NYSBA AUTUMN 2000 | VOL. 13 | 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

NYSBA

PRACTICUM: FORM AND POLICY

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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 December 1 and June 1, respectively.

Reprints

Authors will receive three complimentary copies of the *Practicum* issue in which the author's material is published. Additional copies may be ordered at cost before an issue goes to press by communicating with Daniel J. McMahon, Esq., at the New York State Bar Association, One Elk Street, Albany, N.Y. 12207-1096 (telephone (518) 463-3200, ext. 5582).

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Hot Tips for Greeting the New Millennium: Reflections, Projections and Challenges

Editor's Note: The following is an edited transcript of a program given 26 January 2000 during the annual meeting of the International Law and Practice Section of the New York State Bar Association at the Marriott Marquis Hotel in New York City. Section Chair was Thomas J. Bonner, Esq., and Program Chair was Isabel C. Franco, Esq.

ISABEL FRANCO: Good morning everyone. Welcome to our program this morning. I am particularly happy for those of you that are on time, given the transportation problems and all the slush out there. I would encourage you to get closer to the speaker's platform so that we can have discussions, questions and answers after the program. I'm happy to see Tom Bonner just arriving. Here's the Chair of our Section.

THOMAS BONNER: Well, thank you. That was very kind of you, Isabel. I really was not expecting to open this. I do not want to delay it any more. I thank you all for coming. I think this is going to be an extraordinarily informative program. Isabel and her colleagues have done an extraordinary job in organizing this, and I welcome you all.

I. Beyond the Barrister: Planning and Managing Corporate Crises

MS. FRANCO: Thank you. Let me start by introducing Phillipe Xavier-Bender, the program chair of this first program, "Beyond the Barrister: Planning for and Managing Corporate Crises."

I'm very pleased to introduce you to Phillipe, because he came all the way from Paris for this. Thank you very much, Phillipe.

MR. XAVIER-BENDER: Thank you very much, Isabel. Thank you, Tom. It's good to be back here. There was a time when I was the resident partner for my firm in New York where there were no crises at all except when we were expecting partners from the Paris office. That was a real crisis, because it was always unexpected: theater tickets, that comes number one on the list; second, hotel room changes, that's number two; and three, the job to be done, the meetings to be held. So just imagine what you have to say to a young associate when you tell him now you're off to New York and you're going to do real law. That's not true.

And I'm particularly delighted to have next to me two very prominent speakers. I will introduce them very briefly and you will see from their speeches that their skill, each in their capacity and their experience, will probably give you some tips that will help you appreciate what managing a crisis should be and how long it takes to have an event go smoothly.

The first speaker will be Bob Littleton. I have known Bob for a number of years and we have once again the perfect example of how to manage a crisis. Bob agreed to speak some months ago. It just happened that he called afterwards and said "Well, I'm not going to be able to make it because I'll be in court that day, so my partner Phil Quaranta will speak for me." Now, Phil is in court and Bob had to replace him. So you have here one of those millions of small crises that you have to manage.

Bob has been for fifteen years product liability counsel for various manufacturers. He has been instrumental in crises like recalls, congressional investigations and serious accidents. He has very often written and lectured on this topic, and I'm sure you will be very excited to hear what his experience is. I remember some years ago we did speak about the Yonkers accident together and I was amazed at how smoothly the solution was found, but how complicated it was to put together the management of that crisis. I'm sure that Bob will tell us about it a little.

Our second speaker is Howard Rubenstein. I assume that all of you have heard of Howard. In a crisis, one of the key components is the PR person, and Howard Rubenstein's organization works extremely closely with other specialists in crisis management teams. I'm sure that we will all be extremely interested by the examples and the tips that Howard is going to give us. Bob.

A. The Attorney's Role in Crisis Management.

ROBERT LITTLETON: Good morning, everybody. What I'd like to talk about is the discipline of crisis management. Then I'll give a couple of examples of it with the idea that, as lawyers, probably many of you have handled crises—probably some very high level crises—and you may have some experience in it. Indeed, you may have as much experience as I do.

What I have done is work with the literature, look at my own experience and try to abstract from that experience and that literature some principles in planning for a crisis that, if thought through, can help management of a crisis go more smoothly.

Let me first give an example of the goal that I think crisis management builds toward. The example is in the Metro section on B3 of today's *New York Times*. There's a

story about an elevator cable failing at the Empire State Building. You may have seen something about that story. And it's set up like a typical news story. The first part of the story is to grab your interest: it's a personal account of the person who was in the elevator, and she did not enjoy her ride from the 44th floor to the first with no stops. Obviously the story starts off with a very emotional appeal that grabs your attention.

The second part of the story is more meat and it comes from the spokespeople for the building inspectors.

And then comes the third part of the story, and it takes a while to get to it. What you're looking for is a comment from the building management itself: "How did this happen? Why did your elevator fall forty-four stories? And I must say that, as a person who rides the elevators every day, I read this article and thought, "Gee." My first thought on seeing the story was, "Gosh, that's an old building; I wonder if they really are maintaining those elevators. I wonder what caused it to fail. I wonder if it's a risk that's widespread. I wonder if I'm in danger when I go up the elevator." And you can imagine what I'm thinking if I go through this whole story and I get to the third column and I see, "And the building management had no comment."

Now, I think to most of us, and often as lawyers, that's the response that our clients give; that's the response that our law firms give. And in the public mind I think that often seals the case against you. I doubt this story will be in the paper again tomorrow. This is the one opportunity. And if you get to that part of the story of the elevator falling and the building management has no comment, then the public part of this discussion is over and now it's going to move into whether or not the public feels that we need more inspections of this company, more inspections of the elevators. It begins to get momentum.

Fortunately for the realty company involved here, that's not the way the story goes. In the third column we see "Howard J. Rubenstein," two seats down, "a spokesman for Helmsley-Spear said that, 'The car did not enter a free-fall or slam into the bottom of the shaft.'" "Rather," he said, "the cable gave way, the car accelerated, and the brake brought it to a controlled stop. It wasn't a massive impact." Mr. Rubenstein said, "The building management is pleased that the safety system worked so effectively and averted a possible tragedy."

Now, I must say that by the time I finished this story, I was reassured by the redundancy systems of elevators in New York City, and that reassurance came to me, and the millions of other people who read this, because somehow that company was able to meet the news cycle and get their voice heard in the first cycle.

I'm not going to try to tread into Howard's daily work, because nobody that I know of knows more about public relations than Howard Rubenstein. But what I want to talk about is on the company's side and on counsel to the company's side. That is, what has to happen to meet these kinds of deadlines to get a statement out, to get your word into the official investigation before the government's investigators move off scene, to try to reassure the public, to try and reinsure investors before the panic sets in.

The first thing I want to talk about in looking at crisis management as a discipline is, "What do we mean by crisis management?" "What's a crisis?" And it would usually be defined as something extraordinary to the company's business that poses an extraordinary threat. Examples could be strikes, or *60 Minutes* knocking on the door wanting to do a story on your company's product. If you're Perrier, it could be someone reporting that there's some benzine in your water. If you are a poor manufacturer, it could be claims that your factories in the United States are discriminating against women or minority groups. It could be any number of things. It could be a rape in an amusement park. There are any number of things that can happen that can threaten a company.

In terms of preparing for a corporate crisis, the first thing the company's got to do is designate a crisis manager, because what happens in a crisis is like a hurricane inside the corporation. People are in a panic, people need to be reached, things are happening very quickly, and unless there is someone designated as the go-to person when a crisis hits, you can lose hours trying to get to the right people and set up the chain of command in an emergency. So it's critical that the company designate ahead of time someone to be the crisis manager. That crisis manager could be someone in the company or it could be outside counsel.

I think a perfect example of a crisis manager that I've seen dramatized was in the movie *Pulp Fiction*, although I don't know how many people here have seen or will admit to having seen *Pulp Fiction*, which came out a few years ago. For those who haven't seen it, I'll describe the situation and then the crisis management.

In that movie there are a couple of pretty low-level functionaries in a enterprise and they set out to do a fairly routine day's work. During the course of that day's work, which involves killing several people who haven't paid money to the organization, something goes wrong. It should be routine, but something goes wrong and they end up killing the wrong guy in a car and now they have to get rid of the body and the car. Now, that's a dramatization, but the point that they reach is that something has come up within the company that they would like to resolve within the company

without going outside, and in that film they have to reach a crisis manager. The low-level people are in a panic and they call their immediate supervisor, who is fairly high up in the company, and he says, "Don't worry, I'm going to get Mr. Wolf"—who is the crisis manager. Everyone relaxes, and that says something about who the crisis manager is. In that dramatization, and in real life, the best crisis manager is somebody who's been around the company long enough, either inside or as trusted counsel outside, so that when people hear his or her name there's a sense of relief: that person has been there, that person has been through crises before, that person is going to get us through this one. So in thinking about a crisis manager, think about who would fit that bill.

The second thing about that crisis manager is that he is senior enough in the organization and clearly has the weight of the senior people in that company behind him so that when he says "Jump," everybody jumps. And it's critical that this crisis manager, whoever the manager may be, has the obvious support of senior management, or else the crisis manager won't be able to get things done quickly.

The other thing about this crisis manager is that he is clearly committed to be available and accessible all the time, every day. Everybody knew at that odd moment, which in the movie is 7:00 in the morning, where and how to reach this guy so that he could respond to that crisis. It was a crisis that had to be dealt with within a matter of a few hours. In the movie he's at a cocktail party, which is rather odd at seven in the morning, but that's where he is, and he's in a tuxedo and he is reachable and he is available. He at once says he's going to extract himself from the social situation and get on scene immediately, and he has at his disposal the tools to do that. Now, in a corporation that might be a clear budget to get on the Concorde, it might be access to a helicopter, anything like that to get on scene quickly and not freeze and let time pass, since time is your enemy. Now, in the movie he has the Honda equivalent of a Ferrari and is able to get across town quickly. So the crisis manager is available, gets on scene quickly, and that's what a crisis manager is like. And as soon as he gets on scene, he takes command of the situation. You can't have an equivocal person as crisis manager.

The other point to think about in terms of personnel is, "Who's going to be on the crisis manager's team?" "Who are going to be brought to the summit conference immediately?" In my experience and in working with several companies—there may be some variation on this—but generally speaking the team is going to include a senior person in the company, at least a senior vice president, if not the president. It's going to include the senior public relations person in the company, if they have one. It's going to include the risk manager, since in many crises insurance issues are going to be triggered and you want to be certain that the insurance resources are brought in and that notice requirements are met properly. It's probably going to include government relations people if the company has them, because most crises as they unfold are going to involve some regulatory agency. And it may include investor relations people, if it's a public company and this is something that will affect the stock. And in many instances it may involve people like myself: I work for a liability defense firm and the things we deal with are employment situations, people being hurt, and buildings falling down. So it may involve one of us.

That's the team and everybody on that team has to be available and reachable just as the crisis manager is. What that means is, if they commit to be on the team, they commit to carry a beeper, they commit to keep their cell phone on, and they commit to keeping everybody up to date on where they're going to be all the time. They've got to be reachable at 2 a.m. on Christmas Eve. So that's the team.

I want to watch my time, but I do want to talk a little bit about how the team, generally speaking, might react in a crisis. I'll use as an example the crisis Phillipe mentioned. It's a smaller and a local crisis that we worked on, but one that downstate lawyers may remember from a couple of years ago, when we were greeted on the morning news by the segment that a gasoline tanker had been T-boned by a car under an overpass on the New York State Thruway. The gasoline tanker went up in flames, the driver of the car was killed, and the bridge melted, closing the main arterial into New York City for the morning rush hour.

That's the kind of story that's of interest to people, and the way we heard about it was that some lawyers in my office represent the trucking company. The lead lawyer on that account got the call in the middle of the night that there was a truck on fire in Yonkers, that it looked like a big problem, and that there was a driver killed: The driver of the car that struck the truck was incinerated, and his car was melted; the car couldn't be identified, and the driver couldn't be identified. I got the call as the crisis manager in our firm shortly thereafter, and by sunrise we had in place a lawyer at the trucking company's headquarters working with the trucking company to try to pull together the facts of the investigation. I was working with a president and trying to put together some kind of press release with them. They did not want to use an outside public relations firm, which may or may not have been a mistake. But the client was a local firm—a local company without a big public image, if you will—and they were not going to go outside, so I was the press guy. Sometimes you as lawyers end up being the press guy. We had a lawyer on scene who specialized in fire investigations working with the National Transit Safety Board. We had

an accident reconstructionist on scene working with the National Transit Safety Board. We had a lawyer with the driver trying to protect him from the DA and from the press, who was all over his house, The beehive of activity in that company is hard to imagine—unless you've been through a crisis like that.

The first thing we wanted to do from my end of it was to close all the windows to the company so that information came in and out of the company from one source. You might think about that in terms of a crisis: When a crisis is happening and it's a crisis that catches the public eye, reporters, especially those in this town, are wonderful and they're very skilled and they are all over the place. Consider this poor driver of this truck who has been up all night: he's just been in an accident where a person has been killed; he tried to pull the driver out and got burned himself; he's sitting in his living room, and outside his house are twenty vans, and a hundred reporters, and the *New York Times* is sliding a note under his door saying, "We hear that you are a big hero. We'd like to talk to you." Now, P.S., they didn't want to talk to him about whether he was a big hero, but that's the *New York Times* and you can imagine what the less reputable papers were doing.

The company was getting calls at least every five minutes from the press asking for comment. Now, the company had had its troubles. I don't know the myriad of the allegations, but there were stories coming in the papers that morning that there had been racketeering charges against them, that some of the trucks had been forfeited, and looking around the company, we didn't see immediately someone who was going to be a great spokesperson to put in front of the cameras. I must say, there are a lot of companies like this, where there were a lot of people in that company who would be extraordinarily good at running a trucking company in New York, but in terms of reassuring the public when a person's been killed, we didn't see any of those people.

So what we determined to do, and I will give you this, since Howard may take issue with it, but what we did was this. We prepared a press release and all the calls coming into the company went to me and I took the calls and said, "We will have a press release at 2:00; give me your fax number, we'll get it to you." And beyond that, we had nothing to say until the press release came out. Since the people in the company were not experienced, since we didn't have a PR person, and since I don't purport to be a PR person, that way we were able to control what we said. But we were able to get heard on the first news cycle, since a lot of that press release was recorded verbatim both in the newspapers and in the news. The way the story went was not, "Isn't this truck terrible? Isn't this a terribly unsafe company?" The way the story took off and grew legs and ran was that, "We really need to be looking at the design of these tanker trucks." The current regulations require filling hoses to be on the bottom; perhaps they should be on the top." And that's the way the story went. It was on for about a week and then was gone. The litigation continues, but the company has, I think, publicly done well. That's an example of a crisis.

I want to finish by saying that, in thinking about your crisis management team, I would offer from experience that the most important thing that has to happen in a bureaucracy like a corporation is that the crisis managers be empowered to do certain things in advance. Otherwise the time to gather decision makers and get decisions made will kill you. And by that I mean that it has to be decided in advance that the crisis manager will have a discretionary budget to do whatever the crisis manager thinks necessary—up to perhaps $50,000 in the first week—and they don't need anybody to sign on that. They have the authority to retain a press agent, they have the authority to retain an investigator, they have the authority to retain outside counsel, they have the authority to get people traveling on airplanes. All those things having to be approved in advance or nothing will happen and there has to be authority established in advance to issue a press release within the first press cycle. Otherwise you're going to freeze. One way to do that is to have a discretionary budget established. Another way to do that is that some companies offer crisis management insurance, which the risk manager of the company might know about, as an endorsement to the director's and officer's policy. That creates a discretionary budget of $50,000, and that allows the crisis manager to do what he or she needs to do, very quickly without asking anybody and that way things get done. Thank you.

MR. XAVIER-BENDER: Thanks very much, Bob. I will say that I have here the press release that you have drafted in 1997 and this is a treasure of a letter. The president speaks, but doesn't speak about the company, but rather speaks about the NTSB, speaks about DOT regs, speaks about the driver, speaks about safety regs, and also begins by saying that, and I'll read the two first lines, "On behalf of myself and our company, we express our deep concern and sympathy for those affected by this tragic accident." This is exactly what should be done. The no comment is extremely dangerous and that's the first mistake you shouldn't do.

Now, if you don't have a PR person, this is what you have to cope with. But how is it, Howard, when you do have a specialist of the press and you have a PR company or a PR person like you in a crisis like the one that Bob has described in the first words of his speech?

B. The Public Relations Agency's Role in Crisis Management

HOWARD RUBENSTEIN: Well, thank you very much, Bob. Thanks for those remarks about the Empire

State Building. I will send you a lifetime pass to the observatory.

The odd thing about that crisis is that it happened at about 4:00 and the people at the building failed to call anybody. They didn't call me, and I've been working for them for thirty-five years. They didn't call Mrs. Helmsley; they were afraid of her. They didn't call anybody. The first that I knew about that was when ABC Network Television called and told me what happened. That's illustrative of how not to handle a crisis within a corporation. Many of the reasons for such a breakdown in response relate to fear. And the people that were there, the security people and others there, feared internal reprisals, even though they had nothing really to do with creating the crisis. So you have to stand up to the crisis internally and get that crisis team working the moment you have the first inkling or knowledge of the crisis. But very often the company will go underground into the bunker and try to keep the incident from top management and keep it from the lawyers and everybody else, thinking it will disappear. It just doesn't work that way. They might get away with it once or twice over a series of crises, but that's absolutely the wrong way to function.

We're involved in literally hundreds of crises, and have been over the course of the years. I'll just mention a few that you probably will recognize. We handled the millennium celebration at Times Square. Well, for at least six months we helped the city, working with the city to prepare a crisis plan if terrorists hit or there were any problems that night. There was an extraordinary plan that brought together government and private interests. We represented the city pro bono, but we also represented four or five of the sponsors of the celebration. We also represented—represent still—the New York State bankers and the clearinghouse banks, fearful that they would not function appropriately at the year 2000. Again, almost a year or nine months of preparation of trial runs to see that the transition would be smooth. We had with them an extraordinarily detailed crisis plan.

There are others that you've seen. We represent the New York Yankees, and Steinbrenner is in a crisis every day. We represented the au pair company where in Boston the au pair was accused of shaking a child to death. That was a terrible crisis. Michael Jackson, the performer: we've handled some of his crises. And Ronald Perlman on divorce. And we represent the newspapers that expose crises: the *Star*; the *Enquirer*; the *Globe*. They expose the crises, but as soon as *they're* in a crisis, they say, "Oh, my God, what do we do?" So they hired us. But it is a little odd, because from time to time they go after some of my clients.

Just these last few days we have the *New York Post*. One of their star columnists was arrested drunk at the airport, got very nasty and was put in jail for four hours. Another crisis: on and on. You see sexual harassment crises, employment discrimination, collapses, fraud, health recall, shipping disasters. We've been in them all, but there are common threads that you really have to look for in almost any crisis that would involve the news media. That is, the crisis may not necessarily already involve the media, but it could involve media.

First, the description of the crisis team was excellent, Bob. That really is how it works and should work. And centering the calls into one person's hands is very important. I see that tactic. We represent newspapers and television. We represent Disney, ABC and others. I see how it works. They'll call all through the chain of command of a corporation and try to get someone to talk, and if a company is not fully aware of how to function in a crisis, you'll get some lower-level manager of one of the departments saying something that will undermine your case.

I insist in every single crisis I'm in that they bring in an outside lawyer, without fail. I insist on that all the time, because the lawyer on the outside will be dispassionate, will be able to give solid judgement. Sometimes the in-house attorneys are audit takers. I won't say that is the case often, but sometimes, and they're fearful of their own position if the crisis goes wrong. So I really press very hard to use the law firm that they have or find a crisis management law firm and bring them in. I would recommend to all of you that if you have a client that's in a crisis, assert yourself or get somebody from the outside to work with them in the crisis.

