct erroneous personal data included in one's file.

(3) Safeguard the security and confidentiality of the personal data and make sure it is kept from unauthorized third parties.

(4) Comply with CNIL data audits and requests for information.[51]

(5) In certain situations, obtain affirmative CNIL permission prior to processing any data (e.g., when implementing certain whistleblower hotlines).

When transferring data outside France, the statute requires an employer to file a registration form and complete an online simplified registration procedure before transferring data outside France. Depending on the type of data processing, an employer is not required to obtain any affirmative permissions or approvals from the CNIL before sending information out of France, although information and consultation may be required from employee representatives. That is to say, the works council representatives, as a general rule, are required to be informed and consulted about the creation of a database before any processing of information takes place, regardless of whether that information will be processed in France or sent abroad.

Under the simplified notification procedure, only HR data for administrative management of employees may be transferred beyond the borders of the EU. Such data include, for example, employee-related statistics and lists of employees for administrative management purposes, the internal directory, and the Intranet.

Under Article 226-22-1 of the French Criminal Code, a transfer of personal data outside of the EU in violation of the measures taken by the EU Commission or the French Data Protection Agency is punished by five years imprisonment and a maximum fine of EUR 300,000 (approximately U.S. $400,000).

In April 2007, the French subsidiary of a U.S.-based company, Tyco Healthcare France, was fined 30,000 (ap-

proximately $40,000) for improper notice to and lack of transparency and cooperation with CNIL. Tyco had notified CNIL in September 2004 about a data processing system it had implemented to help manage the careers of employees working in several different countries. CNIL repeatedly requested supplemental information from the subsidiary regarding the data processing and, in particular, the circumstances under which the personal data would be transferred outside the EU. Despite those numerous requests, the company did not provide CNIL with the information but, rather, merely told the agency that the database was only a reporting tool and that the personal data was transferred to the U.S. when it was deemed necessary by management. In May of 2006, CNIL ordered the company to either answer its inquiries or cease the processing of the data in question. In June 2006, the company announced that the processing was suspended. However, during a mission control (i.e., spot-check) of the company data processing system (which agents of CNIL have the authority to conduct), the CNIL discovered that Tyco had nevertheless continued its data processing. Furthermore, CNIL discovered that the actual purpose of the processing far exceeded the purpose the company listed in its report to CNIL. That is to say, the purpose of the processing also included managing stock options schemes and professional training, among other things. For this reason, CNIL decided to levy a fine against the company.

C. Germany—"Federal Data Protection Law"

Germany's initial data protection law was actually the main inspiration for the EU Directive. Nevertheless, similar to France, Germany spent a great deal of time fine-tuning its data protection law to meet the standards of the EU Directive. Although the EU deadline was 1998, the final revision of Germany's law, which rendered it fully compliant with the EU Directive, was made in 2002.[52] Germany's Federal Data Protection Law (*Bundesdatenschutzgesetz,* or BDSG) is enforced by the German Federal Data Protection Commissioner.[53]

Germany's data law requires only a select group of businesses to register descriptions of their data processing systems with the German state (*Laender*) data bureaucracies, such as businesses that regularly transfer personal data, whether the data is anonymous or not, to third parties, such as German credit recording agencies, direct marketing companies, and market research institutes. German businesses can exempt themselves from registering if they designate an internal data protection officer who is registered under the Federal Data Protection Act;[54] employ fewer than four data processors who process personal data only for in-house purposes; or conduct their processing pursuant to data subject consents or contracts with the data subjects themselves.[55] Those businesses that do actually register must reveal the following:

(1) company name and address;

(2) name of the individual who represents the company for data purposes;

(3) the reason the company processes personal data;

(4) who the data subjects are and what data are being processed about them;

(5) the recipients of the data;

(6) rules governing the deletion of data;

(7) any contemplated transfers to third countries; and

(8) applicable security measures.[56]

D. United Kingdom—"Data Protection Act"

The Data Protection Act (the "DPA") was passed in July 1998, and became effective March 1, 2000.[57] The Information Commissioner, also known as the Data Protection Commissioner, is charged with enforcing the DPA.[58] Generally speaking, under the DPA nongovernmental data processors must inform the Information Commissioner's office before processing information. The notice requirement essentially means that even standard hiring, filing, customer sales, and e-mailing are impermissible in the UK until a data notice has been filed. This notice filing must disclose the following:

(1) The data controller's name and address;

(2) The name and address of any data-law representative designated by the company;

(3) What type of personal data will be processed and the data subjects that will be affected;

(4) A reason for the data processing;

(5) Potential recipients of the data; and

(6) Which non-EU or EEA jurisdictions the data might be transferred to, either directly or indirectly[59]

In February 2007, the Department of Constitutional Affairs (recently renamed the Ministry of Justice) declared that courts would be granted much greater powers in sentencing those who breach the Data Protection law, including the discretion to impose prison terms for those convicted of such breaches.[60] Prison sentences of up to two years may now be imposed for violations.[61]

Also in February 2007, the Financial Services Authority (FSA), the UK's financial services regulator, imposed a £980,000 fine against Nationwide Building society, the UK's largest building society, after a laptop with customer data concerning eleven million account holders was stolen from an employee's home.[62] The FSA justified the fine by noting that the Nationwide Building Society did not sufficiently anticipate or address the risk of cus-

tomer data being lost or stolen. The employee in this case reported the theft but failed to mention that substantial personal data was stored on the computer. The employee then took a three-week vacation, yet nothing was done in the interim to determine what data was actually on the computer that was stolen. The FSA ultimately concluded that Nationwide's risk assessment and security procedures were insufficient, noting that: due to the inaccessibility of policies and a lack of adequate training, the staff was not aware of which procedures to follow in response to such a breach, and, because nothing was done to address the situation within the first three weeks after the theft, there was ample opportunity for whoever stole the data to use it improperly. (Notably, there was no actual evidence of such misuse.)