Ever since Watergate, the news media has found it a field day. They're all looking for Pulitzer Prizes. They all want to be Woodward and Bernstein. And you see politics in crisis and scandal, business in crisis, the social life of the CEO in crisis and scandal, fund-raising in crisis. In today's paper you'll find every one of these as a crisis for the company, even though some of them involve the individual CEO. We have Ronald Perlman in his divorce with Patricia Duff: everyday there's something there and it does, in fact, impact on how a person runs his or her business and how the public looks at the business. So in advance you should have that crisis team set. Don't wait until the crisis. Exchange phones and faxes and communication systems on how you get to each other.

The warning signs sometimes are ignored. What are the warning signs? Internal information that something can happen to disrupt the company. That information sometimes is slow in coming up the line, but usually you will get a call. Someone, such as the PR person, will get a call from a media outlet. It can be a small media outlet; it doesn't have to be a major newspaper, magazine or TV station. And that's the first inkling that you have of it. Sometimes the in-house PR people who

might be doing product publicity or entertainment publicity really won't understand the impact of that phone call and they'll say, "I'll get to it tomorrow." Never, never get to it tomorrow; get to it that moment and get involved in it. So when you're talking to your clients, you really have to talk about the timeliness of the beginning mechanism of response.

Now, the timely response that Bob referred to is critical. This story on the Empire State Building probably will last a bit longer. The government today is probably going to issue a formal report, so that will be regurgitated. We've been getting calls from all over Europe and South America because tourists now are afraid to come. So you have to reassure them that this was a unique happening. They have 3.5 million tourists going to the top of the Empire State Building. That generates a huge, huge income. If that falls off even ten percent or twenty percent, you can imagine the impact on the income of the building. So there's a business reason to handle the thing in a timely way. If you miss the news cycle and you say, "No comment," you do your client a tremendous disservice.

Now, it's rare that I or my staff will go onto television and read a statement. We'll handle the issuance of a statement. It's rare that I'll put a CEO onto camera to answer a statement. I try to hold the CEO back, but I always will try to find a spokesperson, and very often if a legal issue was involved, particularly a criminal issue or anything with fraud involved, I like to use an attorney who's skilled up front. But sometimes it's very complicated when *60 Minutes*, which is investigating one of my clients now, comes to you and they'll soft soap you and they'll say, to get someone on, "We'll be gentle." I know that show. I know that show intimately. They'll soft soap you and watch out. So never take at face value the soft soap line from a reporter.

I've been in my business for forty-six years, and my father was a reporter for the *Herald Tribune*. I treat every reporter and every editor—and probably I know thousands of them, and my staff does the same (we have 165 people doing this)—at arm's distance and professionally. We never get into an argument with a reporter. We'll never go over the head of a reporter to an editor to complain about a reporter either. You'll see your client say, "They got the fortieth paragraph wrong, and they spelled this wrong, and they said that wrong; go and complain to the publisher." That's a recipe for an ongoing disaster. So be cautious when your client insists that you sue for libel: you'll never win a libel suit, or only very rarely. I haven't seen very many successful libel suits, but if you see something coming at you where the reporter is talking in terms that could be libelous and could be very damaging and is incorrect, because that's where the libel comes from, and he shows animus, very often I will ask the law firm to send him a letter describing the inaccuracy. I may send a copy to his editor, but I'll tell the reporter what we're doing. I don't surprise a reporter, because that reporter will lie in wait for that company or that individual forever. I don't want to jeopardize a reporter's livelihood in dealing with a crisis.

Sometimes the client will speak in terms of spin control. That's sort of a misnomer, because it has a very negative connotation. But you should find the positive side in any crisis and try to get it forward quickly. Don't overwrite, don't get lost in five pages of an explanation, because the press will just use a few sentences of what you say or what you do. So keep right on target, be succinct, get your message across and get it out. But very often, instead of putting someone on camera or doing electronic interviews, we'll do what Bob did: write a short statement and get it out right away. But always get it cleared. The instinct for many is to get it out, not clear it appropriately and in a timely way, and then they've made a mistake in what they've put out. That's worse. That's worse than "no comment," because backtracking on a statement saying, "I didn't have all the facts"—that's terrible. So keep your statement short, sweet and accurate when it goes out.

Now, when David Letterman, whom we represent, went in for the open-heart surgery, that was a tremendous threat to ratings, to CBS, and to his own career. So we had to tell the story of how healthy he was, other than the heart issue: that he was a runner and that he dieted carefully. We issued bulletins of him telling jokes and walking around, just to solve the business problem and his career problem while this was all under way. He refused all direct comment other than the jokes. We kept his producer from comment, because he was emotional, although two days ago he did some interviews. We got one of the doctors and put him on to Larry King Live: he was very good, and he explained the positive side of what was going on, and in a way we tried to downplay the serious nature of that emergency operation. Well, any crisis is quite like that.

So you have to figure the heart of your response and get it out quickly. Sometimes the client will say, "Look, we'll say this and it's not exactly on target with the facts, but no one will know. Just let's say it and no one will know." It doesn't work that way in today's society, with the Internet and all of the global communications. If it happens, it will be known. Remember that: If it's a fact, it will be known. If it's not a fact it also might be known through some crazy reporting by somebody, but don't assume you can cover up anything. Also don't assume you can kill a story. As long as I've represented the *New York Post*, as I said twenty-six bloody years—and that's one of the tabloids that really goes for the jugular—I don't think I ever killed a story.

One time—and I'm Murdoch's spokesman—one time a client of mine was receiving death threats and

the gossip columnist at the *Post* wanted to run his home address, so when I asked the person not to do it, it fell on deaf ears. I said, "I'm going to Rupert on it; I'm going to Murdoch on it." And I did. And Murdoch called down. But he was interesting: he didn't say, "You may not run the address." He said, "Why don't you look at this again and make a judgment?" So even within the publication that he owns, he's cautious in how he talks to his own editors. That's really how it works. An editor will sometimes be a little more difficult with the reporter, but you will very rarely find that a publisher or owner will just issue marching orders.

I remember years ago, when we represented the *Village Voice*, which Murdoch owned, I was sitting at breakfast with him. He's turning the *Voice* and he sees a huge story attacking him for tax reasons—and he owned the paper. So he said, "Howard, call your friend Jack Newfield and tell him not to do this. You know, was outraged. I said to Rupert, "You own the paper." He said, "But you call him." So I said, "But his name isn't on the story, someone else wrote it." He said, "He's behind it."

Well, that's an awkward thing, but it's a lesson. They're very, very cautious of how internally they will tell a reporter, an editor or somebody how to do or not do something. And don't think that if the CEO of your client company tells you to kill that story that you can: you probably can't.

Some of the do's and don'ts: Certainly don't lie and I've seen lies floated. I've had clients try to get us to float lies. Don't buckle to management's insistence when they're wrong. Stand up to it. And sometimes those are very tough internal roles.

Don't make up answers when you're not sure of the answers. I've seen that. You say, "I don't want to look stupid"—so you make up an answer. You say, "Oh, that's probably right," and you make it up. That's another recipe for disaster. You're not lying, but you just don't really know. There's nothing wrong with saying to a reporter, "I'll get back to you." There's nothing wrong with it. Ask him what his deadline or what her deadline is, and then get back to them in a timely way—and don't be afraid to say you don't know. Don't be intimidated by the statement that you have fifteen minutes to reply. I get that all the time. I know all the deadlines. They say, "You have fifteen minutes to reply." I say, "Okay, if I can't get back in fifteen minutes, do what you have to do." And they say, "Oh, okay." They have a good many very late deadlines very often, even though they tell you they have very early deadlines. And sometimes they'll remake it if it's an important story.

Don't react in a hostile way to hostile questions. A tactic that a good reporter uses sometimes is to ask outrageous questions. Then the client will call back and say,"Oh my God look at that." Michael Ovitz is a client of mine. He's had some really tough stories and when they ask him just any kind of a hostile question, he says "Oh, they're out to kill me." Well, I understand his point of view, but it doesn't always work that way. The reporter will report what's said or what factual information the reporter has. You've got to calm your client down and say, "Hostile questions don't necessarily mean hostile reporting." That's tough to accept, very tough to accept.

In fact, when you go into a crisis, you got to find out factually what happened. You really have to. If there's a privilege, there could be a privileged communication of you to your client. But the PR person doesn't necessarily have privileged communications unless the lawyer hires the person. I'm a lawyer too, but I don't practice. So sometimes the lawyer will hire me as an individual or our firm, and our product is the lawyer's product. I prefer that in very volatile situations. You could always hold up that privilege, and by the time the crisis is over, you don't need the privilege any longer. Remember this: the institutional memory of the public is very short.

So here is what you have to do. First, you ask what the facts are. Then you ask whether we were wrong. Then you ask what we have to do to correct it: Is any apology needed? Do we have to say something nice and sympathetic? The temptation of some of the people at the Empire State Building was to criticize the woman. She was in a terrible state. Emotionally, it had to be difficult for her at the very least. You don't criticize that person; you really sympathize with that person. The lawyers will take care of whatever follows, but publicly you can't look arrogant, aggressive or too negative. So don't say, "What do we say?" Say, "What do we do?" And then let what you say reflect what you've done. That's the basis of how I function. I know we're out of time so I'll stop there.

MR. XAVIER-BENDER: Thank you very much, Howard. It's always very complicated to speak after Howard, and I will not try to. I will probably just give you a couple of examples that we have gone through either as lawyers, law firm or in our country. You may have heard that on December 26th, 1999, France went through the first hurricane since about two centuries. You probably didn't hear about it. You heard about the Eiffel Tower that was lit on December 31st. But a week before, France experienced the worst hurricane ever.

To give you an example, three million houses were without electricity the next day. To make things even worse and adding insult to injury, the *Erika*, this tanker, had broken up on the shores of Brittany a week before. So we had the hurricane, the oil spill, and we had December 31st going on at the same time.

Let me give you two examples of good and bad crisis management.

First the bad news. The oil spill was the result of the breakup of a tanker that belongs to a company that in turn belonged to another company that in turn belonged to yet another company. We don't know where it stops, but the freighter was Total Fina's. Total Fina bought Elf last summer. That was one of the most incredibly well-managed takeovers in France since years. The president of Total Fina appeared to be a young, intelligent, aggressive, well-behaved, and well-advised manager. Then came a case like this one. First of all, Total Fina didn't speak for ten days. The only leaks that came out were from odd specialists of those situations that tried to link the accident with the *Amoco Cadiz* a few years ago, and they said Total Fina could not be held responsible legally. This was wrong. Everybody in France thought, "Look we're not going to be able to get the owner of the ship, but we'll get Total." This is something new in France: We have the deep pocket syndrome coming in very quickly, as well as you do in your country. So Total Fina's being attacked in the press.

The result is that Total Fina has already agreed to pay—and I'll give you the list—for the cleaning of all the shores on about two hundred kilometers. Second, to provide food and shelter to volunteers that have come from all parts of France. They have agreed to pay for all the materials that are used every day to clean up the shores. They have agreed to send on the shores very heavy materials where the oil spill has to be cleaned very, very carefully. And on top of it, they have very recently agreed to pay for the pumping out of the remaining oil in the cargo hold of the ship.

Now, everybody in France says Total Fina has made itself responsible for the disaster of the upcoming tourist season in France. This is very bad crisis management.

By the same token, during the hurricane, we thought—and everybody in France was absolutely certain—that EDF, the national electricity producer and provider, Electricité de France, which is a nationally held company, would not respond well to the crisis, since it is very well known for its strikes, for its very well paid employees on civil service, who do nothing very early in the morning and not too much in the afternoon.

But EDF reacted marvelously. The first thing they did was recall all the retirees. Those guys are retired at fifty-two years old. They have nothing to do but sit at home. An emergency for an ex-employee of EDF is the best thing that could happen to his life.

Second, they called upon all the national and privatized electricity producers all over Europe. They called all the carriers, road transportation, rail, aircraft, anything, and they publicized the fact that they were bringing in material, people, help. They even called the army. The president of EDF on television asked the president of the republic to put the army at their disposal. How could he say no? At the end of the day they said, "December 31st is in six days; we want the three million people to have at least electricity that day." It never happened because it was impossible. On top of it, we lost one half of our forest, so the trees were lying on the various electricity lines, and that's the reason why not all of the three million got electricity for New Year's Eve. But let me tell you something: there was a time where the privatization of EDF was the hot topic in France. It is no longer a hot topic.

So you can see what a well-managed crisis can end up doing in the long term.

Thank you very much, gentlemen, for these tips for the millennium. It is extremely helpful for us to have heard your experience, Howard, and your experience, Bob.

And if in any event you in the audience go through a crisis, remember the golden rules: Never cover up; never say no comment; and never forget that the press needs some answers. Thank you very much.

MS. FRANCO: I think we have about five minutes for questions you may have. Yes?

MEMBER OF THE AUDIENCE: How do you handle a foreigner? For example, in most countries, especially in Latin America, there's a principle that says that dirty laundry is washed at home. It would be most inappropriate for somebody to speak to a foreign journalist other than to say he doesn't know anything—which you're saying should not be said. Now, there is a complete conflict between what happens in the United States and what happens in most other countries, because libel claims might be to some extent of little concern over here, but that's not the case in some foreign countries. So if somebody were here from a foreign country, whether it be France or Mexico or Spain or what not, more likely than not they prefer to be crucified here by the press, rather than at home.

MR. RUBENSTEIN: Anything he says here will be reflected in the media there and vice versa—what with the Internet and with all the global communications. We have a number of foreign clients in several countries. I won't bring them to the media if they can't tell the truth. If they tell me, "If I say this, I'm going to be in real difficulty in my home base," I won't bring them the media. I'd hold back. I would issue written statements if it were a heavy news story—and some of them are very heavy news stories. With Rupert Murdoch, he doesn't do but two or three stories all year long, and we instead issue written statements, we talk to the press, and his in-house people talk to the press. Publicity can be very, very damaging, and you have to look at the

different publics that you're reaching with the publicity. You might be talking to stockholders, but consumers may be outraged. You know, on the one hand a company might be firing 30,000 people and the stockholders are applauding, but the public's response may be horrendous.

So you really have to analyze the impact of what you're going to say and you're not under subpoena to give an interview. A lot of clients don't understand that. They get a call from the media and they start talking and talking and then they talk some more and they say "Oh my God, kill what I said." It's too late. I never rush into an interview. If I think there could be a hostile interview, I knock it off. I don't do it.

MS. FRANCO: Yes?

MEMBER OF THE AUDIENCE: Yes, I am a New York lawyer living in Quebec, and when Mr. Xavier-Bender described the problems with the windstorms, I could not help but think of two years ago in Quebec, when we had the great ice storm and the counterpart of Electricité de France for Quebec and the Army served similar roles in Quebec. But my question is this: I appreciate that lawyers have to be on top of corporate crises and to know about them, but I didn't quite get what is the role of the lawyer in all of this—which is mostly for the PR people or the corporate chiefs. How do these interact?

MR. LITTLETON: I'm being humble about the world of a PR person because I'm here with a master. But oftentimes my clients have not allowed us to hire outside PR people, and we have to be the PR people. But that's one crisis of management. The other is the background investigation. I'll give a brief example. We were involved in helping Pepsi a few years ago when they had a scandal about syringes in the liter bottles: you may remember that. It came in the height of the summer soft drink season and it was killing them. The FDA came out initially and said "We don't think you should drink Pepsi; there may be something to this." The lawyer's role in that was huge. We were working on all the on-site investigations. We were working with the local law enforcement people to start prosecuting the people who were committing frauds; government relations lawyers were working with the FDA, presenting them information hourly, saying, "Isn't it odd that these five bottles in which syringes were found, we can look at the bottom of them and find they were made in five different plants months apart, and they were all discovered the same week: how did that happen?" We had lawyers working with the investigators going to the convenience store, getting the videotape of the person putting a syringe in the bottle and then the government affairs people taking that to the FDA. So the lawyers had a huge role in that, and the quarterbacking of all the unseen stuff was being done by the in-house corporate lawyers.

MS. FRANCO: Thank you very much.

II. Enforcing International Contracts Formed Through Web Site Activity

MS. FRANCO: Our next panel is "Enforcing International Contracts Formed Through Web Site Activity." And the chair is Gerald Ferguson of Thacher, Proffitt & Wood, and he will introduce the speakers. Thank you.

GERALD FERGUSON: Thank you, Isabel. Wayne Gretzky, who is perhaps the greatest hockey player of all time and the greatest hockey player who will ever be, when asked why he scores more goals, many more goals, than anyone else, often gives the explanation that the trick is not keeping your eye on the puck; the trick is keeping your eye on where the puck is going to be.

Our topic today is going to be e-commerce and specifically enforcing contracts that are formed through Web site activity, and if our program serves our goal today, our program will be giving you guidance on not just seeing where the law is now, seeing where e-commerce is now, but it will give you guidance in seeing where e-commerce is going to be. This is an area of the law that's developing so quickly that, if you're only focusing on what's happening now and advising your clients on the state of the law right now, you may be missing out on giving them the most critical advice that they need to hear.

On our panel today we have, on my right, Oliver Armas, a partner of mine at Thacher, Proffitt & Wood. Oliver splits his time between our New York and our Mexico City offices, and he's going to be focusing on Latin American law and issues of e-commerce. Also we have Tony Burke of Mason, Hayes & Curran of Ireland, who braved the storm yesterday and flew in to join us. So if any of your partners or colleagues back at your office say the weather kept them away, tell them about Tony. Tony is going to be speaking from a European perspective. I think we're particularly fortunate to have someone from a premier Irish firm, because Ireland really has become a center of high-tech activity in Europe. Tony is a graduate of Trinity College and the University of Amsterdam and has been a partner at Mason, Hayes & Curran since 1982. He specializes in computer law, commercial property, and business agreements, and he's the head of the e-commerce unit for Mason, Hayes & Curran.

Our format today is going to be broken down into two parts. We're going to start by giving just a little bit of the background on the sources of law when you're looking at e-commerce issues. Again, that's a particularly important issue, because there isn't necessarily a lot of law yet. So I think some of the most important tips we can give is to identify the developments you should

be keeping an eye on to see where the law is going to be. Then what we're going to do is we're going to go through four specific scenarios, four specific contract scenarios, that raise common issues that come up in e-commerce, and we'll talk about them in the context of cross-border contracts between U.S. and Latin American clients or U.S. and European clients.

A. Sources of U.S. Law

MR. FERGUSON: Since this is an international panel, I will begin by just talking briefly about the sources of law in the United States. I'd like to give my colleagues a little bit more time to talk about the developments in their area, but I think (and this is all spelled out in detail in my paper that is in the materials that you have) you look to the common law for sources of law. The common law principles are still applicable. You also look to statutes. There have been statutes that have already been enacted. But I think the most important sources of law that you want to be looking at are the work of the National Conference of Commissioners on Uniform Laws. There specifically are two uniform laws that are still in the constant process of revision, although they're already being put forward to the states.

One that you want to focus on is the Uniform Electronic Transaction Act, which is normally referred to as UETA. As a matter of fact, I have difficulty saying the name because I always just refer to it as UETA. The other is the Uniform Computer Information Transactions Act, which is generally referred to as UCITA. UETA focuses on the nuts and bolts of electronic communication; UCITA focuses on contracts relating to computer information. I think UCITA is especially significant because it also governs Web site activity: that's where it's going to most likely have an impact on your client's life if you have any software specialist clients.

I will say that, of the two, UCITA is much more controversial. UETA seems to be really sailing through the states in terms of being adopted. New York just last fall adopted an electronic contract statute that was based on UETA. UCITA is more controversial because the focus in UCITA has been to come up with a flexible series of guidelines that will assist the development of electronic contracting and software contracting. The criticism, and there has been some vocal criticism, is that it doesn't do enough to protect consumers' rights and there's too much risk of consumers being opted into agreements they don't intend to opt into.

But in any event those are the uniform acts I would think you should keep your eyes on, and I'll be coming back to these statutes when I get to the second part of our program, which will focus on some specific factual scenarios. [In addition, in June 2000, after this program was held, Congress enacted legislation regarding digital signatures - ed.]

Let me turn it over at this point to Tony and we'll talk about developments in Europe.

B. Ireland and the EU

ANTHONY BURKE: Good morning, ladies and gentlemen. It's very nice to be in New York, even though it's a little bit cold. The last time I was in the States speaking was in Minneapolis at a regional forum, and I'm very impressed with the technology here, because at that meeting all the technology crashed. There was panic all around and it was a real case of Murphy's Law—and I had thought up until then that Murphy was an Irishman. (Laughter.)

So what I'm going to do in about eleven, twelve minutes is to try to give you a sketch of what's happening in Europe: what the current position is and what's coming down the pipeline in relation to a e-commerce and contracting on-line.

I would describe the current position as of January 2000 as unclear and uncertain and the position as of July 2001 as a little bit clearer, a little bit more certain. When I say unclear and uncertain, that doesn't mean it's impossible to contract on-line in Europe. If you do it right, probably the case is that you can create contractual obligations. But as someone said—and I didn't invent that—e-commerce is all about eighty percent commerce and twenty percent "e." We all know about the eighty percent. We know what's implied into contractual relations. It's trying to get the twenty percent into all that in order to make the contract effective that's the chore at the current time.

Basically we have to go back to reading the first principles. You remember from your contract law that you have offer and acceptance, that there should be consideration in there, and that there has to be the intention to create legal relations. With contracting on-line, is the offer clear? Is it actually an offer that you're reading, or is it an invitation and you must make the offer? Is there a time for making the offer or otherwise its lapses? In relation to acceptance, the acceptance has to be unconditional. How is that achieved? Is there a possibility that there could be a counteroffer? And then you're back to acceptance again. Can acceptance lapse? Can acceptance be revoked? They are the issues that you have to try to deal with. On consideration, what is the price? Is there going to be any variation in the price? And on the intention to create legal relations, what normally happens, as you probably know, at the moment is that you require the person to scroll down to terms and conditions, and then you have something at the end designed so they clearly understand that what they're entering into is a contract: then they're asked to accept and press the accept button and then proceed. Actually, in all contracts, performance is always a good indicator that there is some contract and what that contract is.

That brings me to the next point, which is causing a lot of problems in Europe at the moment: jurisdiction and applicable law. You may well have terms providing for jurisdiction, you may have terms providing for applicable law. In Europe we have the Brussels Convention on jurisdiction and the Rome Convention on applicable law. And under the Amsterdam Treaty, there's a provision to incorporate these conventions into European law. The European Commission has come out with two proposed regulations—a regulation functioning more or less as a statute of the EU. They are called the Brussels Regulation and the Rome Regulation, and what they're trying to do there in relation to jurisdiction and consumers is that, if you direct your offer into a Member State of the European Union and a consumer takes it off, you could find that the jurisdiction is the jurisdiction of the consumer's country. Similarly with applicable law, they're trying to deal with it on that basis, so that applicable law becomes more dangerous because then you could be subject to the noncontractual aspects and implications of that particular Member State's law. One example would be with Germany: Within civil law jurisdictions of the European Union you have these principles of unfair competition which are different from antitrust. For example, in Germany an offer of two for the price of one is illegal, and if you are then giving an offer of two for the price of one and it's subject to German law, you've got a problem.

Because of the outcry in relation to this and the implications for e-commerce, last November the European Commission held a meeting in Brussels for two days to try to get the ideas of industry consumer groups. It was very inconclusive. In fact, the European Commission hasn't come out with anything as a result of those discussions. There hasn't even been a press release, because I don't think they know exactly what's going on. But in any event that's going to be one of the issues in the next year.

As for what's coming down the pipeline, there's two things the Europe Commission is looking at: electronic signatures and e-commerce. They're proposing two directives.

The first one is the electronic signatures directive, and that was in fact adopted on the 30th November last. And Member States are required to implement it by the 19th of July, 2001. The first objective of the directive is to be technology neutral. It does this by way of a series of definitions: the definitions are framed in a particular way so they can deal with the ongoing developments in technology. In relation to a light regulatory framework, they're saying that there should be no prior authorization. For the creation of these certification service providers (CSPs), they should be recognized by another Member State if they're established in one Member State. The qualified certificates which these CSPs issue—and the qualified certificate is defined—must be able to freely go around Europe and be recognized by respective member states. They are intended to give confidence to on-line traders and consumers and need certainty. The way we've done that is that a qualified certificate and an advanced electronic signatory using a secure signature creation device will have the effect as if it were a handwritten signature and cannot be in any way inadmissible in court proceedings. The directive then goes on and says a signature by virtue of creation by electronic means of itself cannot be denied validity or admissability. So they tried to keep it neutral and they have tried to make it equivalent to a handwritten signature.

The second directive is the e-commerce directive, which has not yet been adopted. There was a political agreement in December last and what happens now is that the draft goes into what's known as conciliation procedures between the European Council and the European Parliament. But it is expected that the current draft will be enacted without any further amendment and, again, the estimated adoption date is 2001 (probably July). And again the objective is to be technology neutral and create a light regulatory framework based on recognition of the provision of information services by information providers in the definitions in the directive (and that they're recognized in the respective Member States of European Union) and legal certainty. Basically the requirement is that, in relation to the conclusion of contracts on-line, they have to be treated equally with any other types of contract and no obstacles are to be created to prevent that from happening.

How are contracts under the directive then concluded? Again, the directive says Member States must ensure that they're given full legal effect and validity. There are possible exclusions: for example, contracts for real estate; family law matters; law of succession. But they're only possibilities, for they can be included if a Member State so chooses.

An important issue is what information must be provided in order to conclude a contract on-line under the directives. Some of the requirements are that the person must be able to show the different technical steps for the other party to follow, whether the contract is going to be filed, and if that contract is going to be accessible. There must be a technical means of identifying and correcting errors. Also, given there's so many languages in Europe, is there any choice of language for the conclusion of the contract? If there are codes of conduct regulating a particular service, there has to be an indication of what they are, and those terms and conditions must be capable to be stored and reproduced by the recipient.

In regard to placing an order, what is required is, again, that you have to be given details of how to correct errors in relation to it, and the person receiving the

order must acknowledge receipt without undue delay. Now, undue delay probably is going to be a subject for the national courts to determine, but I would imagine it needs to be reasonably quickly after the order has been placed. And then there is the question of when something is received in relation to ordering and the acceptance of the order: the directive says that receipt is when the parties to whom it is addressed are able to access them, and that presumably it is going to be when the parties' facilities are to be able to do so, and click receipt.

In relation to the regulation, there's a provision in the directive for codes of conduct. There are particular bodies which will consult on a Member State level, and give details to the European Commission. This supports that codes of conduct should continue to be harmonized throughout Europe.

There's a provision that Member States must provide for some form of out-of-court settlement procedures. What they will be is uncertain, but it seems likely to be some form of conciliation. There's also the provision that there must be judicial relief.

There's an obligation on Member States to cooperate with each other and also to cooperate with the Commission in relation to it. There is the provision for sanctions. Member States must bring in severe sanctions for any breach of data and of the conditions of the directive. And then, as with the electronic signatures directive, there is a provision for the Commission to review it after a couple of years and to make necessary reports to the Council and to the European Parliament.

MS. FRANCO: Thank you very much.

C. Latin America

MR. FERGUSON: Thanks, Tony. Now Oliver is going to talk about issues to be looking at in Latin America.

OLIVER ARMAS: Thank you, Gerry. I'll make some general comments and then we'd like to put up some screen shots and walk you through certain issues that often come up in fairly typical e-commerce type transactions.

But generally speaking, and technically, e-commerce contracts are valid, are per se valid, throughout Latin America. The problem is that you may not be able to enforce them. That's the reality at least as to what the law is now. Now, there's pending legislation in most of the countries throughout Latin America. Argentina has proposed a series of legislation; and Brazil, Chile, Ecuador, Mexico and Peru all have pending legislation. Columbia's actually passed a law.

But for those of you who are familiar with litigating in Latin America, it could be like living *la vida loca*. I mean it's typically at the trial court level that one has all these evidentiary hurdles that you have even with documents that are signed in an original. It's difficult to fathom what would happen if a typical court in Latin America is faced with an electronic contract. There are a whole host of issues that come up in trying to deal with a situation like that.

Now, I've been involved in a case in Mexico for quite some time. I've been very fortunate in having the assistance of one of the top lawyers of Mexico, who's actually here today, Aureliano Gonzalez Baz. In terms of evidence in that case, we have seen it all and have been through it all. The difficulties, again, just trying to bring in copies of documents. We're representing a foreign entity litigating in Mexico: We are trying to bring in faxes and things of that nature as direct evidence in that case and not automatically having that knocked down to, if we're lucky, circumstantial evidence. So when we're dealing in the electronic environment, issues like whether there's a valid contract, whether it was actually formed, and (if you get beyond that hurdle) whether it will be recognized (that is, whether the signature's going to be recognized) or whether it's going to be given the highest probative value are the realities of at least what currently exists throughout Latin America. It will be difficult.

The good news is that, with legislation that's pending and developing, it's going towards uniformity, and hopefully things like digital signatures will be recognized. At least the formation of the contract, the actual contract *per se*, should be recognized and enforced. And things like the use of disclaimers and choice of law provisions—all the things that normally attach to a transaction like that—should be recognized and enforced by local courts. If not initially at the trial court level, we hope that through appeals these things can be gotten through. At the moment if I had a client that came to me and it was a big enough transaction and everything was in electronic format, I would probably push settlement over anything else at this point—quite frankly because I don't think I would risk litigation, based on what's on the table as far as current legislation and law go. I don't think I would actually risk it in court, but perhaps that can change sometime soon.

Now, the problems with enforceability again somewhat break down to pretty basic principles. Throughout Latin America—since they are civil law jurisdictions—anything that's written with a handwritten signature is given the highest value. Anything without that is given less and less value, and sometimes completely disregarded by courts. So it's just a practical reality again of having to litigate in those jurisdictions.

D. Hypotheticals

MR. FERGUSON: I think we are going to go on to the second part of our program. Here's what we want to do here: we're basically going to take you through

three hypothetical scenarios we've created. Up on the screen will be some sample potential electronic contracts that we'll be talking about, and what we'll do is essentially identify and describe the contract that we're talking about, and give an example of it.

I will talk initially assuming this is purely a U.S. contract. And then we're going to expand it and assume that this was, in fact, between Mexican citizens or U.S. and Irish citizens, and just try to talk about what the applicable laws are going to be, what some of the issues are going to be, and, since this is called a hot tips format, what our tips might be in terms of the type of advice we'd be giving clients.

So the first scenario that you see up on the screen is an e-mail. That's a pretty standard format e-mail. What we'd like you to imagine for this hypothetical scenario is that a company has expressed interest in some software: there's already been some discussions, the software designer is now e-mailing her standard contract, and as an attachment she has the actual contract terms. No point in putting that all up on the screen. If you can just assume that attached to that are a number of standard contractual terms, and to make it interesting we'll say there might be some things in there like an arbitration clause—something that has to be in writing, but doesn't necessarily have to be signed. Let's assume for the purpose of this scenario that there's nothing in here that would implicate the statute of frauds: digital signatures is going to be the next topic we're going to be addressing. At this point, we're just focusing on the formation of a contract through the Internet.

What has happened is that your client has received this e-mail, "Do you agree to purchase my software under the terms of the attached?" And then your client issues the following reply: "I agree." And as is typical in e-commerce, your client is in such a hurry, he doesn't even bother to capitalize. Now, later, an issue has arisen. Has an enforceable contract been formed? I don't think that there's any question that, under prevailing U.S. law prior to there being such a thing as e-commerce, an enforceable contract has been formed: you got an offer; you've got an acceptance; you got a meeting of the minds. We'll assume that there's sufficient definiteness in the attachment to satisfy what other requirements you might imagine.

So the problem historically is not going to be whether a contract has been formed. Instead it's really going to be similar to what Ollie has mentioned in the Latin American context: It is going to be an evidentiary problem. Will these documents be treated as business records within the meaning of the business records rule? Would they be treated as party admissions? Would they satisfy the requirements as to the best evidence rule? I can say, as someone who's been litigating these issues for several years now, that early on there was some question about that: there would be motions flying back and forth; there were some decisions that had some law. But I think the case law is now coalescing toward a recognition of these type of documents. But to speed that process along, the most important development has been what I referred to earlier, the UETA or Uniform Electronic Transactions Act. That Act—to just take it down to a simple essence—says that an electronic contract should be treated exactly the same as a written document would be treated. They're going to get the same treatment in the courts. That doesn't mean you can't attack the reliability of the document, that you can't argue that it's been tampered with. You can still raise all those issues, but in terms of meeting basic evidentiary requirements, or, for instance, satisfying the requirement that an arbitration agreement be in writing, under UETA the standard is going to be to treat the electronic contract just like a regular pen and ink contract. New York has adopted UETA with some modification, but I think you can essentially advise your clients that in New York, yes, this is an enforceable contract. Assuming the other requirements have been met, this is an enforceable contract.

Now, let's assume that your client, rather than contracting in the United States, is contracting with a party in Ireland. The software designer is in Ireland. And your client e-mails back, "I agree." Let me ask you, Tony, is the analysis going to be any different? Are there any issues that you would say we should be concerned about?

MR. BURKE: I think the first thing would be to make sure the parties are legitimate because e-mails can get corrupted; it can be intercepted. We can then go on to the situation, and Gerry mentioned the best evidence rule. The best evidence is the original, and everything else that comes after that is a copy. We have that same best evidence rule under our issue: you will be faced with the objection that this is not the original contract, and you will be asked to produce the original contract. One possibility to get over that is first by showing the terms, trying to prove the terms, trying to see where the other party is disputing the terms, and second by showing performance. For if there's been performance, then it becomes a little bit more persuasive as to what the actual terms of the contract will be. I think that will be best. I'm a little bit uncertain, but I would have thought that it's possible it would be considered enforceable so long as we get over some technological problems which could arise in the transition.

MR. FERGUSON: Would the pending EU directive enhance the enforceability of this sort of agreement, or does it not really speak to it?

MR. BURKE: It does. In relation to the security, we have the electronic signatures directive. If it is done in accordance with that directive, then it has to be treated

as if it were a handwritten contract. And in relation to the e-commerce directive, there is a provision in there whereby there's a little bit of allowance—when they're not dealing as consumers—that there will be more effectiveness. Once those directives come into force I would say there would be, let's say, ninety to a hundred percent certainty expected as to enforceability. That is not bad for a lawyer.

MR. FERGUSON: Thank you, Tony. Oliver?

MR. ARMAS: It's not terribly different in Latin America, as long as the underlying contract is valid, doesn't violate public policy, there's an object, clear price, et cetera. Currently speaking, at least, you can form a contract this way. Again it's an issue of enforceability. There are some current amendments proposed. Mexico, for example, would definitely recognize this type of contract formation under proposed legislation. Amendments which were proposed last April specifically say that judicially binding force will not be withdrawn simply because it is contained in an electronic or similar format.

So, again, these are proposed. They have not been enacted. Similar legislation has been proposed in Latin America like the EU directive. I think these proposals, once enacted, will start clearing this up a little bit. But technically speaking, you can't contract this way. Again, you may have difficulty trying to enforce it for all the issues that have been raised already with the best evidence rule, et cetera.

MR. FERGUSON: I think we'll move on to the next factual scenario now. What we're going to envision now is that your client entered into a contract with another party. The initial contract was a signed contract; it was a traditional wet-ink signature that had a provision in it that this contract couldn't be modified unless there was a writing signed by the parties. There is subsequently a modification, but the modification is electronic, and what the parties do is they try memorializing the modification. We'll look at two issues. One, they try to memorialize it with an electronic signature. Two, they try to memorialize it with a digital signature.

The distinction between the two signatures should be understood very broadly. An electronic signature is any mark, any electronic mark, or identifier that a person intends to use to identify himself or herself. So it could just be S\John Hancock. It could actually be a electronic recreation of their signature, which we have up on the screen. It could be an icon or a symbol or something like that. An electronic signature is understood very broadly.

The second possibility is a digital signature. Without getting too technical into this (because I would embarrass myself and show my ignorance), but what a lawyer needs to know about a digital signature is that a digital signature has a unique piece of encrypted code in it that identifies that signature and that can be verified by a third party. It also will indicate if there's been any tampering in the document. There are a number of companies out there who are providing digital signature services right now. A number of states have adopted legislation which defines what's an acceptable digital signature. What you see on the screen is actually a download from one of the sites that provides those digital signatures, and one of the services they provide is that it's got that encrypted code in it. If you click on that signature, you get a certificate which appears and that's the message box that you see to the right of the signature which talks about when it was created, verifies who created this signature, gives information about the verifying authority. You can then e-mail that verified authority or otherwise contact that verified authority and get confirmation that this, in fact, was signed by the person who purported to sign it.

That's one way of doing it. There's other ways it can be structured. The important point is that there has been some computer code that's been put into the signature, encrypted to make it a unique document, and there's a third-party verification system in place.

MR. ARMAS: Technically the way it works is they take measurements, biometric measurements of the handwriting, the signature, and that's all stored and that's what they use.

MR. FERGUSON: That's one way of doing it, but digital signatures often are defined more broadly to be any system where there's going to be a third-party verification. Let's go back to my factual scenario. There's been a contract modification, it needed to be signed by the parties: is this going to be an enforceable modification? A much dicier issue. Again, UETA speaks to this issue. UETA very broadly provides for enforcement of both electronic signatures and digital signatures. Some states have taken a more restrictive approach: they only allow digital signatures. Some courts have taken an intermediary approach, recognizing both, but giving greater weight to the digital signature. New York has adopted the UETA approach, so both electronic and digital signatures are recognized. [Since this program was held, Congress has adopted federal legislation on digital signatures - ed.]

There are important carve outs. For instance, real estate is carved out, trust estates are carved out. But, again, the scenario we've given is a computer contract that's been modified, needing a modification in writing. Any electronic signature's going to work in New York. Ollie, you want to talk from that last perspective a little bit?

MR. ARMAS: Sure. I'd like to follow up on what Gerry said. Here it starts getting a little dicey. The more reliable the source that's verifying the signature, the tighter the chain of custody—all of that cuts in your

favor. I understand that's obvious, but you have to realize that in Latin America, and I'll use Mexico as an example, to find a notary who's actually going to ratify and recognize the signature, and maintain the control over the signature, may be difficult. Mr. Gonzalez Baz raised a very good point about that before the start of this panel. It may be difficult. If you'd like to share your comment with us, I think that could be very valuable.