A recent Act of Parliament gives the UK's Information Commissioner's Office the authority to impose monetary penalties for misuse of personal data in violation of Section 55 of the DPA. For some years, the Information Commissioner's Office has had only limited means of securing compliance with Section 55 of the DPA, which makes it a criminal offense to knowingly or recklessly obtain or disclose personal data without consent. While the Information Commissioner's Office has had the power to take action against individuals who violated Section 55, the imposition of a penalty was left to the courts. All this changed on 9 May 2008 with the enactment of the Criminal Justice and Immigration Act. The Act grants the Information Commissioner's Office the power to impose fines directly for violations of Section 55 of the DPA. This increase in the Information Commissioner's Office's authority mirrors that of other UK regulators like the Financial Services Authority, which in 2001 obtained the power to impose fines on banks and other financial institutions for data security failures.

VI. Conclusion

With the number of data privacy laws being implemented world-wide, it is virtually impossible to master the complexities of every applicable statute and regulation. Nevertheless, there are common issues that are typically addressed in these laws, and it is these issues, rather than the minutiae of each individual statute and regulation, that should be identified in order to effectively engage and collaborate with local counsel in the relevant jurisdictions to craft creative, effective solutions for companies attempting to maneuver around the landmines of the international data privacy realm.

Endnotes

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4. *Id.*
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6. Directive 95/46/EC, Art. 2, para. b.
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17. Directive 95/46/EC, Art. 7, para. a.
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29. Directive 95/46/EC, Art. 14, para. b.
30. Directive 95/46/EC, Art. 28, para. 1.
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35. *WP 108 Working Document Establishing a Model Checklist Application for Approval of Binding Corporate Rules,* EU Article 29 Working Party Working Paper 108, 14 Apr. 2005 [hereinafter WP 108].
36. WP 108 at § 5.13.
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The Application of the Sarbanes-Oxley Whistleblower Hotline and No-Reprisal Obligations Under Swedish Law

By Pia Nyblæus

I. Introduction

The objectives of this article are (i) to describe how the rules under the U.S. Sarbanes-Oxley Act of 2002[1] ("SOX") interact with Swedish labor law with respect to the establishment of so-called "Whistleblower Hotlines" under SOX and the protection against reprisals for the reporting of irregularities through such hotlines and (ii) to give an account of the corresponding rules established under Swedish law.

II. The Swedish Model

The Swedish labor law model, also known as the "agreement model," is based on the fact that social partners in large part solve their problems without intervention from the state. By tradition, the state has chosen not to interfere in labor issues other than through fundamental legislation and employment measures. Until the 1970s, labor-law legislation applied only to limited areas. Since then, however, the majority of labor law issues are governed by statute. Collective bargaining agreements also have come to play an important role as a source of law, since the legislation in many cases is "semidispositive," meaning that the law may be departed from through collective bargaining agreements. The 1976 Employment (Co-determination in the Workplace) Act (the "Co-Determination Act")[2] constitutes a codification of the collective-bargaining law and contains provisions regarding the law of association, the right to negotiate, collective bargaining agreements and their effects.

Swedish labor market conditions are characterized by a high rate of unionization. More than sixty percent of Swedish employees are trade-union members.

Swedish trade unions have the right to use the threat of "industrial actions" to compel an employer to sign a collective bargaining agreement. Swedish labor law is based on the principle that taking industrial action for trade union purposes is permissible; however, the Co-Determination Act contains rules on the obligation to keep the peace established by a collective bargaining agreement. The law does not provide an exact definition of "industrial action": the legislature, by avoiding a firm definition, sought to avoid the evolution of new forms of industrial actions in the labor market. The trade unions' right to take industrial actions is constitutionally protected by Chapter 2 of Section 17 of the Swedish Constitution.[3] It should be emphasized that industrial actions may be taken only with respect to such legal matters as may be included in a collective bargaining agreement.

The primary purpose of a collective bargaining agreement is to regulate salary and other employment conditions for employees falling within the scope of the collective bargaining agreement. This means that minimum wage issues, for example, are governed not by statute or regulation but by the agreement. A collective bargaining agreement must be in writing. The employees must be represented by an organization, but the opposing party (i.e., the employer) may be either an individual employer or an employers' organization. An employer may be bound by a collective bargaining agreement through membership in an employers' organization. The employer is bound by the agreements entered into by the employers' organization with different unions, providing they are applicable to the employer's business.

The collective bargaining agreement is an optional private-law agreement that is binding on the contractual parties. The common law of the Swedish Labor Court states that a collective bargaining agreement as a rule is uniformly applicable to all employees within a certain field,[4] meaning that a collective bargaining agreement today is binding on organized as well as unorganized labor. If an employer signs a collective bargaining agreement directly with a union, it is a so-called "local collective bargaining agreement."

III. SOX Section 301—Mandate to Set Up Employee Hotlines

Section 301 of SOX requires the audit committee of a company subject to the law to set up an internal reporting system to handle anonymous information concerning allegations of financial and auditing misconduct.[5] SOX does not specify a method for how to design these procedures; thus, it is up to the company to establish reporting procedures, such as e-mail, mail, telephone, fax, and the like. The anonymous reporting systems established pursuant to SOX Section 301 are usually referred to as "Whistleblower Hotlines." The reporting is anonymous in order to encourage employees to report irregularities without having to worry about reprisals.

If a company neglects to establish reporting systems or does not meet the requirement for anonymous reporting systems specified in the law, the company risks sanctions issued by the U.S. Securities and Exchange Commission (SEC). The company may, for example, be fined, or, in the worst case, prevented from listing its shares on the stock exchange where its shares are traded.

The rules on Whistleblower Hotlines seem to be extraterritorial, unlike the SOX Section 806 rules on protection against reprisals.[6] In Europe, three prominent legal cases are under review regarding the establishment of Whistleblower Hotlines: two French rulings (Group McDonald's France[7] and Exide Technologies[8]), where the French data inspection board, citing French data protection law, placed restraints on establishing Whistleblower Hotlines; and a German ruling[9] in which the higher labor court (*Landesarbeitsgericht*) in Düsseldorf placed restraints on the establishment of Wal-Mart's Whistleblower Hotline, at least where there were no negotiations with the works council.