MR. GONZALEZ BAZ: The fact is that in Mexico an e-contract at this point is totally unenforceable. It serves as a means to prove that there was a transaction, but becomes very difficult to enforce because the parties have to sign something. You cannot deny that there was a contract, because otherwise you'd be fraudulent, but the terms and the conditions can be very much debatable. I think that the following procedure in Mexico could be applied throughout a number of countries: that we would store your signature, your digital signature, with the institution of the public records to provide signatures, if signed in Mexico or one of the various countries that have similar institutions. If you're a foreigner or if you're not signing in Mexico, then possibly a notary public in the country where you're signing could serve that role, because full faith and credit is given to them. But at least in Mexico the difficulty is to prove what the terms and conditions of the contract are. These are very big hurdles to overcome, because if you change this you have to change it for the whole country, and Mexico doesn't even recognize, you know, photostatic copies of anything as valid proof of an instrument for a litigation, as we both know.

MR. ARMAS: Absolutely. And, in fact, if I were, hypothetically speaking, counselling a client in a situation similar to this in Mexico, and if the transaction lends itself, I would suggest that, if you have a master agreement, have the original signed off and then subsequently, have electronic contracts under that master agreement: if one of them blows up, you take your chances. I agree with everything Mr. Gonzalez Baz just said. There's still huge enforceability issues and something like this, even if you do it through a notary, may not get you far enough. At least not yet: things may change, but at least currently not yet.

MR. FERGUSON: Well, thank you. This is the last scenario we're going to run through now, and I have thirty seconds to do it, so I'm going to speak faster than the speed of light. If you can go to the next screen.

This is a scenario that I think you're going to see more and more clients coming to you about. They want to start doing business over the Web. They're putting up a Web site: "You're my lawyer; is there anything I should be worried about?" I guess if there's one hot tip that we can give you here, make sure your client's Web sites have terms and conditions. It's the fine print on the document. There are questions about enforceability that we can go into, but there are a lot of potential liabilities that may arise in doing business on the Web that your clients may not be aware of, and they may not be insured for. Terms and conditions are something that you can provide to them. You can download a sample from another Web site. You can provide it to them. It's an important thing—a very low cost thing—you can do for them to make sure that they're doing what they can to minimize their liabilities on the Web.

And so the specific factual scenario we're talking about now is your client doing business on the Web. Let's say your client is providing software and someone orders software through the Web site. Your client sends them software, or even just be information about their business or delivery schedules or something like that. There's a virus in it. It affects the customer's computer. The computer goes down. Their business operations are wrecked for several weeks. This being the wonderful United States of America, they turn to our national pastime—which isn't hockey, it's litigation—and they sue. I haven't seen a lot of this litigation so far, but I think it's something that's going to be an increasing problem in the future. And is there something you can do to insulate your client from that? Maybe it's worth trying. And that's to have terms that limit liability. Among other things, that limits liability for the transmission of viruses. Is that going to be enforceable? We're going to take you through two scenarios.

Let me run through this very quickly. The first you saw on the screen was where you've got the standard Web site, you've just got to link to the terms of use at the bottom. The second scenario to click to it is you've got a user agreement: this is the first thing that they see. They have got to click through all those terms and then they have got to click, "I agree." Under UCITA, which deals with the uniform transmission of software information, both would be enforceable. UCITA promotes a very flexible approach. Any way that the contractual terms have been brought to the attention of the user, they would be enforceable. As I've said, there's a lot of concern about that from consumer groups, and it may well be that the only thing that's going to survive the legislative process or survive enforcement would be the second scenario. The problem is that it's a marketing disaster to have that as the first thing that appears when someone comes onto a Web site. So what we usually advise is that, for the pure marketing aspect of your site—the home page—just have the terms of use at the bottom. But when you get to the interactive part, where they might actually be ordering something from you and where there's greater risk, then I think the consumers are being taught to clip through an actual terms of conditions and agree to it. That would be the U.S. approach.

III. The Euro: A Year Later

MS. FRANCO: The next panel is going to talk about "The Euro: A Year Later." The program chair is Joyce Hansen from the Federal Reserve Bank of New York, and she will introduce the panelists.

JOYCE HANSEN: Thank you, Isabel. I have on my left Eberhard Rohm, a partner from Fulbright & Jaworski. He's going to give us some of the basic law underlying the euro. On my right is James Duffy of Berg & Duffy, and he's going to give us an assessment of the euro a year later. I'm going to end up the panel with a presentation of my own on the impact on the U.S. banking industry.

I also want to put in a little plug for a CLE Program which this Section sponsored on the impact of the euro at the Federal Reserve Bank of New York two years ago. Those papers were collected and published. They are still very relevant. So I encourage you to take a look at that.

Without further ado, in the interest of time, I will turn over the podium to Eberhard.

A. The Law Underlying the Euro

MR. EBERHARD ROHM: Thank you. Good morning, ladies and gentlemen.

This is a subject of great import, if you want. When we travel to Europe now and we go to eleven of the fifteen countries that form the European Union, we still carry along with us our francs and marks and guilders. Yet these currency denominations, which appear like national currencies, are not, since January 1st of last year, what they appear to be. They are absolutely no longer the national currencies of France or Germany or Holland. They are the new common currency, the euro.

So you ask, "How come it doesn't say that on these coins and notes that we carry with us?" It's easy to ask that. Why are these now euros and why aren't they national currencies any longer? After all, when you cross the border, we ask if we can use the Deutsche Mark to buy our lunch there, and the answer is still no; they most likely won't take the Mark and they would like you to change it first for francs. But the exchange rate is now fixed, since the 1st of January, by law. Each currency is just a fixed fraction of the euro and, therefore, the rate is completely the same. It's no longer like in the past, where it went up and down: it's fixed until the euros come into circulation on the 1st of January 2002. So then you will ask, "Well, if that is so, that's okay, at least that's clear to me. But why is the bank making money for giving me the francs now?" The answer is, they're not supposed to, but it became practice last year for the banks to take in a small fee, let's say an exchange fee, to make the exchange for you. Even so, strictly speaking, by law they're not supposed to do that, because it's now all one and the same currency.

So why are these national coins and bills now a supernational monetary instrument? The reason is that the national states have surrendered their sovereign rights to issue national currencies—or at least eleven of these countries have, not all fifteen. They've surrendered sovereignty to the supernational agency, The European Central Bank. In legal terms what that means is that the national central banks, which continue to exist, are now nothing more than branch offices. They're branch offices of the European Central Bank in Frankfurt.

So you ask, "Why do we have to wait two more years until there are notes in euro currency in circulation to make it easier for everybody?" Two interesting reasons, neither of them legal, but rather practical.

One was that they wanted to give the business community time to get adjusted. Thus many companies are now gradually going to count in euros, but can still continue to do business under national currencies. If they had done it all at the same time, it might have created chaos, because not everybody might have been able to conform.

The second reason was the enormous expense connected with collecting all these national currencies and issuing new money. I have heard different numbers of how expensive this whole exercise is. I don't think that anybody really knows, but it's a very, very expensive exercise. That brings us to think, "Why is it even worth doing that, since for more or less 2000 years we have always had a lot of different currencies in Europe?" The last time in history that you could pay in a common currency was really during the Roman times.

Also you might want to perhaps muse and conjecture that, if Europe had introduced the European dollar on May 8th, 1945, when the Second World War ended, it would've been so inexpensive and so easy to have had a common currency issued at that time, when all the national economies were more or less at a very low or zero rate.

You know, things have to be just right, and I think that the time has come now. People are just ready to do it, and no matter what the cost would be, they just want to do it now, and they have done it. And they didn't do it overnight. It started really in 1951, when six European countries, France, Germany, Italy, and the three Benelux countries, started the European coal union. This was the basis of the treaty that is the basis of this currency union; namely, the Coal and Steel Union of 1951, and increases with the 50s and 60s amendments and grows until in 1993 the Treaty of Maastricht formed the basis for the currency union which started last year.

There is for us lawyers a very interesting problem, which I'd like to show you this morning. That is this. When these eleven countries surrendered their national sovereignty concerning the monetary and the currencies, they did not surrender their sovereignty over wages and taxes and economic policies—very important powers that they didn't give to the bank. Last year the European Central Bank was in the headlines a lot because the German finance minister tried to attack its independence, but the Central Bank won that battle: The finance minister had to retire. The bank did decrease its interest rates by half a percentage point in April. It raised them again in November, and the Member States accepted it. The reason this has been fairly smooth sailing—in spite of all the headlines that the bank and its president, Mr. Duisenberg, got—was because of Yugoslavia. Still, the initial exchange rate to the dollar was $1.18, and in July it was down to parity with the dollar: therefore, an eighteen-percent loss in value. You could argue that that was not very well received by the citizens of the European Union, which number about the same as America. All of a sudden your money's worth in six months eighteen percent less.

So Mr. Duisenberg got a lot of mail, especially from Germans, as I understand. He wrote back and said, "I promised you stability of the currency in terms of prices and that's what I delivered." Indeed, inside this currency union, the price stability is remarkable. It's only a one-percent inflation rate. But the legal basis for keeping that currency stable is shaky. That's because of what I just said about the nations not surrendering their sovereignty over their tax policies, their wage policies, and their economic policies. The real risk is a spiraling inflation in one or more countries that would shake up this currency stability, causing either a breakup of the currency union or capital flight. The first thing would be flight of capital out of the EU into a safe currency like the dollar.

The treaty has some prohibitions to help provide stability, and it has worked so far. Everybody is of good will, and the countries agreed to keep the inflation rate under two percent, and their debt within three percent of their gross domestic product. That is fine, but the sanctions that the bank has are soft. They can fine the states who violate that. They can try to ostracize them. But they cannot force them to adhere.

There was an interesting outlook article in the *Financial Times* about why these states are not getting together to have a common constitution and create a totally political union. Perhaps this is the next step, but not so soon. Thank you very much.

B. The Current Status of the Euro

MS. HANSEN: Next we'll turn to Jim Duffy.

MR. JAMES DUFFY: I'm going to approach this topic in many ways similar to Eberhard. However, I think I'm going to get more into the data of what happened. There are three questions that I think we'd like to explore today: Did the euro live up to its expectations so far? (I think the conclusion may be that it did not.) Why did it go wrong? And what is likely to come?

From a New York point of view, these currencies are all functional equivalents of one another, and they're commercially reasonable substitutes, so that automatically gets you into a body of case law that eliminates a lot of legal problems. More importantly, New York has enacted General Obligations Law §§ 5-1601 through -1604, which automatically eliminates any problems. If you have a contract, a long-term bond or long-term note or mortgage or something like that, that's denominated in French francs, once the franc disappears, you're not going to have any legal problems with it. That is because these are all functional equivalents of one another and substantial or commercially reasonable substitutes. It's probably a lot easier in drafting contracts these days to work in euros and not spend a lot of time trying to negotiate transition issues. I certainly wouldn't give up anything important in order to achieve that, because it's going to happen anyway.

Now, we're already through the interim period. That was the period during which the governments agreed on what these various fixed exchange rates would be. We're now in the transition period, which will go to 2001. During that time, you cannot impose euros, but you can't refuse them either, and in January of 2002, there will be a brief period of six months during which multiple bills and notes will circulate.

At the moment, there are no euro bills or coins and the euro is really a paper currency. Our office in Monaco receives in effect two bank statements, both on the same page. One is in French francs: the other is in euros. Most of the transfers that we receive and most payments in Europe are made by interbank transfer: they actually come in in euros and we prefer to leave them in euros. But the bank, being basically French oriented, also wants to tell us how many French francs we have in there. But as you know, the relationship is fixed and there's effectively no transaction cost at the bank level. So we find it very, very useful to keep the currency in euros, because if we want to make a transfer to Germany or to Italy or some other place, we're going to be making that transfer in euros, and that eliminates the transaction costs.

Eberhard mentioned that he was not sure that it was possible to quantify the benefits that can be achieved from having the euro. I've tried to list some of them here. One, of course, is the obvious one that Eberhard mentioned: there are no longer any exchange risks. There may still be exchange costs. That's been a ques-

tion within the European Union, because banks used to make a lot of money exchanging money. They still want to get the profits for that, and the fees that they're charging have been under close scrutiny by the European Commission.

More importantly, there's a greater price transparency. When you see the price of goods quoted in euro, you can see that there is a great deal of difference between that same item in France and, let's say, in England, and that is making it much easier for consumers to evaluate the cost of goods. Presumably when they look and see that things are much cheaper in one country than in their home country, they're going to put political pressure on their governments to eliminate these differences and costs. There's obviously a more optimal capital distribution. It's a lot easier to make investments and plan when you're dealing basically in one currency, and the estimated benefits of all of this are approximately a .5 percent boost to the gross domestic product. So at least the data I've looked at is quantifiable and it's significant, relatively speaking.

Now, there are some clear disadvantages to this structure that's been set up. Europe is not organized the way the United States is. You still have, as Eberhard pointed out, some very, very significant regional differences. Just think for a moment what would likely happen in the United States if, let's say, West Virginia was economically depressed. There would be all sorts of things that would kick in at various levels. For example, the federal government might start to spend very heavily in West Virginia with government projects. The government in West Virginia might do the same. The people in West Virginia might choose to go to neighboring states or might go a great distance, let's say, to California, because there is more work there. At the end of the day, those people who remained might be willing and would probably be willing to work for significantly less than they had been working previously just in order to be employed.

Most of these safety nets or whatever you want to call them that we rely on in the United States for dealing with these problems do not exist in Europe as it is currently politically structured. For example, there is no true mobility of people. Although free movement of people is guaranteed, it's not all that easy for someone in Italy to go to Germany. Even if there is more work in Germany, culturally there is a great deal of difference—and therefore great deal of reluctance to do that.

Now, consider what has happened since the introduction of the euro. There has been a rather persistent downward trend towards parity. Parity, however, has proven to be a very, very strong psychological barrier in the euro. It depends on what data you look at, but I'm not aware of any accepted data that says that the euro has closed under parity with the dollar. However, there are people who insist that it has. [Since this address was given, the euro has sold significantly below par with the U.S. dollar -ed.]

You may be aware that, of the different currencies that are the constituent currencies of the euro, the British pound is not included. If you look at the relative value of the British pound *vis-á-vis* the euro, I suppose you can guess rather quickly what the reluctance might have been on the part of the British to joining the euro. Incidentally, within the last few days, the European Central Bank has announced that, if the British do want to join, they will probably be joining at a very strong rate relative to the euro. Something approaching the current rate.

Now, there are no coins or notes yet, but they are coming and there are going to be a variety of sizes. They're going to look in many ways similar to some of the experiments that have been going on with our quarters.

There are euro notes. These notes are not yet in circulation, but their format has already been established and has been established for some while. These notes will go into circulation at the beginning of January 2002, and you'll notice that there are some psychological or some mythical issues that they're trying to establish by the format of these notes: the authorities are very clear to say that none of these pictures actually represented real places. They're supposed to be symbolic of various aspects of the European Union and the various countries that comprise them.

Let's move forward. There will be coins. The coins are going to have a common front and a different back, very similar to the way our new quarters look. So you'll have eleven different versions of each particular coin.

When the euro was first introduced, there was a headline in the *Herald Tribune* announcing that the euro is here and the dollar is now in great trouble. Well, obviously that didn't happen. The euro has constantly fallen in value against the dollar in a relatively short period of time.

I think this is perhaps the most important lesson that I would like to leave with you regarding the euro. One of the things that is going to happen with the free movement of goods, the free movement of capital, and the free movement of people is that markets are going to get much more competitive in Europe, and the purchasing power parity model is going to become much more important as a means of valuing the euro relative to other countries.

If you look at the purchasing power parity model, there's a great deal of room for the euro to go down and there are a lot of indexes that deal with this issue. Some are somewhat tongue in cheek, like the *Economist*'s Big Mac index, which is actually an index that they publish.

It's based on the price of a Big Mac in various places: if you look at what a Big Mac costs in euro terms, the *Economist* says the euro may be worth 92 to 95 cents. So if the euro ever goes through that psychological barrier of parity, there's going to be a very, very significant downward possibility, keeping in mind that in currency trading, even a very small percentage of change is significant. And looking to where the euro is likely to go, it's obviously an international currency now simply because of the large volume of transactions that are conducted. It's conferring substantial benefits to people who are using it. However, the structure, as Eberhard points out, to make it a true international currency similar to the way the dollar is performing right now just does not yet exist.

One thing I would like to point out is that, if you look at some of the issues that arose in the 19th century, where you had two standards—a gold standard and a silver standard—and all of the interesting problems that that caused, it would be very, very ironic if we were to wind up at the end of the 20th century and the beginning of the 21st century having similar types of problems due to two different currency standards. Treasury Secretary Rubin, when he was still in office, declined very strongly to try to link the euro and the dollar, and he also declined to involve the yen in that process, saying that market forces should settle this question. You've seen what market forces have done thus far.

Now, I think a very important question at the end of the day is, "Will the euro become an important reserve currency?" At the moment it is not. Most European central banks or Member State central banks and the European Union itself are really looking at the dollar as the reserve currency, and there are a lot of different reasons for this.

Now, one of the things that would be somewhat counterproductive is if the euro does become a reserve currency: that's actually going to siphon euros off the market. One of the reasons why the dollar has been so much of a reserve currency these days is that we've been running incredibly huge trade deficits. So we've been pumping dollars out into the marketplace, which allows people to hold them as a reserve or investment currency. Of course, if the euro were to be a counter-reserve currency—and euros were siphoned out of the market—this would put upward pressure on its price and that could create very severe problems for the European economies at this time. They're on the verge of recovering, but one of the reasons why they are doing so well is their goods are relatively speaking considerably cheaper a year later than they were when they started out.

The U.S. economy is still in excellent shape. It's most likely going to perform far better than the euro zone for the next year or so, or Japan. I think the short-term prospects for the dollar *vis-á-vis* the euro look relatively good. I'm certainly not pessimistic about the euro, but I think I'm much more bullish about the dollar. Thank you.

C. The Implications of the Euro for U.S. Banks

MS. HANSEN: Well, thank you, Eberhard and Jim. You heard some of the real underpinnings from Eberhard and perhaps some of the potential weaknesses in the treaties and the potential challenges that lie ahead.

I think Jim gave you a nice overview of the sort of advantages or disadvantages. He started out focusing on I guess what economists would call the real economy and kind of ended up hitting on the financial economy, with the rule of the dollar. That creates a nice transition to my remarks, which are about the impact of the euro on the U.S. banking markets. While labor markets certainly are not global, as Jim pointed out, the financial markets are global. So some of the impact on the financial economy may be different. There are advantages and challenges in that area as well.

In any event, I'm going to focus on the realization of the single European currency, the continued harmonization of the financial market. The payments infrastructures of Europe, and also "Euroland's" effect on U.S. banking organizations broadly defined, both inside and outside the euro zone.

I believe that monetary unification in Europe is already providing opportunities for U.S. banking organizations. To properly assess the opportunities, I'm going to just focus on the changes that I think the EMU is and will continue to bring to the U.S. capital markets and the development of financial intermediation services.

First, it's creating deeper and more liquid pan-European securities markets by removing exchange rate risk. The single currency is enhancing borrowing and lending opportunities across European borders. Facing no currency risk, corporations are finding it safer to issue bonds and equity to foreign investors. In other words, across-the-border issuances, and the absence of currency risk, will enable institutional investors to diversify their portfolios across a broader range of foreign securities.

Second, the more competitive and efficient European capital markets resulting from EMU will further encourage corporations to issue securities rather than seek bank loans to obtain financing. And even governments will tap a common capital market to finance their deficits, which will subject their actions to stricter market tests than they'd face if they were relying on captive local savings.

This active market will perhaps contribute to the development in the government sector of a market such as the municipal bond market in the United States. So just bottomlining my remarks, the securities markets

will play a larger role in channeling the economy's savings between borrowers, both private and public, and lenders.

The other implication I'd just like to mention is that, with the increased number of securities issuances, there should be an overall enhancement of the role played by institutional investors. More extensive issuances of bonds and equities will mean a wider variety of securities for institutional investors to package. As a result of these more attractive opportunities, European bank customers may shift from low-yielding deposits to higher return mutual funds and employer-sponsored thrift plans. And at the same time, the trend towards private pension plans and away from public pay-as-you-go pension plans, which is well developed in the U.S., could further enlarge the role of institutional investors. Those investors will also be presented with more freedom in making investment decisions, because the single currency has permitted investment restrictions that might apply to insurance companies and other regulated industries to fall away and make them irrelevant. And as a result of the changeover perhaps to the self-directed retirement plans, households' experience with that would make them more familiar with making portfolio choices, and, just as in the U.S., a household may move their savings away from bank deposits and toward either direct or indirect holdings of securities.

So to the extent that events unfold this way—and they are already beginning to do so—there are bound to be a lot of gains for U.S. banking organizations. Specifically there will be increased activity for U.S. commercial and investment banks, who will be able to capitalize on their well-developed skills in underwriting and asset management. U.S. firms are building and have already built products for European markets, including pan-European equity indices. They organized their research along and are trading along pan-European sector lines rather than geographic lines, and they have great proficiency in placing securities among institutional investors, managing portfolios and providing advice to investors and to employers sponsoring a thrift plan for instance.

The advantages of the experience gained in the U.S. domestic markets, I think, will place these U.S. institutions ahead of their European counterparts when competing for underwriting and asset management business. In fact, Morgan Stanley's acquisition last year of one of the largest financial services groups in Spain is an example of the euro opening up opportunities and asset management for U.S. companies.

There's another dimension to the opportunities available to U.S. banks. The introduction of the euro is expected to touch off a wave of mergers and acquisitions in the corporate sector and the financial service area. United States firms have played prominent roles in advising participants in several recent mergers and hostile takeovers. For example, the Olivetti Group was advised by Donaldson, Lufkin & Jenrette, Lehman Brothers and Chase Manhattan in the acquisition of Telecom Italia. Other parties to the transaction, including the Italian government, were advised by U.S. firms. Germany's Hoechst, which was advised by Morgan Stanley, agreed to a merger with France's Rhone Poulanc, which was advised by Goldman Sachs to create one of the largest life science companies, Avantis. And Goldman Sachs and Morgan Stanley advised Elf Aquitaine, and Merrill Lynch advised Total Fina in its hostile takeover of Elf. So there are lots of instances where U.S. banks have captured the business in Europe that has been spurred by the euro.

In addition, if recent trends continue in the European economies, there could be more privatization of state- owned enterprises, so there's room for U.S. banks to provide advice on some mergers and acquisitions. There are many instances when U.S. institutions have been the key underwriters of some large transactions over the past few years, including most recently in the telecommunications industry.

Another potential long-term benefit should arise from the eventual consolidation of financial market-making activities in one or two market financial centers, such as Frankfurt or London. That leads to the necessity of fewer operation centers for firms. There's also a great anticipation that Europe with a single currency will alter the face of the financing markets in the region. That is, more liquid European securities markets free of currency risk raise the opportunities for more collateralized lending, asset securitizations, and in particular more financing by the repo market. And a further harmonization of market conventions and practices (although Eberhard had skepticism about that: perhaps the gradual convergence of regulatory and fiscal regimes) would assist in that regard.

I've focused thus far on the opportunities for you as banking organizations and the wholesale markets. But there are also important opportunities, I believe, in the retail markets. This is in large part because of the highly developed customer service and direct marketing skills U.S. financial institutions have, which will make them well placed to penetrate the European market for personal financial services. As I'm sure you know, U.S. banks have gained expertise in offering credit cards, residential mortgages and small business loans nationally by relying on the mail and the telephone, and they're not limited to the area covered by their branches in the U.S. Also, mutual fund families have achieved tremendous success using direct marketing techniques. So I think all of that experience in the U.S. will make U.S. firms well placed to penetrate this market for personal financial services.

In addition to these business opportunities, and with the spirit of greater harmonization, it's possible that European governments may be more reluctant to intervene in increased competition among financial market participants. This may be so despite recent events, which include the German government's denunciation of a hostile takeover by Mannesmann by Britian's Vodophone and the furor over the severance package which Elf Acqutaine's chief executive got.

I think there are also some challenges that I'd just like to mention. First of all, the European Central Bank's role in supervision is vague and the supervision continues to be decentralized. I think cross-border mergers will, in particular in the financial industry, increase the need for coordination and communication and harmonization. And it will be important to the success of this new regime that the harmonized arrangements are seen as being at least as robust or more robust than current national arrangements or arrangements in the U.S., because those arrangements, when they are robust, help develop confidence in financial markets.

It's also possible that U.S. banking organizations will face different competition from their European counterparts. There are likely to be large megabanks in Europe that could challenge some of the largest U.S. banking organizations. The recent takeover of Paribas is an example. There's a hostile takeover going on right now between the Royal Bank of Scotland and the Bank of Scotland over NatWest. There are cross-border alliances that have been developed between French and Spanish and Italian banks. One could hypothesize that maybe European banks would pursue a strategy of regional alliances in order to better position themselves, as they seem to be doing, for larger European-wide competition similar to the regional alliances which were formed in the U.S. in the 1980s, and which were facilitated by the regional compacts that the states entered into. And even acquisitions of U.S. banks by more capital-rich European banks are possible. Bankers Trust was acquired last year by Deutshe Bank, creating the largest bank in the world in terms of assets. And often overlooked is the acquisition of Republic by HSBC. So this will also raise the stakes for increased regulatory cooperation within and without the euro zone.

Another potential uncertainty is the role of the dollar, which Jim mentioned. I think the dollar is still currently used in more than eighty-seven percent of the two-way transactions in the foreign exchange markets. And I don't think its position as a reserve currency is terribly threatened yet, but that could change over time. What the implications of that are for U.S. banks is unclear. It could just mean that they would develop euro-denominated activity on both sides of their balance sheet, just as a euro dollar market developed in the 50s.

Payments are another area in which the impact on U.S. banks is unclear. There are fundamental changes taking place in the payments infrastructure in Europe and in the wholesale markets. There's a variety of alternatives. It's unclear which will become the dominant one. There are also various ways in which more efficient clearing and netting and settlement mechanisms are taking place for securities. So there's a struggle going on there for dominance as well.

Despite these areas of uncertainty, my assessment of the implications of the EMU for the U.S. banking industries is optimistic. It's likely to further the forces of securitization, deregulization, harmonization, mergers and acquisitions, and that would bring the E.U. market closer to the U.S. or Anglo-Saxon model that U.S. banks are already very experienced with. It's been argued that U.S. institutions already are more pan-European. If this is confirmed, they will be able to meet these many challenges. Thank you.

MS. FRANCO: We have time for a few minutes of questions before we welcome our next panel. Yes?

MEMBER OF THE AUDIENCE: Just a very mundane question after all the interesting information. As far as the actual printing of the coins and the paper notes of the euro, has it been decided which mint or which printers will do this, or is this an argumentative contention between the various member countries?

MR. DUFFY: That's all been agreed upon. In fact, they will do it in very similar fashion to the way we have. You notice that in the United States there are mints in Philadelphia and Denver and what not. There's a mint in every country.

IV. China, Seattle and the WTO: Implications for the U.S. Economy

MS. FRANCO: Well, thank you very much, Jim, Eberhard and Joyce, for a very interesting panel. Now, I would like to welcome Saul Sherman.

MR. SAUL SHERMAN: Because we're running behind, I'm going to start even though Bob Herzstein is getting set up.

MS. FRANCO: Okay. Saul Sherman is with the Sherman Law Firm of Water Mill. His panel will be talking about "China, Seattle and the WTO: Implications for the U.S. Economy."

You will be starting, Saul?

A. Introduction

MR. SHERMAN: I'll just start us off briefly and then I'm going to fill in for Alan Dunn after Bob Herzstein has spoken.

In the next few months we're going to have in this country a debate in Congress that will attract a great

deal of attention. It will be on whether China should be admitted to the WTO, the World Trade Organization. We're going to have more or less simultaneously in the Congress a debate on whether the United States should pull out of the WTO, so that we are going to some extent in two directions at once.

I think it would behoove us all to pay a great deal of attention to what goes on. The enemies of the trade regime that exists have been very vocal lately, and I think there's a great deal to lose if they are the only voices that are heard.

This presentation is not going to be a love feast, in which we're trying to sell you the proposals of the United States Government. In fact, we carefully avoided inviting the people who are actually doing the work currently, so that we could get some outside objective criticism and commentary. But I do think that trade has become a dirty word to an extraordinary extent. It is really the goose that has been laying a lot of golden eggs lately, and it has come to be taken for granted. We had better take another look at it and not take it for granted. With that, I'm going to turn the proceedings over to Bob Herzstein, who was the first head of the International Trade Administration in our Commerce Department. He went with Juanita Krebs, who was the Secretary of Commerce in the Carter Administration, and negotiated the first agreement opening China to U.S. business, and he's been very close to that scene ever since: we couldn't have a better person to speak. Bob has been teaching at the Harvard Law School lately. He's a partner currently at Miller & Chevalier and formerly of Arnold & Porter and Shearman & Sterling. He's one of the top people in the field.

B. China and the WTO

MR. ROBERT Z. HERZSTEIN: Thank you very much, Saul. You make it sound as though I can't hold a job. (Laughter.) Yes, I was once accused of being a poster boy for the revolving door set.

My basic message to you today is a fairly simple one. It is that, although the admission of China to the WTO is being described as opening a vast new market to western businesses (and it does indeed have that potential), the fact is that an effort to do business there will be quite perilous. Even global companies accustomed to operating in many national markets should proceed there with caution. I'll explain why this is so, but I want to make clear at the outset that I don't oppose China's entry into the WTO and I don't want the facts that I'm pointing out to be used by those who do oppose it. But I think it is important that business executives and their lawyers not feel that this important milestone means that they can go over there and start doing business on the terms that they are accustomed to in other countries.

First, very quickly we'll review what China's accession is intended to achieve. From the Chinese point of view, it will give them a legally assured continued favorable access for their exports to the U.S. and to other markets. At present they have favorable access—as favorable as any other country. But it's on a year-by-year basis. As you know, Congress discusses it every year and it's hard for a business entity to do business on a year-to-year basis. They need to have more long-term predictability. For China, it will also give them the right to participate in the activities of the WTO, including shaping new rules and their right to invoke dispute resolution settlement procedures against other member countries if they feel their products are not being fairly treated.

Okay. What does it mean for the United States and for other WTO members? It's being advertised by Secretary of Commerce Bill Daly as follows: "In opening China's economy, the agreement will create new opportunities for American businesses and workers to compete in China's vast market of 1.3 billion consumers." Many people say, "Gee, if I can only sell one pair of shoelaces to every person in China, I'll be rich." You hear that all the time from people who are new to the market there. We started hearing it in 1979, when we were opening up in the Chinese market or beginning to try to. And as you may recall, there was a great train of American business executives flying over there, CEOs coming back and saying, "I've got a deal, we're going to do such and such and so and so and we'll all be rich." You see that many of those wishes have not yet been achieved. The admission of China to the WTO will certainly facilitate this process. Let's look at how that will happen.

Basically the WTO achieves an economic objective of open markets through a legal mechanism: a set of rules and a system for enforcing them. That's what the WTO is all about really. It's a legal system which has grown increasingly sophisticated over the roughly fifty years of its existence. It starts out with specific promises of each country as it enters the WTO. In the case of China, they will reduce their tariffs in the amounts indicated. They will end their import quotas and import licensing, which have been very strict and which give a lot of discretionary authority to officials. When you want to send something to China at the present time, you have to get a license. And whenever you have to get a license, it means you have to cope with someone's political agenda. It also, of course, opens up the opportunities for corruption. Under the accession agreement that China has made with the United States, they will drop their import licensing system and their quantitative restrictions. They will also let foreign businesses in in certain service areas to a certain degree: telecommunications, Internet service, insurance, banking and that

sort of thing. Those are among the most important specific promises that China has made.

The other thing that the WTO does which is more important in the long term is establish a system of rules for all of its members: rules of good behavior. Each nation commits itself not to discriminate against the goods from one of the other member countries and in favor of its own domestically made products. It also agrees to restrain government subsidies according to certain legal standards so that they don't subsidize domestic industries and distort competition unfairly with foreign competitors. Those rules of the road are the essence of the GATT, which was established in 1947 and which has been made a part of the rules system of the WTO organized four years ago.

Now there's also a system of dispute resolution in the WTO, which so far (it was just established in 1996) is working very well. You may have read about some of the cases. The U.S. won a case against Europe, which was refusing to take American beef because it was grown with hormones. And another case involved bananas from the Caribbean, which the Europeans were discriminating against. The Americans have lost some cases to the Europeans also, but basically we're evolving toward a pretty good system of adjudication for disputes among countries on whether the countries are abiding by the rules that the WTO sets, the rules of good behavior.

Now, the question is, will those rules work? Will those disciplines work in opening the market in China? Here, again, let me stress that I think it's great that we're getting China into the WTO. We get specific commitments from them, we will have their commitment to abide by the general rules of behavior. Let's assume that the Chinese government as a national entity in its relation to external trade abides by all the rules. Will that mean that an American businessman can go over there, take his goods or his services, find customers, sign up orders and carry on business in a reliable and predictable way, the way he might in most of the established western markets, including these days Latin America, much of Asia, and, of course, Europe?

Well, the basic assumption of the WTO is that the governments will stand aside, and in response to the rules businesses will decide on the basis of commercial considerations whether to buy foreign goods and services or those they make at home. But the reality in China is something different, and it somewhat contradicts that fundamental assumption that the WTO (and the GATT before it) had been built on for fifty years. We've had fifty years of market-oriented assumptions built upon rules in the GATT in western countries. During virtually the same fifty years we have had in China a system of central planning, in which commerce is viewed as a state responsibility. Even with the tremendous and dramatic economic reforms of the last ten years in China, they still describe their system as a socialist market economy. This basically indicates that they don't subscribe to the western idea that there should be some kind of bright line between what government decides and what a businessman decides.

You have the habits of thousands of government officials and party leaders. Not just the handful of sophisticated globally oriented officials in administration of trade who negotiate for China's succession into the WTO. Rather, you have tens of thousands of officials in other ministries and at the provincial and local levels and in the communist party system. These officials have a set of different habits that they have built up over fifty years, and those habits include intervention in commercial transactions in order to achieve planning goals, and to assist favored enterprises that they may have built into their own political and personal set of values and goals over the years. A set of personal relationships between officials, government officials, party officials and commercial players means that they will attempt to intervene in commercial transactions in a way that simply does not take place in western countries. The globally oriented officials in Beijing who negotiate WTO will, of course, not approve of this. But China has had a tradition for hundreds of years in which the central government has had difficulty controlling what happens out in the provinces. I think it will be a long time before they are able to change the habits of those officials.

A final point here is that China's legal system will not restrain this kind of official meddling in business decisions. In the United States or in Europe, if a government official got out of line and called the company and said, "I want you to turn down the transaction with so and so and do it with such and such instead." Or "I don't want you to do that merger; I want you to buy this company instead of that." Those things happen and the behavior in different countries varies, but by and large a businessman is schooled to say, "That's none of your business, I'm operating in the interest of my shareholders and I'll do what I need to do." And if the government official persists, there is generally legal recourse in most of the western countries in which the government official can be held in his place and made accountable. The fact is that in China we have no administrative procedure act and a very inadequate judicial system.

In light of that, I think it's fair to assume that the kind of intervention that officials have been accustomed to in China for the last five decades will continue, and the western business person going in there will have a great deal of difficulty. I think I'm getting ahead of myself here.

A foreign businessman is going into China. Let's assume he's read in the newspaper that China has agreed as part of the specific promises to reduce its tariff on his product to zero and to eliminate import licensing. He's been very successful in doing business in other countries, so he says, "Okay, I'm going to call my fellow who's currently in Hong Kong, and have him go set up an office in China. We'll put some resources into that and we'll start doing business there." Well, my guess is that in many cases—not all cases, but in many cases—after two or three years of effort and a lot of expense, those people may report nothing but frustration.

The kinds of things they will encounter are that state-owned customers are still a very large segment of the Chinese GNP. He'll approach one of those companies to sell his product and he'll find that they have a relationship with other people in China: they're trying to help those people achieve their plan, they're trying to achieve their own plan, and they're still under the thumb of some minister. As a result, they're not going to be very interested in his product. Even if he finds a privately owned company, he may find that the manager or owner of that company is taking his guidance from a local party official or government official. He may find hidden government subsidies in the form of low cost energy, low cost resources, cheap transportation, or something available to his competitor who's making the products in China, but not available to him as an outsider. This is because the Chinese system has been built on this concept of reciprocity among enterprises rather than on commercial considerations.

He may also find skewed regulations that were adopted without his knowledge, without his opportunity to participate in them, but which put him at a disadvantage compared with competitors producing a product that can substitute for his. He may find hidden cartel arrangements. In fact, my guess is that he will find lots of cartel arrangements between both horizontal and vertical entities in China. Thus he'll start to sell to a particular customer and, without his knowledge (or maybe it will eventually come to his knowledge), that customer already has an arrangement with his Chinese competitor and they're going to keep going at it in spite of his efforts. So that's the kind of frustration one might encounter.

In light of that, I was amused yesterday to read in the *Wall Street Journal* an article entitled "China Internet Investors Face Web of New Rules." A part of the deal that the U.S. negotiated with China was to allow Internet service providers in China to be fifty percent foreign owned. That was the best U.S. negotiators could do. They couldn't achieve one hundred percent, but they did come back and advertise that as a great breakthrough. And a number of U.S. Internet companies have started going to work over there. Well, in a recent interview the minister of communications in China, who's a very influential and lively guy, gave details of planned regulations that could rein in China's freewheeling Internet. He said that the new laws will require content on Internet sites to be regulated by Beijing, that all Internet companies will have to apply for licenses, and that the foreign investors will need official approval before taking stakes in such companies. There, again, you have ministerial discretion coming in the way of doing business. The reaction of one U.S. Internet executive was the following: "When you make an investment you like to be welcomed by the government. No one wants to play hardball to try to get into this market." So that's just one little example of this problem.

Now, as I mentioned earlier, if the foreign business executive is frustrated by the types of obstacles I described, he does not really have recourse under Chinese law. What else can he do? Well, he can come back to the U.S. government or the government of whatever country in which he is based and say, "Look, China isn't living up to their obligations. In fact, they promised to let me do business there, but when I go over there, I'm running into all kinds of obstacles and they're not doing anything to clear them up." My prediction is there will be so many of these complaints that it will overwhelm the system. The cases will be fact intensive. Each situation will be full of details that need to be investigated. It won't be an easy case for the lawyers to process, and the WTO's resources for resolving disputes of this nature would be overwhelmed by those cases.

At present, the WTO handles maybe ten or fifteen or twenty cases a year. Here you could have hundreds coming out of China alone. The WTO does not have any resources for handling fact-intensive cases. Almost all of the disputes that go there are questions of law involving interpretation of the WTO rules. So basically the WTO system relies on each country to be the primary recourse for observing the rules, and a business that feels the rules are not being observed needs to have access to fair and effective adjudication within that country rather than taking the cases to the WTO. Only when that is not available is the WTO going to be an effective remedy.

The result of this for some years—possibly several decades—will be a situation in which China, because of its WTO accession, will gain access to the markets of other countries which are much cleaner in this legal sense than the market that it is offering to its trading partners. Does that mean that we shouldn't put China into the WTO? I think not. I think it's terribly important to begin to bring them under the rules system, even though we recognize their own institutions are such that they will not be able to be what we would regard as a good citizen for some time. The basic problem is that they can't control their own officials and make

them accountable to the rules that China has agreed to externally with other countries.