IV. Swedish Rules for Establishing Whistleblower Hotlines

Interest in anonymous reporting systems in Sweden has increased significantly lately. Under Swedish law, there is nothing directly corresponding to the SOX rules establishing Whistleblower Hotlines. For a long time, public opinion in Sweden had been that Sweden had been spared from corruption. The public's trust wavered, however, due to a number of major scandals involving companies like Trustor, Systembolaget, and Skandia. In order to suppress corruption and improper financial actions, an overall code of corporate governance was implemented for the first time in Sweden in 2005: the Swedish Code of Corporate Governance (*Svensk kod för bolagsstyrning*).[10] This code was revised in July of 2008. The code regulates many of the areas regulated by SOX. In contrast to SOX, the Swedish rules do not provide for any penal sanction but are instead formulated on the principle "follow or explain." Moreover, the Swedish Code for Corporate Governance contains no equivalent to the SOX rules on anonymous reporting systems or protection against reprisals.

There are two primary legal questions that must be answered to ascertain the legality of implementing Whistleblower Hotlines in Sweden. The first question is whether a company is required to negotiate with the union before setting up a Whistleblower Hotline. The second is how an anonymous reporting system like a Whistleblower Hotline will comply with the Swedish Data Protection Act. A third question of interest is whether a Swedish individual will be required to report irregularities discovered within the company of which he or she is an employee, regardless of whether the company has set up a Whistleblower Hotline.

V. Duty to Negotiate and Disclosure Requirements

In Sweden, before making various everyday decisions, an employer is required to negotiate with the relevant unions. Employers are also required to keep the relevant unions updated on the company's business and employment policy. The pertinent rules are found in the Co-Determination Act.[11]

Only trade unions may appear as negotiating partners; individual employees lack the right of negotiation with their employer. A union's right to negotiate presupposes that at least one member is, or in any case was, employed by the employer. This fact should be distinguished from the validity of collective bargaining agreements that arise irrespective of the employers having employees that are union members. On the part of the employer, the company itself or its employers' organization may enter into negotiations.

The scope of the duty to negotiate depends upon whether the company is bound by a collective bargaining agreement. Under Swedish labor law, there is a distinction between a general and a primary duty of negotiation.

A general duty to negotiate means that an employer is required to take part in negotiations only when a trade union demands it. An employer that is not bound by a collective bargaining agreement and that also does not have any employees belonging to a union has no duty to negotiate with or to provide information to the union whatsoever. The general duty to negotiate concerns all issues—including individual work and employment conditions and the employer's business in a broader sense—regarding an employer and an employee who is member of a trade union and who is, or has been, employed by such employer. This duty of negotiation arises when one of the parties demands negotiation. The duty of negotiation does not, however, impose any requirement for the parties to compromise or agree, and a negotiation may be ended without the parties having come to any agreement.

When the primary duty to negotiate exists, the employer must on its own initiative negotiate with the trade union *before* decisions are made and implemented on those issues that concern the business of the employer and that have such scope and significance to the employees that a trade union would normally be expected to demand an opportunity to negotiate before any decision is made. Decisions and measures frequently recurring in the same form and scope are outside the primary duty to negotiate since, when they occur, they are treated as matters of routine. Significant personnel policy matters such as administrative rules and social issues are to be regarded as important changes in the business.[12] It is, however, at this point unclear whether a decision to establish an anonymous reporting system such as a Whistleblower Hotline would be considered a major change in business on the part of the employer. A decision on establishing a Whistleblower Hotline, however, should be subject to the duty to furnish information in accordance with Section 19 of the Co-Determination Act.[13]

The objective of the negotiation is to account for the opinions of the employees at the earliest stage possible and to take such opinions into account before making a final decision. If the parties do not agree, the employer is free to make a decision of its own choosing.

An employer not fulfilling the duty to negotiate may risk the imposition of compensatory damages. According to Swedish law, there is no fixed amount of damages for failure to negotiate. The amount of damages is judged individually and is discretionary; however, the common law suggests that the amount of damages may be between €5,000 and approximately €15,000, depending on (among other things) the size of the company and the circumstances of the individual case.

Provided that a company or a group of companies on a European-Community level have more than 1,000 employees, including 150 employees in at least two different member states, the Swedish and the European statutory rules on European works councils must be taken into account when establishing a Whistleblower Hotline in Sweden. In 1996, a Council Directive on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees[14] was implemented in Swedish legislation through the 1996 Act on European Works Councils.[15] As a result, a company's central management, or the management of a parent company, is required, within the framework of the Act on European works councils, to inform and consult with the works council at annual meetings before taking any action of major importance for the employees concerning the entire group of companies.[16] The establishment of a Whistleblower Hotline may thus constitute a duty of negotiation within the framework of the rules on European works councils.

VI. The Swedish Data Protection Act

The Swedish Data Protection Act[17] is based on an EC Directive, the European Parliament and Council's Directive 95/46.[18] As the data protection directive contains a number of rules whose deeper content remains relatively unclear, it is not possible to determine a common opinion in the EU regarding the establishment of anonymous reporting systems such as Whistleblower Hotlines. To ascertain the legality of a Whistleblower Hotline in an individual member state, the answer must be found in the legislation of that state, such legislation being the means of implementation of the data protection directive.