There are two possible approaches to remedying this. One is that China be required to commit to the WTO to establish a modern and effective system of administrative law, including a version of the APA with judicial review of administrative decisions. That commitment would mean that if China is not making progress in establishing that system or does not maintain it, it would be subject to sanctions in the WTO and you could go up to the WTO dispute system. China doesn't have a system of administrative law or is not using it, and that itself would be adjudicated in the WTO. If China were found to be in violation, the country adversely affected would be entitled to impose trade sanctions on China, which is the only sanction available under the WTO system.

So that is what one might call the lawyers' approach. I think it offers some opportunity over time. Most of the American and European scholars of Chinese law feel that this is a big task, but a feasible one, and I think they generally would support this recommendation. Thus far it has not been written into any of the deals with China. There's still an opportunity, as China negotiates the final arrangements for its accession with the WTO countries, for this to be put in as one of the requirements.

The other possible ground for hope over time is simply commercial pressure. China will want global companies to come in. But companies like the Internet one I described will say to China, "I don't want to come there because it's a mess to do business there, so shape up, and then you'll get a better response from global companies." That may lead over time, as it has in some other markets, including a number of Latin American markets, to China cleaning up its act, and eliminating the arbitrary and unpredictable government actions that are discouraging foreign companies from coming in.

C. Seattle

MR. SHERMAN: Bob's talk is a perfect launching platform for the discussion of the Seattle debacle. The purpose of the so-called ministerial meeting in Seattle was for the ministers of the member countries, 135 of them in the World Trade Organization, to set in motion a new round of trade negotiations to strengthen the GATT.

There was a great deal of ignorance exhibited on television and in the press and on the streets at the time of the Seattle meeting, and it's worth starting off by mentioning that the trade organization has no legislative powers at all. The only rules it applies are those that are agreed upon in treaty negotiations by the parties. And the organization grew up originally as the GATT, meaning the General Agreement on Tariffs and Trade. The key word is agreement: it wasn't an institution; it wasn't an organization; it was just really a network of treaties. But it was regarded as one global agreement originally and primarily for tariff reduction. Over the years it has spread, and the subject matter dealt with has greatly increased. The negotiations evolved into a series of rounds, of which you may recall the Tokyo round and then there was more recently the Uruguay round, which we'll come back to in a minute, since it was the jumping off point for what happened in Seattle. The time seemed right to the parties, who had been sort of creeping up on this launching process, which was what was to happen in Seattle. But it didn't happen because people couldn't agree.

Broadly speaking, there were two problems in Seattle. One was inside the negotiating hall (if and when the delegates were able to get there); and the other one was out on the streets, where two groups were demonstrating and picketing—and occasionally rioting, once the roughnecks got involved in it. I want to mention those on the outside first and then go on to what was going on, or what was supposed to be going on, inside.

The two groups outside were labor and environmental advocates. Labor is unhappy about the WTO because it regards it as a vehicle for foisting upon the American public and, therefore, the American working force, the products of cheap labor overseas. Their view is that's why companies go abroad, and if they do, Americans are going to lose jobs and it's unfair. Therefore, they're picketing.

There is a certain truth in that. Over the years I expect one way or another gradually, but probably very gradually, the working conditions and wage levels and what not will come up in those countries. Japan used to make cheap junk, and to say it was made in Japan was sort of a kiss of death for products when I was a kid: all they made were little tinny toys. Now look where they are. Taiwan was a cheap labor place, and it came up. And so on and so forth. That's the pattern that's evolved, but the labor folks are unhappy and understandably so. On the other hand, if they were to tear down the WTO, cheap labor wouldn't go away, it might be even freer to foist itself upon the rest of the world.

There was a treaty signed by the United States, shortly before Seattle, to outlaw the worst forms of child labor. That was regarded as sort of an entering wedge for introducing the subject of labor rights into the trade organization scene. The President made a reference to it in an interview early in the Seattle proceedings and that ignited great fright because the less developed countries regard their cheap labor as their greatest asset. They think that the wealthy countries are trying to rob them of that asset, and they don't want that. Clearly whether it's the workers in those countries or

the governments and the ruling classes in those countries, the objectives of the labor movement are not at all clear from what they say. I'm told by people in the government that they know pretty well what labor wants: I don't, and the press doesn't. And I'm not so sure the government does either. I'm not even sure by a long shot that the labor movement knows exactly what it wants here. The grievance is real. The blaming of trade and the WTO is another matter.

The environmentalists likewise are hard to pin down. They regard at the broadest reaches economic development in general as bad: it creates pollutants; it cuts down trees; it paves over beautiful fields; it uses bulldozers and what not. Again, there's a certain degree of validity to that. But you can't stop the population growth. And it is also thought by many that, if you enhance the economic strength of an economy, then it can cope with the problems of environmentalism.

The worst environmental debacles have been in eastern Europe, Soviet Union, for a while in the south of Italy, and somewhat in the poorer places. As these places get more prosperous they can afford to clean up. This argument has gone on with Mexico: The results are not in there yet. You can't freeze development very well in Mexico City, but the Mexicans know how polluted their air is, and they're as anxious as anybody to do something about it.

I should say one other word about the environmentalists and the World Trade Organization. There are a few decisions that have come down that are pointed to as showing an anti-environmental bias by the WTO and/or an intrusion into the domestic affairs of the United States. The original classic was the tuna and dolphin case, which said the United States couldn't discriminate against tuna fish coming in because it was caught by methods that needlessly killed dolphins. I don't want to kill dolphins needlessly and I don't want to eat that kind of tuna fish for that matter. But the World Trade Organization said that is not an adequate ground for excluding the imports of tuna fish from the countries that don't follow the American rules. I think it's a bad decision, but it certainly doesn't exactly threaten the environmental protections of the United States of America, and it was confined to denying a right to complain about the environmental effects of the production process outside our country.

There are a few situations in which the medical or physical or other aspects of a production process are complained about. We happen to be mostly on the other side of that issue. When our beef goes to Europe and they say, "No, we won't let it in because you fed the cows hormones," we say, "Hey, wait a moment, that's just an excuse for keeping our beef out." They say, "No, you're infringing our sovereignty, and our people don't want to eat that kind of meat; we want to protect our people, and we have a domestic law that applies to our domestic production as well that says you can't feed them that kind of hormone." That's the sovereignty issue.

I think the thing to emphasize about all of this is that by and large the WTO rules do not create the environmental issues. If you look at the broad question of, say, how are we going to stop them from cutting down the rain forest in Brazil, well, the WTO isn't telling anybody to cut down the rain forest in Brazil, and it doesn't have the power to stop them. And it's a little hard to know how you can give them the power to stop them, but that's another subject for another day.

Let me turn to what was supposed to be going on inside the hall in Seattle. There were a couple of things that were sort of basic. One of them was that, while the GATT had started off as a tariff negotiating organization, it has expanded far beyond that into something called "non-tariff barriers"—into the kinds of things that Bob was talking about. I'm not going to try to go into detail on any of this, but I'll try to hit a few mountain peaks. There is a proposal for bringing competition policy in so that various kinds of cozy little arrangements between companies in the country you want to export to can't block your imports. There are a variety of other things. To make a long, sad story very short, there were great differences between the developed countries: we have our sacred hormone cow, the French have their sacred cow called agriculture. As the time has come to get down to some of these last hold-out issues in the trade field, the resistance has gotten stronger and stronger. That meant that, at least so far as Seattle went, they weren't able to resolve or even to launch a negotiation and agree upon the ground rules for resolving those disputes.

I want to mention one more important thing about Seattle, and that is the lack of preparation. These trade meetings and especially the initiating meetings to launch them, are usually prepared to a fare-thee-well. I don't mean there they are staged and I don't mean that there's complete agreement beforehand. But there is usually years of work. We have had in Geneva a situation where the parties couldn't even agree on a new director general, and the staff was at sixes and sevens. As a result, for four months, from April to September, all of that preparatory work pretty much went by the boards. More important than anything, the real driving force behind this whole evolution of the trade regime, the global trade regime, has been the United States. But for five or six years the Congress has refused to grant so-called fast track authority. What that really means (although it's frequently misunderstood) is negotiating authority. It's a congressional go-ahead authorizing the President to tackle another round. That has never been forthcoming for Clinton—long before the current scandals. The scandals probably lost us another year of seri-

ous top-level attention in Washington, and now we have a lame duck president and the driving force to get this thing going just isn't there.

I will tell you that last minute escapes are par for the course in the trade field. Things are always collapsing and then, just on the brink, rescued. Seattle is by no means the end. But there's no clear next step in sight. The trade organization has tried with the leading developed powers to put it back on track quickly. That has not succeeded, and it probably won't get very far in the coming year, although they may be able to lay the groundwork for something in the year to follow.

The one other point to make is that, if the global system starts to weaken, two things can happen. One of them is the cliche of the bicycle. If the trade process doesn't go forward, it's likely to fall over and collapse. It needs a certain momentum and it needs an outlet for people's grievances. One of the big beefs now is that you get the decisions in your favor, but you can't enforce them. Of course, that gets closer and closer to the subject of sovereignty. The alternative is possibly to turn to regional blocks and agreements as the alternative and let the progress go forward there. To some extent it's been going forward also on sectors within the trade organization. Investment is one that has been proceeding by itself. There are real problems with this. The basic rule of the GATT and the WTO is nondiscrimination, and by their very nature regional groups are friends among themselves and discriminate against outsiders. Regional arrangements, therefore, pose, in some sense at least, a threat to a cohesive and friendly world of trade. And yet we've survived sort of working both sides of the street—on the global and the regional—so far, the EU and NAFTA being the classic original examples.

I'll stop there and maybe we'll have time for one or two questions.

MEMBER OF THE AUDIENCE: Thank you, gentlemen, for your excellent presentations. I think one of the complaints about Seattle or other activities at WTO have been around the subject of transparency. Some of the critics say that it's fine to have a dispute settlement process, but the general public or even professionals often don't have access to records or the decisionmaking processes, and that this is at odds with the idea of international trade.

MR. SHERMAN: That is certainly one of the problems. The U.S. government is on record as favoring transparency there, as in many other things. It's one of the improvements that ought to be made. It's not an accident that it's that way. It reflects the fact that originally the GATT was a diplomat's club and diplomats work quietly behind the scenes, since they don't like to be pinned down. They like to fuzz things over and they don't like lawyers. There's a very explicit book by one of the earliest secretary generals of the GATT on what's wrong with having lawyers around when you're trying to make trade deals. And more and more, as Bob said, it's become a rule-based system: we're having dispute resolution mechanisms and an appeals process—all so they don't have disparate rulings on different subjects. As a result, it's beginning to get more and more lawyered. The star chamber aspect is a relic of this diplomatic background, and it's getting more legalized and opened up.

Bob, I don't know if you'd like to add something to that.

MR. HERZSTEIN: No, I think that's right. I think we're making progress. You just can't do it all at once. The present adjudication system in the WTO is largely the recommendation of the U.S. It was quite astonishing that we got that in place in 1996. Other countries are definitely coming around as they find that they can use this process to contain the misbehavior of big countries like the U.S.

AUDIENCE: I just have one quick question for Bob Herzstein. Bob, it's true that China has a billion three hundred million consumers, but on a purchasing power weighted basis, how many European-type or American-type consumers do they actually have?

MR. HERZSTEIN: It's still substantial. I think there are something like a hundred million middle class types in China. So it's a substantial market. I refer you to a very interesting article in *Foreign Affairs* about two or three issues ago called "Does China Matter?" In that article a scholar takes a rather contrarian look at the whole thing and he points out all the reasons why China doesn't really matter very much economically, politically and militarily and so forth. It's very refreshing to read it.

MS. FRANCO: Okay. Thank you very much.

Crisis Management

By Robert W. Littleton

I. Definition of a Corporate Crisis

A "Corporate Crisis" is an extraordinary threat to the corporation's business. The corporate crisis may take many forms, including the following:

- An attack on a manufacturing company's product by the government, consumer groups or the news media.
- An attack on a company's commitment to non-discrimination.
- An attack on the company's ability to maintain safety and security at its premises or workplace. Examples of this type of crisis involve violence to workers or visitors at the company's facilities, toxic exposures, fires. These crises are particularly damaging for the hospitality industry, including lodging companies and amusement park owners. Premises-related crises are also problematic for mall owners and other retailers.
- Environmental crises. These involve toxic or radiation exposures. They are a serious concern of the chemical industry and utilities.
- Public carrier crash. These include airplane and surface vehicle crashes, but are not limited to transportation companies. Many companies have faced corporate crisis arising out of the transportation of their products by truck or rail.
- Extortion. The company may have to respond to criminal threats threatening boycotts, product tampering, sabotage, or strikes.
- Fraud investigations.
- Hostile takeover attempts. In these crises it is very important to manage a response for the effect it will have on investor confidence.
- Computer "hacking." This includes attempts to hack into the company's network from the outside along with internal sabotage.

A. Threats Posed by Corporate Crises

The company may be threatened in many different ways, depending upon the nature of the crisis. It may be threatened with a loss of consumer confidence due to adverse publicity. It may be threatened with the loss of confidence by the product's retail or wholesale distribution outlets. The company may be threatened with the loss of investor confidence. There may be the threat of government fines, sanctions, bans or recalls. Finally, there may be the threat of litigation and claims against the company.

B. What Is Crisis Management?

Crisis management is an emerging multi-disciplinary approach to preparing companies for these extraordinary threats and assisting in the company's response to these crisis on a short-term and long-term basis.

C. Members of the Crisis Management Team

The Crisis management team will vary, depending upon the nature of the crisis. At its core, it will probably include the following.

- In-house lawyers.
- In-house public relations personnel.
- In-house investor relations personnel.
- Outside public relations experts.
- Outside lawyers with expertise in the particular threat, either corporate if the threat is transactional or experts in product liability, premises liability with security issues, discrimination or environmental liability.
- The company's risk manager.
- Inside and/or outside government relations personnel.
- Investigators.

II. Stages of Crisis Management

Crisis management can logically be divided into three stages:

- Crisis preparation. As the name suggests, this involves working with the company to prepare it to respond to a corporate crisis.
- Short-term crisis management. Many corporate crises arise and dissipate within thirty days. Certainly much of the scope and shape of the crisis will be formed in the first few days, if not in the first few hours.
- Long-term crisis management is the management of the crisis beyond the first thirty days. By this point the principal issues, threats, constituencies and corporate responses will have taken shape.

Much of the short-term crisis team will have moved on and the long-term resolution of the crisis begins. The stage may last years.

A. The Goals to Strive For

When a crisis breaks, it can be compared to a hurricane striking a ship at sea. For the ship to survive with the least damage, the crew must know who is in charge and all members of the crew must have a clear definition of their respective roles and their respective responsibilities. Since there is little time for the usual bureaucratic process of consensus-building and approval, there must be a "captain" with clear authority and discretion to make prompt orders. There must then be a clearly defined and tested communication system in place to see that these directives are immediately conveyed to the proper personnel and that the directives arrive with sufficient force behind them to prompt immediate action. Preparing for a crisis in the midst of a crisis is like preparing to sail a boat in a hurricane in the middle of a hurricane. The results will be disastrous.

B. Forming a Crisis Management Team

The enterprise should designate a "crisis manager." This person will head the team. Depending upon the size of the company, the crisis manager may be inside or the manager might be an outside lawyer. The crisis manager should be senior enough to have the company's respect but should also have duties that will allow the manager to devote a substantial amount of time to the crisis until it is resolved. For this reason, the crisis manager would not ordinarily be the senior manager of that company. It may be the risk manager or the senior lawyer.

As indicated above, other core members of the crisis management team would ordinarily include the corporate risk manager, investor and public relations personnel, government relations personnel, tort lawyers and corporate lawyers. Ordinarily, investigators are on a standby basis to respond as needed when the crisis occurs.

When the crisis manager has been selected, his or her other responsibilities and contact information should be publicized to the company's management. The company should be made aware that this is the individual to contact at the first hint that a crisis may be arising.

C. Establishing a Communications Tree

When thinking about a corporate crisis, planning should be for the worse-case scenario. From a communications standpoint, consider a crisis arising at 2:00 a.m. on Sunday morning during the week between Christmas and New Year. Federal and state investigators are on the way to the location of the crisis, reporters will be on the scene for the morning news shows. They are looking for a quote from the company by sun-up.

Under these circumstances, the following questions will be foremost.

- Does everyone in the company know who the crisis manager is?
- Does everyone at a managerial level know how to reach the crisis manager at 2:00 a.m. on Sunday morning of Christmas week?
- Does everyone in the company know that they should not give a statement on behalf of the company without clearing it with the crisis manager?
- Does the crisis manager know how to reach the appropriate corporate spokespeople and the inside and outside public relations people at 2:15 on Sunday morning the week between Christmas and New Year?

Unless all of these questions are answered in the affirmative, the opportunity to be heard during the first new cycle (which may be the only news cycle during which your crisis is on the front page before being knocked off by something else) may be lost. In addition to prompt communications, there may be other matters to be resolved before the sun comes up that will require reaching out to other members of the team. For instance, it may be necessary to get the company's internal investigation started to be prepared to answer questions from the press and from government investigators investigating the crisis. It may be important to reach the lawyers so that they can be on the scene to assist in providing an interface between the investigating entities and the company personnel. None of these things will happen unless a telephone tree has been established and is regularly updated and tested.

Being a crisis manager or a member of the crisis team, unfortunately, means having a beeper. Beeper, cell, house and temporary phone numbers must be maintained and updated on a list available to the members of the crisis team. If the company is networked, a central list can be stored on the company document network so that it can be accessed by anyone with authority. Key personnel should provide personal information for their back-up people.

D. Establishing Authority in Advance of the Crisis

Corporations, for better and for worse, generally require consensus and multiple levels of approval in order to take decisive action. This cripples companies during crises if they are not prepared.

The crisis manager must have authority to take the steps necessary to address the immediate needs of a

corporate crisis without delays for approval of expenditures for certain activities. It must be established in advance that the crisis manager can approve the issuing of public statements and the retention of outside counsel, investigators, public relations personnel and technical experts. The crisis manager must be able to approve immediate travel expenses and other incidental expenses necessary to react promptly. The crisis manager must also have the authority to issue internal statements necessary to brief company personnel and to assure a uniform and centralized communication of statements to the press and other interested parties outside the company. The crisis manager must have the authority to draw on corporate resources to provide information and expertise on an extremely expedited basis.

There are several methods to achieve this. First, the crisis manager should be given spending discretion up to an established budget. The right to retain outside personnel as needed should also be confirmed in writing. The authority to use internal resources should be made clear to managers by express authorization of the president or CEO of the company. It should be clear that the crisis manager is acting as the "secretary of state" for the highest levels of the company and that the crisis manager's directives are to be treated with the same urgency as a direct request from senior corporate management.

Another way to avoid a log jam caused by indecision over expenditures or the need for approval of crisis budgets is to purchase a "crisis management" insurance policy. These policies are usually added as an endorsement to a directors and officers liability policy. The policy can be used to create a pre-authorized budget for the retention of necessary public relations and investigation personnel.

III. Crisis Management Audits

Once the team is in place and a communications network has been established, it is helpful to run an initial "fire drill" and to do so again on an annual or at least biennial basis to test the crisis management team. This will reveal flaws in the communication system and assist everyone to be prepared in the event of an actual crisis.

The mock crisis can be created by outside public relations and legal consultants. Some care must be taken in protecting the confidentiality of the corporate crisis. If a real crisis similar to the hypothetical crisis arises later, opponents who learn of the hypothetical crisis will use it to argue that the company was on notice of the possibility of such a crisis and failed to take adequate steps to prevent it. While the crisis hypothetical should be realistic enough to provide an opportunity for testing the crisis management system, it should also be a hypothetical that would not be embarrassing to the company if publicized or introduced in evidence in a lawsuit against the company.

During the mock crisis, the outside crisis management consultants will work with the inside crisis managers to see if the system is able to direct the information to the crisis manager and through the conduit of that crisis manager on to the appropriate sources inside and outside the company. Among the things that will be examined are the following aspects of the company's response during the test hypothetical.

A. Immediate

- Is information flowing to the crisis manager and then on to a corporate spokesperson?
- Is there a statement review and approval system in place which will allow a spokesperson to be selected and to issue a statement for the company properly and in the proper format?
- Are all the necessary decisionmakers available?
- Have the crisis manager and the spokesperson for the company been identified to all company contact points so that inquiries from the outside can be routed to the right people?
- Are the company's public relations contacts to the appropriate local or national media in place?
- Are the proper inside or outside lawyers available to monitor statements from the company and other interactions within the company and outside the company for their legal implications on the long-term defense of the company?
- Are lawyers available to conduct those parts of the internal investigation which should be kept within the attorney-client or work product privileges?
- Does the company have the capability to activate an immediate internal investigation and external investigation?

B. Credible

- Is the crisis manager credible within and without the company?
- Is the corporate spokesperson selected for the issue appropriate and credible?
- Is the spokesperson for the company properly and fully informed so that his or her statements are accurate, consistent with company statements and documents and consistent with the long-term litigation and business goals of the company?

C. Consistent

- Is the company speaking with one voice?
- Do the employees appreciate the necessity of avoiding loose statements and the long-term damaging effects of corporate admissions?
- Do the company personnel handbooks and protocols adequately train company personnel on the need to direct outside inquiries to the proper personnel?

D. Helpful

- Are the people selected to interface between the company and authorities appropriate for that role?
- Are they informed enough to be helpful to the investigators so that information useful to the company can be brought to the attention of the investigators?
- Are they diplomatic enough not to inflame or create antagonism between the investigators and the company?
- Are the individuals giving statements credible and armed with information that will assist the media in reporting factual information and official company statements?
- Will the spokespeople be in the position to give information in a form that will be helpful in reassuring the company's customers and investors?

IV. Other Planning

A. Risk Management

The risk management structure should be examined. Experts in insurance, including brokers, may be able to assist with this. The question should be: Will we be able to steer a consistent course of claims management as the company moves through its primary layers of insurance or its self-retention? If the answer to this is not in the affirmative, the company will be rotating strangers through the claims management of the corporate ship during the hurricane conditions of the crisis. This could be troublesome.

B. Considerations for Risk Structuring

- Does the company have the right to participate in the selection and direction of outside counsel?
- Does the company have the right to participate in the selection and direction of coordinating counsel on multi-venue litigation?
- Will the company be able to keep its selected trial or regulatory counsel and coordinating counsel as it moves through different layers of insurance?
- Does the company have sufficient control over the claims resolution strategy to maintain a consistent position as it moves through policy layers? (A substantial deductible or self-retention may assist here.)

Another area which can be worked on in advance of a "fire drill" is document auditing to see that the company's document retention policies are being followed and that individuals within the company are sensitized to the way that corporate statements can be taken out of context and used to create a very false impression of the company's motivations in the press or in litigation. (Certainly the tobacco industry has learned this lesson.) A crisis management consulting team can also assist in helping the company to identify threats which may create crises for it and to plan for those threats.

On that note, it should be made clear that it is impossible to plan for every type of crisis a company may confront. Certainly a hotel can and should anticipate how it will respond to the rape or murder of a hotel guest. A company who knows that industry conditions make them a takeover target should consider how it will react to a hostile takeover bid. A food maker must be prepared to react to a contamination or tampering claim. A transportation company must be prepared to react to a train wreck or plane crash. Beyond the obvious, the main goals should be to have the right people, the right scope of authority for these people to act, and the ability of these people to move quickly.

V. Short-term Crisis Response

The first steps after receiving the call that a crisis is underway are the following.

- Overview Evaluation
- Forming the Team
- Establishing Deadlines
- Establishing Communications
  - Internal
  - External
- Getting Personnel in Place
- Second Level Investigation
- Initial Statements and Actions
- Continuing Investigation
- Continuing Statements and Actions

A. Overview Evaluation

The first thing to determine is whether the crisis is one that the company can contain internally without violating the law, consumer safety or the public trust. The crisis manager must use careful judgment in this regard and the decisions will not be easy. Even in instances where neither the law, consumer safety, or investor or public concerns create a need for disclosure, it may be important to prepare for disclosures in the event that the matter does become public.

The second thing to determine is what interests will be affected. Is the government already involved at the federal, state or local level? If not, is there a question as to whether they will need to be notified? Is there a question of consumer safety that may require public notification, a recall or a stop-sale? Has the crisis attracted media attention or is it likely to? If so, will it be national or local? Will it be general interest or trade interest? Is this crisis likely to result in litigation? Will it be tort, securities, employment, labor, environmental or commercial litigation? Will the interests of the company and the involved employees be aligned or will they need separate counsel?

B. Forming the Team

Having quickly scanned the crisis to determine which interests will be affected, the crisis manager must now assemble the core crisis team, which will typically include upper level management, risk management, public and investor relations and legal personnel. Calls will then be made to the designated experts internally and externally. If the government is or will probably become involved, government relations experts must be retained. If there is a question of consumer safety, product experts must be retained to determine the cause, cure and magnitude of any risks to consumers. If there is a question of securities reporting, securities lawyers will be called. If there is a question of illegality, white collar criminal experts should be contacted. If people or property have been threatened or injured, tort lawyers should be contacted. Factual investigators may need to be called in. Public relations personnel will need to be contacted and, with their assistance, a spokesperson designated. Someone will need to run the switchboard, fielding all external calls and routing them to the correct team members. Someone will need to undertake the logistical aspects of moving personnel and equipment to the scene.

C. Establishing Deadlines

With the assistance of the crisis team, deadlines need to be established immediately. If public safety is involved, what must be done by when to best protect the public? If there are government reporting requirements, which in the consumer safety area may be measured in hours, what are they? When will the affected people learn about the crisis, be they investors, consumers or customers? What is the news cycle? How soon must insurers be notified?

Working backward from these external communication deadlines, how long before these deadlines will the communicators need the results of the initial investigation and factual and legal research in order to be prepared to make complete and accurate initial statements? Working backward from the internal reporting times, when will the investigators need to be in place to begin their research and investigation so that they can give timely reports to the communicators and they can in turn give timely information externally?

D. Establishing Communications

1. Internal Communications

As soon as the crisis begins, a command post must be established. If the crisis is likely to create external interest from customers, consumers, the government or the media, a communication should be issued under the authority of senior management in whatever media will most promptly achieve its dissemination to all affected personnel, which in a larger scale crisis may be every employee of the company. This communication should tell the reader, in words which would not embarrass the company if taken out of context and read to a jury or placed on the front page of the morning paper, the general nature of the crisis, the fact that the company is investigating the crisis, and that in order to assure consistent and accurate dissemination of information, all external inquiries should be routed to the administrator for the crisis management team. It should be clear that employees are not to offer independent comments, since that could compromise the company's desire to issue the most timely and accurate information possible. The goal here is to shut all the information windows into and out of the company except for those established and controlled by the crisis team. You do not need a delivery truck driver serving as the company's spokesperson on the evening news.

Internally, the members of the team will be reporting to the crisis management headquarters. Since a series of decisions that will cut across widely disparate disciplines must be made in very short order, it will be important for the core team to be together in a central conference room with access to several phone lines and speaker phones. The decision of how and what to report to the government or the public will require the rapid gathering and integration of information from lawyers, regulatory experts, technical experts and public relations personnel. The flow of that information through the company's nervous system must be moving toward a central processing point. Otherwise, infor-

mation will flow into several pools in the company and will not move rapidly enough to support prompt decisionmaking.

Key members of the team must keep the crisis administrative assistant aware of their movements so that they can be reached at any time during the initial hours or days of the crisis.

2. External Communications

Once the internal "nervous system" is activated and information is flowing from all affected sectors to the crisis management team, decisions will be made on what should be communicated externally and the best vehicles for effecting those communications. If consumer safety is involved, is the product a registered product with limited distribution whose purchasers can be reached through warranty registrations? Is the risk such that a written communication will suffice or must more immediate communications take place? Will the proposed method of communication comply with government regulations?

If a government investigation is underway, who are the best personnel to interface with the investigators in this instance? Is the investigation primarily a legal one? In that case, lawyers may be the most helpful company contact points. Even if they are not, it may be helpful to have lawyers act in conjunction with company contacts to assure that the information communicated is accurate, helpful and not unnecessarily prejudicial to the company's future position in regulatory actions or litigation. If an investigation of technical issues is underway, it may be critical to the outcome of the investigation to provide technical assistance, either from internal experts or from retained experts, again assisted by attorneys, to assist the government investigators, who may be much more generalized in their expertise, to understand fully the technical issues and the appropriate responses for the company to make. Prompt and accurate information here may result in a much more favorable official record and response.

If the matter has prompted or will prompt public and media interest, determinations must be made on how best to present information to the public. As discussed below, a press release may be best for smaller or inexperienced companies. A spokesperson may need to be designated in other instances, who may or may not be the company's CEO or president. Remember that the qualities that may allow an executive to motivate employees, cut costs and survive tough competition may not be the qualities which will allow the CEO to convey to a watchful public that this is a corporation that is concerned with safety, integrity and the interests of its customers, consumers and the general public. On the other hand, if the CEO does present this kind of appearance, it may be very helpful to have the CEO speak for the company. These decisions must be made dispassionately and may be more easily made by outside public relations personnel, who are not part of the political structure of the company. (It may be easier for them to announce the emperor's absence of clothes.)

E. Getting Personnel in Place

The crisis manager must be close to senior management. If the crisis is far afield, a trusted lieutenant should be dispatched to the scene immediately to gauge the local response, direct the on-site investigation and provide unfiltered information to the crisis management headquarters. The lieutenant should arrive with unquestioned authority to obtain information and give tactical orders at the scene and with a discretionary budget to assure that the kingdom is not lost for want of a nail or a dedicated fax machine.

Technical personnel may need to be dispatched to the scene as well. Often, experienced counsel will be invaluable on the scene in assisting the investigation so that the record develops in a way that will be sensitive to the needs of judges and juries down the line. Investigators may need to be dispatched to the scene.

Government relations and regulatory personnel will travel to the point where they can most directly confer with their government counterparts. Company personnel familiar with the issues will be dispatched to the scene, with directions to respond to the orders of the crisis management team.

F. Second Level Investigation

While the front line team gathers information there, a background investigation should be underway within the company to research the questions which any competent reporter or government investigator will be asking. What is the history of prior notice of the condition or similar incidents? Who is the affected population? How can they be reached? What precautions were taken to avoid the crisis, to contain it and now to remedy it?

G. Initial Statements and Actions

In the author's view, unless a company is experienced in issuing public commentary and thoroughly familiar with how comments can be used by adversaries and the media, it is best to prepare a written press release to be provided in response to inquires. The release should be authoritative and should provide factual information which will do the following.

- Identify the source of the release, which will ordinarily be a company official.
- Set forth accurate factual information concerning the crisis which will assist the media and investigators.

- Describe the steps the company is taking to investigate, isolate the causes and effects of the crisis and remedy the crisis.
- If possible, reassure the recipients of the communication who are not directly affected by the crisis.
- Be no more than one to two pages in length.
- Be worded so that each sentence and phrase in the release will stand independently if extracted as a quote.
- Provide contact information.
- Tell consumers what actions they must take, if any, to protect their safety.

H. Beyond the Initial Statements and Actions

Of course, beyond the initial statements and actions, continuing investigation and continuing public statements will be required by the crisis response team in accordance with the suggestions contained earlier in this presentation.

V. Conclusion

There are a volume of extraordinary events that may pose extreme threats to any business entity. As the complexity of a firm's business increases, the diligent preparation of Crisis Management personnel and procedures is certainly warranted.

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Enforcing Electronic Contracts in the Americas

By Gerald J. Ferguson and Oliver J. Armas

I. Introduction

Business is going electronic and business law is being dragged along, whether it is ready or not. In the Americas, both North and South, courts and legislatures are grappling with the new dilemmas that e-commerce can create. These dilemmas are inherently international dilemmas, since any company that starts doing business over the Internet immediately has the potential to do international business. The purpose of this paper is to identify the issues that may arise when parties seek to form electronic contracts across national borders, to examine the solutions courts and legislatures have crafted to date, and to look at the pending legislation that may ultimately shape the process of contract formation electronically and across borders.

II. The United States Perspective

A. Sources of Law

United States lawyers pride themselves on the flexibility of the common law system and the ability of that system to adapt to new legal problems. But electronic contract formation puts that vaunted flexibility to the test. This is so because the dilemmas it creates are so new and there is no guarantee that traditional legal concepts will provide adequate answers. Complicating the situation further is the fact that there is no such thing as "U.S. law" when it comes to contract formation issues—electronic or otherwise. Rather, contract formation is, at the core, a question of state law, which means that theoretically for every question the possible answer may come in fifty variations. In attempting to make meaningful generalizations about the emerging law of e-commerce, there are three essential sources of law in addition to the limited case law: uniform acts; state legislation; and federal legislation.

1. Uniform Acts

Uniform acts are not actual laws but rather are proposed laws endorsed by the National Conference of Commissioners on Uniform State Laws ("Uniform Laws Commissioners") as a model law for state and federal legislators to adopt. The Uniform Laws Commissioners adopted the Uniform Computer Information Transactions Act (UCITA) in July 1999. Their goal in doing so was to provide uniformity in the electronic sale of computer information by electronic means. To that end, UCITA validates the sale or distribution of informational products (e.g., selling computer software via the Internet), provided the user demonstrates an agreement to be bound by the terms and conditions of the transaction.

The Uniform Laws Commissioners also attempted to stimulate electronic commerce by setting the framework for general contracting on line. Therefore, in July 1999, the Uniform Laws Commissioners approved the Uniform Electronic Transactions Act (UETA). The Uniform Laws Commissioners wanted to place electronic commerce on the same footing as paper transactions, while leaving the substantive law of contracts largely intact. The fundamental premise behind UETA is that the medium in which a record, signature or contract is created, presented or retained does not affect its legal significance. Although uniform laws are not binding on legislators, they are given great weight in promulgating new laws.

2. State Legislation

State legislatures addressing e-commerce seek to transplant traditional legal notions into the world of e-commerce. The main objective is to provide transactions occurring via electronic means with the same force and legal effect as paper transactions. This notion, however, has yet to be fully tested, since there is currently a paucity of common law (or case law construing legislation) on the subject. The few decisions that do exist also seek to encourage e-commerce by, where possible, upholding state law principles for e-commerce.

3. Federal Legislation

The federal government has also attempted to reconcile the electronic and the paper realms. Although there has been a good deal of federal legislation or regulation involving technology issues, such as the Digital Millennium Copyright Act, the Cyber Squatting Law and the electronic filing of income tax returns, there has been no federal law passed on the subject of electronic transactions. In the last term, the United States House of Representatives and the United States Senate passed differing versions of legislation that would have validated the use of electronic signatures in most commercial contracts by parties who so agree. However, the two versions were never reconciled and presented to the President for signature, primarily due to turf battles among various House and Senate Committees claiming jurisdiction over e-commerce. This legislative wrangling over e-commerce is expected to begin again in the next term, and whether any productive legislation will result remains to be seen. [Since this paper was submitted, Congress has passed, and the President has signed this legislation.]

B. Various Legal Issues

1. Recognition of Electronic Contracts

Some contracts, in order to be valid, must be in writing. Even where writing is not an absolute requirement, written contracts have been given greater weight by courts and juries. It makes sense that, when the parties have taken the time to sit down and write out their mutual understanding, the document that results is given great weight. But today parties are forming contracts by clicking on the "send" button in their e-mail. In light of the fast pace of these electronic transactions, many commentators have worried whether electronic contracts will receive undue scrutiny from the courts. It is safe to say that the overwhelming bias in the emerging e-commerce law is in favor of the enforcement of electronic contracts.

One of the most important developments in favor of the recognition of electronic contracts was the Uniform Laws Commissioners' approval of UETA this July. The purpose of UETA is to "facilitate electronic transactions consistent with other applicable law."[1] UETA requires that an electronic "record" (which, according to UETA § 2(7), is a document "created, generated, sent, communicated, received, or stored by electronic means") be given the same legal effect and enforceability as a regular written document. Thus, if a law requires a contract to be in writing, an electronic record will satisfy this requirement. In short, most electronic contracts will enjoy the same status as a regular written contract when faced with a requirement to be in writing. Although generally broad in application, UETA does contain important exceptions: It does not apply to wills and certain transactions under the Uniform Commercial Code.

The U.S. Senate and House sought to adopt the goals of UETA in drafting electronic commerce legislation last year. The Senate passed an act on 19 November 1999 stating that, "In any commercial transaction affecting interstate commerce, a contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation."[2] The House has adopted a similar provision,[3] but the two chambers were unable to resolve technical differences between their bills before the legislative session expired.

While Congress dithered, some states acted last year and adopted legislation which gives electronic contracts the same status as written agreements. In September of 1999, New York enacted a statute echoing UETA that provides that electronic records are to be given the same force and effect as those records not produced electronically.[4] Significantly, the New York statute carves out not only wills but also real property contracts. Also in September of 1999, California's Governor approved a bill enacting UETA's approach to electronic records.[5] In mid-December, the Governor of Pennsylvania signed a bill which is consistent with UETA's approach.[6] And Illinois adopted a slight variation on the same theme with Public Act 90-0759 § 5-115, which states that, "Where a rule of law requires information to be 'written' or 'in writing,' or provides for certain consequences if it is not, an electronic record satisfies that rule of law."[7]

Other states are also addressing this issue and are following UETA regarding the validity of an electronic record. This past spring, the New Jersey Assembly debated an act that would allow an electronic record to satisfy the Statute of Frauds writing requirement.[8] This proposed piece of legislation will probably be addressed in New Jersey's next legislative session. The Information Technology Division of the Commonwealth of Massachusetts drafted a Uniform Electronic Transaction Act in October of 1999[9] that adopts UETA's approach to electronic records. The legislature in Connecticut also passed an act granting electronic contracts the same status as written agreements,[10] but this was not signed by the Governor.

While electronic transactions are relatively new, legislatures are recognizing that these transactions are an important part of American commerce, and their importance will only increase in the future. As a result, states are looking for ways to promote such commerce. In navigating this uncharted territory, UETA is providing guidance to the state legislatures. Therefore, a contract that must be in writing in order to be valid can either be a "hard" document or an electronic one. States remain reluctant to permit electronic records in certain circumstances—such as wills or real property transfers—where it is essential to have accurate records that are difficult to falsify. But the problems of accuracy and falsifiability are technical problems, not legal problems. As technical solutions to these problems emerge, the challenge for lawmakers will be to adopt flexible legislation that frees business parties to take advantage of such solutions.

2. Electronic and Digital Signatures

In an attempt to promote e-commerce, states are also taking steps to give computerized signatures the same force and effect as regular penned signatures. Although UETA also addresses electronic signatures, many states enacted electronic signature legislation prior to the adoption of UETA, and there is greater variety among the states as to how such signatures are treated. Accordingly, businesses engaged in electronic commerce must be aware of these differences as commerce moves invisibly across state lines.