In accordance with the Data Protection Act, it is only the authorities that are permitted to process data relating to offences, criminal convictions, or security measures.[19] Prior to setting up a Whistleblower Hotline, companies must apply to the Data Inspection Board (the supervisory authority) for exception from the prohibition on processing personal data regarding violations of the law.[20] When the Data Protection Board decides on an exception, it is guided by what the so-called "Article 29 Group" states (in its report on information protection in internal systems) regarding suppliers of information in accounting, internal control, auditing, suppression of bribes, and criminality within the banking system and public finances.[21] (The Article 29 Group is a working group established at the EU level in accordance with Article 29 of the Data Protection Directive.) In its report the Article 29 Group emphasizes among other things the importance of data being revealed in a proportional and independent way and the appropriateness of limiting the number of reportable persons.[22] Furthermore, it states that anonymous reporting is not necessarily a suitable solution; the group recommends signed reports.[23]

From a Swedish perspective, the issue of transferring personal data to other countries is not entirely uncomplicated. As a main rule, the transfer of personal data to a third country is prohibited if that country's level of protection of personal data is inadequate. The prohibition is also applicable to the transfer of personal data to be processed in a third country.[24] "Third country" means a country outside the EU, the European Economic Area[25] or countries acceding to the Council of Europe's Convention on Protection of Individuals with regard to Automatic Processing of Personal Data, the so-called "Data Protection Convention."[26] In addition the Swedish government may grant exceptions from the prohibition regarding transfer of personal data to a third country.[27] According to Section 13 of the Personal Data Ordinance,[28] personal data may be transferred to a third country if the EU commission has established that the country has an adequate protection level in accordance with Article 25 of the Data Protection Directive. According to Article 25 of the Data Protection Directive, the EU Commission has established that an adequate protection level exists when transferring personal data to a so-called "safe harbor" in the U.S., which is also clear from Appendix 1 to the Personal Data Ordinance.

In March 2008, the Swedish Data Inspection Board ruled on three matters regarding how a whistleblower system stands in relation to the Swedish Data Protection Act. The multinationals Tyco Electronics Svenska AB, AON Sweden AB and Telefonaktiebolaget LM Ericsson[29] had applied for exceptions from the prohibition against processing personal data regarding criminal offenses. The companies desired to establish anonymous Whistleblower Hotlines in the entire consolidated group where the employees would be given the opportunity to report violations against the companies' ethical codes and/or Swedish law. The report was to be made over the telephone or through the Internet to, in the case of Tyco, an external party in the U.S. that was a safe harbor certified by the U.S. Department of Commerce. In certain cases the matter could be remitted to personnel in Sweden. As grounds for setting up such a system, both Tyco and Ericsson gave implementation in the U.S. of the rules pursuant to SOX.

The decisions made by the Data Inspection Board on these matters were almost identical. The Data Inspection Board stated that systems such as Whistleblower Hotlines are a relatively new phenomenon in Sweden. Information gained from Whistleblower Hotlines is generally very sensitive and often of uncertain quality, and the risk of unfair accusations is substantial. The consequences for the unfairly accused are hard to estimate. From a privacy point of view, the Data Inspection Board was of the opinion that establishing large new databases with the risk of their containing what may be considered common gossip is not a desirable development. The Data Inspection Board's starting point is that processing personal data within the framework of a whistleblowing system should be strictly limited.[30]

An absolute condition for allowing the processing of personal data is that it not conflict with Swedish labor legislation or possible collective bargaining agreements.[31] In its rulings of 2008, the Data Inspection Board did not specify whether this processing of personal data was in conflict with Swedish labor legislation or collective bargaining agreements. However, in an earlier matter, the so-called "Shell Case,"[32] the issue was dealt with more closely. The Data Inspection Board stated that it must be clarified how information regarding an employee would be processed and that it was necessary that the systems have a high degree of predictability. The demand for proportionality must also be considered. Accordingly, only data that is sufficient, relevant, and limited may be processed.

To sum up, the Data Inspection Board stated in regard to the 2008 cases that an anonymous reporting system such as a Whistleblower Hotline may be put to use only under the following circumstances:

1. The system must be a complement to normal administration and must be voluntary. The system may be used only when there is an objective reason not to use the company's internal information and reporting channels.

2. The scope of the whistleblowing system must be limited to improper actions regarding accounting, internal control and auditing, and the prevention of corruption and criminality within the banking system and public finances. It may also be directed towards serious irregularities regarding the vital interests of the company and the life and health of individuals.

3. Only employees in key posts or managerial positions may be reported and dealt with through the system.

4. The company must ensure that the rules in the Data Protection Act are upheld regarding that part of the process for which the company is responsible: e.g., concerning sensitive personal data, information to employees, and transfer of personal data to a third country.[33]

A violator can expect to pay compensatory damages to the injured party for damages and infringement of personal rights caused by processing personal data in breach of the Data Protection Act. The penalty may also be fines or imprisonment for up to two years if the offense is considered gross, intentional, or due to gross negligence.

VII. Duty of Loyalty to the Employer—Employee Duty of Disclosure

The employee's duty of loyalty to the employer is deemed to result from the employment agreement.[34] This is based upon the principle that the employee may not cause harm to the employer. The employment agreement not only regulates financial circumstances but also establishes a personal relationship between the parties. The employee is therefore obliged to put the employer's interests before his or her own and avoid situations where a conflict of duties may occur.[35]

In employment relationships, as in contractual relationships in general, it is deemed to be a general obligation to inform the other party of important circumstances. The obligation of disclosure is a result of the common duty of loyalty wherein the employee shall make an adequate contribution of labor satisfying the employer's interests. The obligation of disclosure pertains to those tasks with which the employee has been entrusted.[36] Of special interest to this article is whether there is an obligation arising from the duty of loyalty for the employee to reveal crimes, e.g., theft or embezzlement directed at the employer, and whether the employee in such cases is obliged to actively prevent the crime. According to the common Swedish criminal law, an individual is not to be penalized for neglecting to report a crime or for neglecting to intervene to prevent a crime.[37] However, if there is an employment relationship the obligations of the employee to report and prevent a crime go further than in common criminal law. A person in a managerial position ought to report all irregularities and intervene to prevent harm.[38] From case law it is clear that even ordinary employees in a fiduciary position may be obliged to report the theft of goods by fellow workers, even if the goods are of little value. If the employee neglects to intervene or report the matter, there may be cause for dismissal.[39]

VIII. The Swedish Rules in Relation to the Rules on Establishing Whistleblower Hotlines Under SOX

The issue of establishing anonymous reporting systems has been debated in Sweden during the last few years. One of the 21st century's greatest scandals, the so-called "Systembolaget Affair," was exposed by a whistleblower sending an anonymous letter to management con-

taining evidence of shop managers' taking bribes from suppliers. Generally speaking, there are fewer reports of corruption from Swedish employees than from employees in the rest of Europe. Whether this is due to the relatively restrictive rules on establishing whistleblower systems or due to cultural norms is hard to tell; however, Sweden's history is characterized by the country's neutrality. Europe and Sweden are still living in the shadow of World War II, and the establishment of procedures for reporting colleagues has been met with scepticism. Thus, the establishment of whistleblower systems is controversial not only from a legal perspective but also from an ethical point of view.

In Germany, the higher labor court (*Landesarbeitsgericht*) in Düsseldorf deemed the Wal-Mart Whistleblower Hotline illegal, since it had not been subject to negotiations with the works council.[40] It was not the hotline in itself that the German court ruled against but its establishment without prior negotiations. No similar case has been decided in Sweden. Whether there is a duty of negotiation in Sweden is, as described above, unclear and dependent on whether there are union members in the workplace and whether the company has entered into a collective bargaining agreement. Whistleblower Hotlines are established as a rule in multinational companies listed on the stock exchange. The Swedish branches of such multinational companies most probably have union members in the workforce and furthermore have entered into collective bargaining agreements. One may presume, therefore, that there exists a duty of negotiation in the Swedish branches of such multinational companies. It should, however, be pointed out that it is up to the employer to decide whether a Whistleblower Hotline should be established. The Whistleblower Hotline in itself cannot be disallowed if the employer neglects to negotiate before decisions are made, but the consequence can be damages resulting from a failure to negotiate with the union.

It is evident from the facts outlined above that the Data Protection Act places many obstacles in the way of establishing a hotline handling breaches of the law. Before a Whistleblower Hotline is established there must be an application for an exception from the prohibition on processing personal data concerning breaches of the law. The Whistleblower Hotline generally is to be used only as a complement to normal internal administration and the rules of the Data Protection Act, and only with regard to certain serious irregularities concerning employees in key or managerial positions. Furthermore, such data processing must not be in breach of Swedish legislation in general, applicable collective bargaining agreements, or labor market best practices.

Under Swedish law, there is a duty for employees in managerial positions (and, in certain cases, even ordinary employees) discovering crimes within the company to report such crimes to the management. In addition, there already is a regulation that not only requires but also compels an employee to report certain irregularities to the management. That employees are compelled to report colleagues for performing criminal acts against the employer is not new from a Swedish point of view. The problem is instead the way in which the reporting is carried out. As the Data Protection Board puts it, establishing large new databases with the risk of their containing what may be considered common gossip is not a desirable development. Thus, the processing of personal data within a whistleblower system must be strictly limited.

IX. SOX Section 806—Protection for Employees of Publicly Traded Companies Who Provide Evidence of Fraud

Section 806 of SOX forbids publicly traded companies that fall under SOX to

> discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee (1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by (A) a Federal regulatory or law enforcement agency; (B) any Member of Congress or any committee of Congress; or (C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct).[41]

SOX's rules on protection against reprisals are not extraterritorial and are not applicable to employees outside the U.S.[42]

X. The Swedish Rules on Protection Against Reprisals

Under Swedish law, there are no rules directly corresponding to the SOX rules regarding protection against reprisals. This does not mean that Swedish employers are free to penalize an employee who has reported irregularities. The protection against reprisals is mainly regulated through the Employment Protection Act and the Co-Determination Act. To answer the question of what legal protection a Swedish whistleblower has from reprisals,

it is important to bear in mind that the question will be answered differently according to whether the employee concerned is a civil servant or employed in the private sector. This article will mainly focus on private actors in the labor market. The discussion also assumes that the employee reports to the employer or an authorized regulator and not to a third party (e.g., the media).

XI. Informer Protection—Freedom of Speech and Freedom of the Press

All Swedish citizens are assured the freedom of communicating information and expressing thoughts, opinions, and feelings toward the community through speech, writing, art, or other means (i.e., freedom of speech).[43] They also have the freedom to gather and receive information and to take notice of declarations from others (i.e., freedom of information).[44] The freedom of speech and information is only applicable in relation to the community and does not apply to the relationship between individuals, e.g., between an employee in the private sector and his or her employer. In the Swedish public sector, the rules on publicity and freedom of information are deeply rooted. There is, however, no corresponding constitutional provision for the private sector.

As to freedom of speech and information for employees in the private sector, the Council of Europe is updating the Convention for the Protection of Human Rights and Fundamental Freedoms (the "Human Rights Convention"). The Human Rights Convention is currently Swedish law. Section 10 declares the following: "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers." This right includes the freedom of opinion and freedom to receive and disseminate information and thoughts without interference from public offices. The convention is mainly aimed at the relationship of the "community" with individuals. In the role of employer, the "community" is obliged to respect the freedom of speech in accordance with Section 10, irrespective of whether the relationship between employer and employee is regulated through public or civil law. What the Human Rights Convention means by the "community" is somewhat unclear. In the case law of the European Court of Human Rights, it is clear that certain sections in the Human Rights Convention may be important to the relationship between individuals, at least insofar as the sections are deemed to hold a positive obligation for convention states to protect in certain cases against attacks from other individuals those individuals exercising their rights and freedoms. The European Court of Human Rights stated in *Fuentes Bobo v. Spain*[45] that in certain cases convention states have a positive obligation to protect freedom of speech from attacks committed by individuals.

XII. Protection Against Reprisals Under Swedish Law

Under Swedish law, an employer has two causes to state when he or she wants to terminate employment due to circumstances attributable to the employee personally: termination on personal grounds[46] or dismissal.[47] These grounds cannot be abandoned through a collective bargaining agreement.

The foremost protection against unjustified terminations is the requirement of just cause, but what constitutes "just cause" is not specified in the law. Assessment as to whether just cause exists is made from the grounds of termination given. As conditions may vary, it has in practice been deemed neither appropriate nor even necessary to specify what constitutes "just cause." Nor does the legislative history give any details on how the wording should be interpreted; instead, the leading source for interpretation of the term is case law. The rule on just cause when terminating on personal grounds is complemented by a relocation obligation,[48] meaning that the employer must always investigate the possibility of relocation before the termination is effected. As a first option, the relocation must be carried out within the framework of the employment, and as a second option the relocation must be to another position in the company.

For an employer to have the right to dismiss an employee, it is necessary for the employee to have "grossly neglected his obligations to the employer."[49] Normally, an employer has no obligation to relocate an employee in the case of dismissal.

The difference between dismissal and termination is that dismissal is applied when the employee has grossly neglected his or her obligations, and in such cases the employer has a right to terminate the employment agreement without notice. When terminating on personal grounds, the employer must give notice for a period of time in advance of termination stipulated by law or collective bargaining agreements.

The reporting by an employee of financial or accounting irregularities to the employer may under no circumstances be considered just cause for termination on personal grounds or for dismissal.

However, a potentially more problematic issue arises when information regarding an unsatisfactory state of affairs within the company is divulged outside the company. Employee disloyalty to the employer is something the Labor Court takes very seriously. Disloyalty that causes or risks causing harm to the company may be a serious breach of the employee's obligations toward the employer and thus may provide justification for termination on personal grounds or for dismissal. When terminating on personal grounds or dismissing, the burden of proof is on the employer.[50]

The obligation for the employee to be loyal toward the employer is inherent in an employment agreement. In this context, it is important not to confuse the employee's duty of loyalty toward the company, which arises from the employment agreement, with the interests of those who do not wish their irregularities to be discovered. It may even be to the company's advantage if information regarding such irregularities is divulged to outside parties. An employee in Sweden has a right to publicly criticize his or her company to some degree without hindrance from the duty of loyalty. The Labor Court has stated that a far-reaching right of criticism is the foundation of good relationships in the workplace.[51] There are, however, limits to the employee's right to criticize. What the employer is obliged to tolerate is mainly decided on the basis of the position the employee holds within the company. This means that, the higher the position, the higher the demands for loyalty. Whether an employee who reports bad conditions in the workplace to the authorities is disloyal to the company has been tried in the Labor Court. The answer is, however, in no way a foregone conclusion; it depends on the circumstances of the individual case—the graver the conditions, the greater the freedom to act without consideration of the employer. In addition, the extent to which the employee has tried to correct the conditions in question through contacts with the employer before reporting them to the authorities must be taken into account.

The next question that arises is what rights a Swedish employee has if he or she is relocated, threatened, harassed, or subjected to other forms of reprisals by an employer as a consequence of having reported criminal actions.

Swedish law is based on the principle of the employer's having the right to conduct and distribute work. Inherent in this is the employer's right to relocate an employee. If the relocation is not of especial interference to the individual and does not have the direct purpose of making the employee leave his or her employment, an employee may not have the relocation in question invalidated in a court of law.[52]

The Employment Protection Act contains provisions that may affect the employee's responsibilities when he or she has passed on information regarding conditions at the company. Section 62 of the Co-Determination Act states that an employer has no right to take disciplinary action other than to seek recompense for damages from the employee, except as provided by law or collective bargaining agreements.

The right to take disciplinary action against employees in accordance with applicable collective bargaining agreements applies to both union and nonunion labor. For an action taken by an employer to be considered a sanction within the meaning of the law, it must be an action from the employer's side that in one way or another causes harm to the employee or has the character of a "disciplinary action" as customarily defined. Suspension or salary deduction, for example, would fall within this definition, but relocation when used for the purpose of punishment may also have the character of disciplinary action within the meaning of the law. At workplaces lacking collective bargaining agreements, disciplinary actions are permissible only under law. Industry custom is not sufficient.[53]

XIII. How Do Swedish Rules Interact with SOX Section 806 on Protection Against Reprisals?

As the SOX rules protecting a whistleblower from being subject to reprisals are not extraterritorial, the question arises as to what equivalent regulations are applicable under Swedish law.

Freedom of speech is one of the linchpins of the Swedish legal system. However, our constitutional freedom of speech does not apply between private parties. In Europe, there is an ongoing debate as to whether the Human Rights Convention and its rules on freedom of speech have a third-party effect, or *Drittwirkung*, that is, do they apply to private parties? Later case law from the European High Court indicates that the convention may be applicable to such cases. To ascertain its applicability as to matters between private parties and what impact it may have on the problems surrounding whistleblowers, one has to await further case law.

Section 806 of SOX contains rules regarding termination and dismissal as well as disciplinary actions due to employees' "blowing the whistle." According to Section 62 of the Co-Determination Act, a Swedish employer has no right to take disciplinary action other than to seek damages from an employee unless otherwise provided by law or a collective bargaining agreement. Depending on the nature of the action, the burden of proof differs. It is for the employer to prove that a salary deduction is not a disciplinary punishment, while on the other hand the burden of proof is on the employee where relocation is concerned.[54] If the employee does not succeed in proving that the relocation is a punishment, his or her only recourse is to file a lawsuit or show that the relocation was effected with the purpose of making him or her leave the employment in question. The fact that an employee cannot have a relocation judicially determined without hindrance may mean less protection for employees in Sweden falling under SOX Section 806.

According to Swedish law, an employee's reporting of irregularities at the company to a superior may under no circumstances be considered a breach of the duty of loyalty. If on the other hand an employee detects irregularities and reports these to the police or other authorities before making the employer aware of the problems, an assessment must be made in each case to determine whether the report is in breach of the duty of loyalty. Under Swedish

law an employee basically has no obligation to call attention to irregularities to the employer prior to reporting them to the authorities. Where serious irregularities exist, the employee is deemed to be totally free to act without making the employer aware of the problems. The situations regulated in SOX Section 806, which gives an employee the opportunity to call attention to irregularities without risking reprisal, should be applicable to Swedish employees reporting irregularities to the authorities, if the situations are from a Swedish perspective deemed to be serious irregularities. Of importance to the assessment is the employee's motive with the report. If the motive is to bring positive changes to the company, it can be presumed that such reporting is not disloyal behavior. If, on the other hand, the motive is to seek revenge or to cause harm to the employer by not informing the employer prior to reporting the irregularities to the authorities, the opposite can be presumed.

Endnotes

1. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 11, 15, 18, 28, and 29 U.S.C.).
2. [SFS] 1976:580 (Swed.).
3. [SFS] 1974:152 (Swed.).
4. *See* Arbetsdomstolen [AD] [Labor Court] 1983 no. 184; Arbetsdomstolen [AD] [Labor Court] 1977 no. 49 (Swed.).
5. "Each audit committee shall establish procedures for—(A) the receipt, retention, and treatment of complaints received by the issuer regarding accounting, internal accounting controls, or auditing matters; and (B) the confidential, anonymous submission by employees of the issuer of concerns regarding questionable accounting or auditing matters." Sarbanes-Oxley Act of 2002 § 301, 15 U.S.C. § 78j-1(m)(4).
6. *See* Donald C. Dowling Jr., *Whistleblowing Hotlines in Europe Under Sarbanes-Oxley: Directions Through the Maze*, White & Case, New York, Feb. 2007.
7. *See* McDonald's, CNIL Délibération no. 2005-110 (May 26, 2005).
8. *See* Exide Technologies/CEAC, CNIL Délibération no. 2005-111 (May 26, 2005).
9. *Landesarbeitsgericht* [LarbG] [Higher Labor Court] Düsseldorf, decision dated 14 Nov. 2005, court reference: 10 TaBV 46/05.
10. The English text of the Swedish Code of Corporate Governance can be found at http://www.bolagsstyrning.se/en/.
11. [SFS] 1976:580 (Swed.).
12. *See* Prop 1975/76:105 at p. 353 f.
13. [SFS] 1976:580 (Swed.).
14. Council Directive 94/45, 1994 O.J. (L 254) (EC).
15. [SFS] 1996:359 (Swed.).
16. *Id.* sec. 28-29.
17. [SFS] 1998:204 (Swed.).
18. Council Directive 95/46, 1995 O.J. (L 281) (EC).
19. Sec. 21 Data Protection Act (SFS 1998:204) (Swed.).
20. *Id.*
21. WP117; Option 1/2006 on the application of internal accounting controls, auditing matters, and the fight against bribery and banking and financial crime (Feb. 1, 2006), http://ec.europa.eu/justice_home/fsj/privacy/docs/wpdocs/2006/wp117_en.pdf.
22. *Id.* at 10.
23. *Id.* at 10-11.
24. Sec. 33 Data Protection Act (SFS 1998:204) (Swed.).
25. Sec. 3 Data Protection Act (SFS 1998:204) (Swed.).
26. Sec. 34 Data Protection Act (SFS 1998:204) (Swed.).
27. Sec. 35 Data Protection Act (SFS 1998:204) (Swed.).
28. [SFS] 1998:1191 (Swed.).
29. *See* Tyco Electronics Svenska AB, Decision 2003-03-26, registration number 1202-2007; AON Sweden AB, Decision 2008-03-26, registration number 1119-2007); and Telefonaktiebolaget LM Ericsson, Decision 2008-03-26, registration number 1078-2007.
30. *See* Decision 2008-03-26, registration number 1202-2007 at 3.
31. *Id.*
32. *See* Decision 2007-03-29, registration number 1778-2006.
33. *See* Decision 2008-03-26, registration number 1202-2007 at 1; Decision 2008-03-26, registration number 1119-2007 at 1; Decision 2008-03-26, registration number 1078-2007 at 1.
34. *See* Arbetsdomstolen [AD] [Labor Court] 1982 no. 110.
35. *See* Arbetsdomstolen [AD] [Labor Court] 2003 no. 21; Arbetsdomstolen [AD] [Labor Court] 1993 no. 18.
36. *See* Arbetsdomstolen [AD] [Labor Court] 2003 no. 21.
37. Chap. 23, sec 6 [Criminal Code] (Swed.).
38. *See* Arbetsdomstolen [AD] [Labor Court] 1981 no. 163.
39. *See id.*; Arbetsdomstolen [AD] [Labor Court] 1981 no. 144.
40. *Landesarbeitsgericht* [LarbG] [Higher Labor Court] Düsseldorf, decision dated 14 November 2005, court reference: 10 TaBV 46/05.
41. Sarbanes-Oxley Act of 2002 § 806, 18 U.S.C. § 1514A(a).
42. *Carnero v. Boston Scientific Corp.*, 433 F.3d 1 (1st Cir. 2006).
43. Chap. 2, sec. 1 Swedish Constitution (SFS 1974:152) (Swed.).
44. *Id.*
45. Eur. Ct. H.R. 39293/98 (2000).
46. Sec. 7 Employment Protection Act (SFS 1982:80) (Swed.).
47. Sec. 18 Employment Protection Act (SFS 1982:80) (Swed.).
48. Sec. 7 Employment Protection Act (SFS 1982:80) (Swed.).
49. Sec. 18 Employment Protection Act (SFS 1982:80) (Swed.).
50. *See* Arbetsdomstolen [AD] [Labor Court] 1993 no. 70.
51. *See* Arbetsdomstolen [AD] [Labor Court] 2006 no. 103.
52. *See* Arbetsdomstolen [AD] [Labor Court] 1978 no. 89.
53. *See* Arbetsdomstolen [AD] [Labor Court] 1972 no. 7.
54. *See* Arbetsdomstolen [AD] [Labor Court] 1987 no. 18.

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Letters to the Editor

In September, the editors of the *International Law Practicum* received a letter from Leslie N. Reizes, commenting upon an article in the Spring 2008 issue of the *Practicum*. The editors asked the authors of the article, Torsten Kracht and Oleh Beketov, to offer their views in response. Both Mr. Reizes's letter and the authors' response are set forth below.

Sir:

In their fine article on recognition of Foreign Money Judgments in the United States, which appeared in the Spring, 2008, issue of *International Law Practicum*, Messrs. Kracht and Beketov write that the "United States is not currently a party to any international treaty concerning the recognition of foreign money judgments." This is not the view in the Eleventh and Third Circuits. In *Vagenas v. Continental Gin Co.*, 988 F.2d 104 (11th Cir.), *cert. denied*, 510 U.S. 947, 114 S.Ct. 389, 126 L.Ed.2d 337 (1993) the court held that the Treaty of Friendship, Commerce and Navigation Between the United States of America and Greece, 5 U.S.T. 1829 elevates a Greek judgment to the status of a sister-state judgment. Similarly, the court in *Choi v. Kim*, 50 F.3d 244 (3rd Cir. 1995), held that under identical provisions, the Treaty of Friendship, Commerce and Navigation Between the United States of America and The Republic of Korea, 8 U.S.T. 2217 required that full faith and credit be given to a Korean judgment.

Leslie N. Reizes
Boynton Beach, Florida

Sir:

We write in response to Mr. Reizes' s letter of 13 September 2008, concerning our article on the Recognition of Foreign Money Judgments in the United States, which appeared in the Spring 2008 issue of the *International Law Practicum*. Mr. Reizes raises an excellent point about two lower court decisions concerning certain provisions of bilateral friendship treaties. Those decisions cited by Mr. Reizes, "which have been criticized, make an interesting footnote to the position mentioned in our article that the United States is not currently a party to any international treaty concerning the recognition of foreign money judgments.

In *Vagenas v. Continental Gin Co*., 988 F. 2d 104 (11th Cir. 1993), the first case mentioned by Mr. Reizes, the Eleventh Circuit held that a Greek citizen was entitled to the same twenty-year statute of limitations under Alabama law for the enforcement of a judgment that would apply to any United States citizen trying to enforce a judgment under Alabama law. The court stated that the treaty "obligate[s] the states to afford a Greek national the same treatment that any United States citizen would receive in an action to enforce a judgment." *Id.* at 106.

The decision finds direct support in Article VI of the Treaty of Friendship, Commerce and Navigation Between the United States of America and Greece, 5 U.S.T. 1829, at 1851, which reads as follows: "Nationals and companies of either Party shall be accorded national treatment and most-favored-nation treatment with respect to access to the courts of justice. . .[i]n all degrees of jurisdiction, both in pursuit and in defense of their rights." Section 1 of Article XXIV of the U.S.-Greek Treaty, 5 U.S.T. at 1907, defines national treatment as that treatment which is "accorded within the territories of a Party upon terms no less favorable than the treatment accorded therein, in like situations, to nationals, companies, products, vessels or other objects, as the case may be, of such Party."

Unfortunately, the decision also contains dictum about Greek judgments having "sister-state judgment" status, which has been requoted by some commentators, and relied on by the Third Circuit in the other case noted by Mr. Reizes, *Choi v. Kim*, 50 F.3d 244 (3d Cir. 1995). But this dictum is not supported by the plain language of the treaty provisions on which the court's more limited holding relies.

The *Vagenas* decision addresses the question of whether a Greek citizen trying to enforce a judgment in the U.S. has the same rights as a U.S. citizen in regard to the applicable limitations period. It is critical to note that the quoted language of the U.S.-Greek Friendship Treaty does not speak to the automatic elevation of judgments issued by Greek courts to the status of sister-state judgments, but is limited to giving Greek and U.S. citizens (whether natural or juridical) equal access to each other's courts of justice. The overbroad dictum in *Vagenas* and its limited progeny

has garnered criticism. "It is not obvious that a nation's promise to grant nondiscriminatory access to its own courts can be interpreted as a promise to recognize and enforce foreign judgments." Damman and Hansmann, *Globalizing Commercial Litigation*, 94 Cornell L. Rev. 1, n. 141 (2008) (addressing the Eleventh Circuit and Third Circuit decisions cited above).

If a non-Greek national or company obtained a judgment from a Greek court, the above-quoted language from the Friendship Treaty would not apply to an attempt to have that Greek judgment recognized in the United States, because the Treaty applies only to Greek nationals and companies. Conversely, if a Greek national or company obtained a judgment from the court of a country that has no similar treaty provision with the United States, the Greek citizen would still, under the above-quoted provision of the Friendship Treaty, be afforded the same treatment as any United States citizen in the Greek citizen's attempts to have that judgment recognized in the United States. Finally, if a United States citizen tried to have a Greek judgment recognized in the United States, the plain language of the provisions relied upon by the *Vagenas* court would not apply.

Therefore, while Friendship Treaties (and the U.S. has entered into numerous such treaties with similar provisions) may find tangential application to attempts by foreign nationals of signatory states to have money judgments recognized in the United States by providing those foreign nationals equal access to United States courts, we are not of the view that those treaties are appropriately categorized as "judgment recognition treaties." *Cf*. Silberman, *Comparative Jurisdiction in the International Context: Will the Proposed Hague Judgments Convention Be Stalled?*, 52 DePaul L. Rev. 319, 321 (2002) ("The United States is not a party to any bilateral judgments convention.").

We similarly question whether the dictum in the Third Circuit's opinion in *Choi v. Kim*, 50 F.3d 244 (3d Cir. 1995) —which relied on *Vagenas*—can properly be relied upon for the proposition that all Korean judgments are to be recognized as sister-state judgments under the Treaty of Friendship, Commerce and Navigation Between the United States of America and the Republic of Korea, 8 U.S.T. 2217. That Treaty contains language virtually identical to the U.S.-Greek Friendship Treaty provision quoted above, and such a reading would be inconsistent with the treaty provision on which the decision is based. As it is, in *Choi*, the Third Circuit never reached the issue of whether there was a valid foreign judgment to enforce. Rather, it simply assumed this to be the case so that it could proceed to hold that any such judgment obtained by the plaintiff, who was a South Korean citizen, would be unenforceable anyway as a result of due process violations, even under the lower standards applicable to the enforcement of sister-state judgments.

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The *Practicum* is a publication of the International Law and Practice Section of the New York State Bar Association. It is distributed free of charge to members of the Section.

The New York State Bar Association wishes to acknowledge the generous contribution of Mead Data Central, Inc. in donating access to the LEXIS®/ NEXIS® service for our use in the preparation of this publication.

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ISSN 1041-3405 (print) ISSN 1933-8392 (online)