The problem begins with the fact that what is meant by a computerized signature can vary significantly. Under UETA, any sound, symbol or process associated with an individual seeking to sign an elec-

tronic communication is a valid signature. Thus, the notation "/s/ John Hancock" would be a valid signature under UETA. Some states, however, have taken a more conservative approach and require what is known as a "digital signature," which is a type of electronic signature. A digital signature is "created and verified by cryptography, the branch of applied mathematics that concerns itself with transforming messages into seemingly unintelligible form and back again."[11] The secret coding is usually registered with a state's electronic administrator. The advantage of a digital signature is that its validity is independently verifiable both by the parties to the agreement and by a factfinder seeking to resolve any subsequent dispute.

Further complicating the situation, Illinois has enacted legislation which allows for electronic signatures, secure electronic signatures and digital signatures. A "secure electronic signature" is similar to a "digital signature" in that it can be verified by the parties to a transaction, but is different in that there is no third party also acting as an independent source of verification. While all of these forms of computerized signatures are accepted as signature, each is given a differing legal status. An electronic signature will satisfy a signing requirement, but a secure electronic signature will form a "rebuttable presumption that it is the signature of the person to whom it correlates."[12] As a result, the party challenging the integrity of the electronic secure signature will bear the burden of rebutting the presumption that the signature was genuine. The use of state certified digital signatures is considered to be conclusive proof that a document was signed by the individual purporting to sign it, so long as proper certification procedures are followed.

Set forth in Appendix A below are summaries of representative state electronic signature legislation. As is evident from Appendix A, the states are not taking a uniform approach to electronic signatures; although it remains possible that the states will start to coalesce around the flexible approach to electronic signatures proposed in UETA. To the extent that the goal is to promote e-commerce, states would do well to follow UETA's model, which gives the contracting parties the freedom to define for themselves, through their own agreements and practices, what they will accept as an electronically signed documents. To the extent that legislatures impose their own judgments as to what constitutes a sufficiently "secure" signature to warrant recognition in the courts, these legislatures may be interfering with the ability of each industry to develop standard electronic signature practices which are best suited to the needs of each industry.

3. Click-Through Agreements

Promoting widespread recognition of electronic contracts should prove to be the easy part of developing a legal framework for electronic commerce. The more interesting question may prove to be this: what conduct constitutes sufficient conduct to form an electronic contract? In the formation of all contracts, including those created via the Internet, mutual assent by both parties is required. Traditionally, such assent was manifested by signing and exchanging documents, but in today's world of electronic commerce, the rules are changing. Current Internet technology allows parties to agree to contract simply by clicking through webpages listing the terms of the contract before consummating the transaction. Such agreements are commonly known as "click-wrap" or "click-through" agreements. (The name "click-wrap" derives from the early software agreements that came bound inside the box containing the computer software: These boxed software agreements were often referred to as "shrinkwrap agreements.")

Though "click-wrap" agreements are practical in that they facilitate speedy online commerce, some commentators have questioned their enforceability from a legal standpoint. These commentators claimed that contracts arising from a "click-through" should be unenforceable because they may deny parties (particularly small businesses and consumers) an opportunity to evaluate the terms of the agreement and to consider their consequences.[13]

Despite these criticisms of "click-wrap," the early indications from the courts are that such agreements will be upheld as enforceable. For example, in *Hotmail Corp. v. Van$ Money Pie, Inc.*, the court held that a mass-marketing "click-wrap" agreement was binding on a party, and that a party who violated the terms could be held in breach of contract.[14] A New Jersey court also addressed the validity of "click-wrap" agreements in *Caspi v. Microsoft Network*, and held that an electronic contract agreed to by a "click" of a mouse was just as binding as a written contract.[15] This result is consistent with the approach that courts have taken toward "shrinkwrap agreements": Courts have generally held these agreements to be binding.[16]

Uniform acts, such as UETA and UCITA, also are promoting the acceptance of "click-wrap" agreements. Under § 5(b) of UETA, a court should look at the "context and surrounding circumstances, including the parties' 'conduct' to determine if the buyer and seller agreed to conduct transactions."[17] Furthermore, under § 14(2), an individual may consummate an automated transaction if "the individual knows or has reason to know [that his action(s)] will cause the electronic agent to complete the transaction or performance."[18] From these two sections it follows that, if the parties knew that their "clicking" of an acceptance clause would complete a transaction, a court should hold that such conduct constitutes assent to the transaction. Already

states have begun adopting legislation based on this uniform model. In September, 1999, California adopted a bill enacting UETA § 5(b) and § 14(2).[19] Pennsylvania adopted the same language on 16 December 1999.[20] In Massachusetts, a draft proposal based on UETA has been circulating but not yet been addressed by that state's legislature.[21]

UCITA is specifically addressed to the sale and distribution of "data, text, images, sounds, mask works, or computer programs, including collections or compilations of them,"[22] activities which include the sales of computer software or information over the Internet. UCITA is intended to broadly validate such transfers over the Internet by promoting a flexible approach to determine whether a user has demonstrated his or her consent to be bound by the terms and conditions in a "click-wrap" agreement. Under UCITA, a person can manifest assent to a record or term if the person, after having an opportunity to review the record, authenticates the record or engages in other *affirmative conduct* indicating acceptance.[23] Though "affirmative conduct" has yet to be judicially defined, it seem likely that clicking "yes" on a message box after having an opportunity to view the agreement would constitute such affirmative conduct. The answer will ultimately lie in the form in which legislatures adopt UCITA or any related legislation. As of yet, no state has adopted UCITA.

Due to the high volume of electronic transfers via the Internet, the validity of "click-wrap" agreements is of prime importance for those involved in sales through the Internet. Although little guiding case law and legislation exists, current trends indicate that legislatures and courts will be willing to permit the enforcement of such agreements.

4. Enforcing Web Site Terms of Use

In an attempt to limit their liability or impose rules governing the use of their Web sites, site hosts are employing "terms of use" statements. Such terms are usually found by accessing a link located at the bottom of the webpage. Web site owners do not want to use "click-through" agreements before giving access to their Web sites because web surfers are notoriously impatient and may refuse to use a site that requires them to click through a message box every time they want to access it. Although providing access to the terms of use through a link at the bottom of the home page is more user-friendly than the potentially burdensome "click through" agreements, more serious questions arise with respect to their enforceabilty.

As mentioned above, UCITA covers computer information transactions, which includes providing information over the Internet. At § 209, UCITA validates mass-market licenses for informational products, provided the user demonstrates his or her agreement to be bound by the terms and conditions. A person can manifest assent to a record or term if the person, after having an opportunity to review the record, authenticates the record or engages in other affirmative conduct indicating acceptance. UCITA's § 209 clearly provides that an integral part of manifesting assent is the user's knowledge of or opportunity to understand the terms to which the user is agreeing. The key question is how the Web site owner gives this user the opportunity to understand what he or she is agreeing to. According to UCITA, the Web site owner can provide users with the opportunity to learn of the terms and conditions for use by "displaying prominently and in close proximity to a description of the computer information, or to instructions or steps for acquiring it, the standard terms or a reference to an electronic location from which they can be readily obtained; or disclosing the availability of the standard terms in a prominent place on the site from which the computer information is offered and furnishing a copy of the standard terms on request before the transfer of the computer information. . . ."[24] This provision suggests that Web site terms of use will be enforced so long as the Web site owner displays the link to the terms of use prominently on the home page of the Web site.

But, as mentioned above, UCITA has not yet been adopted by any state. In practice, if a Web site host wants to take every step to promote the enforceability of its terms of use, the Web site owner should employ "click-through" type agreements that require the user to agree to the terms before getting access to the site. Such agreements may be appropriate for sites that may have greater than normal liability concerns, such as sites that provide medical information.

Even if UCITA is generally adopted, all provisions in a terms of use may not be enforced. Specific provisions may be void under state law or under regulations pertaining to specific industries. Nonetheless, the early case law, and the software industry's experience with shrinkwrap agreements, suggests that many of these provisions will be enforced.

(a) Liability Disclaimers

Many Web site terms of use contain a limitation of liability clause, including typical bold-faced disclaimers about goods, services or information being provided "as is" with no representations or warranties, and disclaimers of any implied warranties. Under UCITA, the liability of the Web site owner can be limited—provided the user agrees to such limitations. UCITA's § 807(b) provides that "[a] party [to an Internet transaction] may recover consequential damages for losses resulting from the content of published informational content unless the agreement expressly so provides." Consequential damages include "lost profits resulting from that lost opportunity, damages to reputation, lost royalties

expected from a licensee's proper performance, lost value of a trade secret from wrongful disclosure or use, wrongful gains for the other party from misuse of confidential information, loss of privacy, and loss or damage to data or property caused by a breach."[25]

Although no court has specifically addressed the issue of a Web site disclaiming consequential damages, courts have allowed such disclaimers in the context of "shrinkwrap" agreements. In *M.A. Mortenson Co., Inc. v. Timberline Software Corp*, the buyer of computer software used by contractors in preparing construction bids brought an action against the software sellers, alleging that the software caused the buyer to submit an inaccurate bid and was damaged as a result.[26] Timberline Software shipped the diskettes in sealed envelopes that were placed inside white product boxes. The full text of the license agreement was printed on the outside of each sealed envelope. The license agreement was also printed on the inside cover of the user manuals and a reference to the license agreement appeared on the introductory screen each time the program was executed. The licensing agreement contained a limitation of liability clause, including a disclaimer of any liability for lost profits. The court found the license terms to be an enforceable part of the contract, provided it was not unconscionable. "Whether a limitation on consequential damages is unconscionable is a question of law. The burden of establishing unconscionability is on the party challenging the limitation."[27] In this case, the plaintiffs did not meet this burden, so the defendants were granted summary judgment.

(b) Indemnity

Many Web site terms of use also require the browser to indemnify the owner, provided that the user agreement specifically says so. Although the enforcement of such indemnities will ultimately turn on state law, UCITA promotes the enforcement of such indemnities so long as the indemnity provision is expressly, conspicuously and clearly placed in the terms of use.[28] The method of consent to the terms of use—click-through or displayed link—will likely be significant under the law of the state where the indemnity is sought to be enforced.

(c) Jurisdiction, Choice of Law and Choice of Forum

Again, the legal authorities available to date suggest a trend in favor of enforcing choice of law and choice of forum clauses, although the particular law of each state will be significant in this analysis. Although New York courts have not specifically ruled on Internet forum selection clauses, forum selection clauses are generally enforceable in New York, absent a showing that enforcement would be unreasonable and unjust or that the clause is invalid because of fraud or overreaching.[29] Therefore, it is likely (based on authority from other jurisdictions) that the New York courts would enforce a "click-wrap agreement" that required a Web site user to submit the user to the jurisdiction of a particular court.[30]

UCITA's § 110 allows the parties to select the forum and law to be applied. "The parties in their agreement may choose an exclusive judicial forum unless the choice is unreasonable and unjust." Additionally, § 109 of this model act provides that, "The parties in their agreement may choose the applicable law. However, the choice is not enforceable in a consumer contract to the extent it would vary a rule that may not be varied by agreement under the law of the jurisdiction whose law would apply. . . ."

Courts that have enforced forum selection clauses tend to evaluate the following factors: the intent of the parties; the manifestation of the parties' assent; and the reasonableness of the forum selection clause. The case of *Groff v. Am. Online Inc.* provides an example where a court held that a mass-market forum selection clause was enforceable.[31] The case involved America Online (AOL) customers who sued AOL, alleging that, at the time they accepted AOL's offer for unlimited service, AOL knew it would be unable to provide that service. When the plaintiffs signed up for AOL they were required to click through a "click-wrap" agreement. The "click-wrap" agreement contained a forum selection clause expressly providing Virginia law and the Virginia courts as the appropriate law forum for the litigation. The court held that, by clicking through, the plaintiff accepted AOL's terms because, although the "plaintiff had the option not to accept defendant's terms, [he] did not. He chose to go on line."[32] This court also stated that, "Generally, a plaintiff's choice of forum is entitled to great weight and should be disturbed only in exceptional circumstances."[33] The burden of persuading the court on the clause's unreasonableness was on the plaintiff, but he did not meet that burden. Thus, AOL's motion to dismiss based upon improper venue was granted.

In cases where courts have considered whether they should exercise jurisdiction over a company based on the company's Web site activity in the forum, courts have considered and given effect to forum selection clauses in Web site terms of use. In *Decker v. Circus Circus Hotel*, the plaintiffs commenced a personal injury action in a New Jersey court against Circus Circus Hotel ("Circus Circus"), a Nevada corporation with its only place of business in Las Vegas, Nevada.[34] In attempting to gain personal jurisdiction over Circus Circus, the plaintiffs argued, among other things, that Circus Circus maintained a Web site for customers to transact business nationwide. The court held that, although maintaining a Web site does open the defen-

dant to jurisdiction, the "defendant's Internet site contains a forum selection clause requiring that, by making a reservation over the Internet, customers agree to have their disputes settled in Nevada state and federal courts. This forum selection clause ought to be enforced."[35] Therefore, the action was transferred to the District Court of Nevada.

While no courts have addressed the level of prominence of a "terms of use" statement, disputes arising over this issue are sure to arise in the future. In the meantime, it is advisable that a host exhibit the terms of use in an obvious location on the home page. Regarding disclaimers, courts have already enforced such clauses in some circumstances and UCITA promotes the enforcement of such clauses. Therefore, it is a prudent practice to include a terms of use in any Web site, and to make the link to the terms of use as prominent as possible so long as the link does not interfere with the functional purposes of the site.

III. The Latin American Perspective

A. Legal Issues Pertaining to E-Commerce in Latin America

Latin America has one of the world's fastest growing rates on Internet connectivity. Several factors have contributed to the increasing use of e-commerce in Latin America. These include the widespread access to computers by comparatively large segments of Latin America's middle and professional classes (which have been fueled lately by accessible options both to Internet service and computers like the recent offer of low-cost computers by Mexico's Telmex to users of its Internet service) and the continuing exposure through the media, especially television, to the varieties of e-commerce. Free trade treaties have also played an important role in Latin America's embrace of e-commerce by allowing the penetration of distributors and firms which engage in e-commerce activities in the United States. The combination of these factors will cause e-commerce to grow rapidly in a region whose international trade itself has grown exponentially in the last decade, particularly since the advent of NAFTA and MERCOSUR.

There is a concern, however, that current laws in Latin America governing commercial transactions are not well suited to regulate electronic transactions, and, thus, may hinder the development of e-commerce. Specifically, Latin American transactional laws are still heavily influenced by nineteenth century civil codes, which require certain formalities in the formation of contracts. The prevailing principles in Latin American legal systems have a close relation to the paper/handwritten signature environment. They do not recognize electronic messages in such systems generally, and it is therefore not surprising that considerable uncertainty exists with respect to the enforceability of electronic contracts and undertakings. This uncertainty applies to issues as basic as whether an electronic contract is enforceable, especially when its amount exceeds that mentioned in the statute of frauds provision of civil or commercial codes. And though many commercial codes regulate activities with or between merchants, it is not clear if these commercial codes would enforce a contract lacking the traditional writing or signature requirements. It is also unclear what would be the evidentiary value of electronic messages and the validity of electronic documents.

Several Latin American countries such as Argentina, Brazil, Chile, Colombia, Ecuador, Mexico and Peru have either proposed or enacted regulations, or tried to adapt or expand traditional legal notions to include the electronic equivalents. Following this article as Appendix B is a list of such legislation. Since the discussion of all the currently proposed and enacted e-commerce legislation in Latin America is beyond the scope of this article, we have taken the example of Mexico's proposed amendments to its commercial code as an example of the existing legal obstacles to the development of e-commerce in Latin America.

B. Legal Issues Under Mexican Law

The growth and popularity of e-commerce in Mexico have prompted the need to effect changes to the Mexican Commerce Code so that electronic transactions will be recognized under the law, legal security will be provided to parties that enter such transactions, and innovative electronic developments will be recognized (i.e., inspecting a product electronically via a photograph). The challenge to the Mexican legal system, where formality takes precedence over substance, is to implement such changes without disrupting the normal paper and notary-based commercial transactions contemplated by traditional Mexican law.

A bill was introduced to the Mexican Congress on 29 April 1999 to amend the Mexican Commerce Code to recognize electronic transactions and thus enhance the security and effectiveness of e-commerce. This bill is based on the UNCITRAL model laws. Its general purpose is to remove the existing obstacles to e-commerce and take into consideration new advances that change the nature of commercial relationships. The proposed bill's principal aspects include the recognition that electronic contracts are valid and binding, rules for the judicial system to recognize documents that are electronic in nature, recognition that certain types of written agreements may be substituted by electronic documents, and rules for the reception and approval of documents and for public key encryption and electronic certification.

1. Electronic Contracts

For example, one could argue that, when the parties enter into an electronic contract, they have, pursuant to current legislation, reached a "verbal" (i.e., non-written) agreement where they have agreed on the principles of offer, acceptance and price. The problem surfaces when there is a breach and there is a need to enforce the validity of such a contract in court. With verbal agreements, the first choice of evidence would be to rely on witness testimony absent the agreement or transaction. However, it is unlikely that during an electronic transaction there would be many witnesses, and, even if there were, they would likely be witnesses to unilateral acts, which Mexican courts generally dismiss as lacking in probative value. Further, any electronic records ancillary but related to the transaction would also not be recognized by Mexican courts.

To counter these stumbling blocks, the proposed amendments to the Commerce Code (the "Amendments") lay out the basic foundations for the recognition of electronic agreements between the parties under Mexican law. They establish definitions of data messages, electronic data exchange, originator of a data message, recipient, intermediary and information system. Specifically, the Amendments establish that "judicial value, validity or binding force will not be withdrawn from the information simply because it is contained in electronic, electromagnetic, optical or other similar medium." The Amendments also set forth that the data message will have the same value as written documents and any writing requirement can be met by the data message if its information can be accessed later for consultation.

Under the Amendments, the breach of an electronic contract would have had a different outcome than that mentioned above. Once the validity of a data message is established and it is determined that its contents can have the same effects as a written document, the court can determine whether the electronic document properly expresses the intention of the parties (and avoid dealing with the existence of the electronic agreement per se) and rule accordingly.

In e-commerce transactions, the lack of one document containing all of the parties' original signatures can become a major obstacle to its enforcement in Mexico. Traditionally, courts view a document with original signatures as the strongest evidence that the parties were present at the execution of the agreement and manifested their consent to all terms by signing the agreement. The proposed Amendments allow for the consent of the parties (i.e., the signature) to be contained in two different data messages as long as the origin of the respective offer and acceptance can be independently verified.

Despite the Amendments, however, the Mexican legal and judiciary systems are highly inflexible, and courts are likely to continue to rule that electronic transactions fall short of establishing the security provided by paper transactions, which by their nature are viewed as less prone to alteration than electronic messages. Although the Amendments provide and encourage the exchange of data messages to express the intention of the parties, the reality under the Mexican system is that any significant electronic contract would have to be entrusted to a third party to guarantee the integrity of its contents and to store it to protect against alteration. Although the Amendments make specific reference to the use of services by a third party to safeguard the data messages, it is not specific as to which institutions or entities should be used. Traditionally in the Mexican Civil law system, similar functions are entrusted to a Notary Public. Notaries in Mexico and throughout Latin America not only participate in the documenting of different types of transactions, but also in ascertaining a party's authority to act and to certify the authenticity of signatures in a document. It is thus likely that Notaries will assume the storage and certification roles contemplated by the Amendments and similar e-commerce legislation pending in Latin America.

2. Digital Signatures

The Amendments recognize electronic signatures and numerical signatures pursuant to the standard model laws of UNCITRAL. The Amendments establish that, as a general rule, when the law requires the signature of an individual, this requirement will be met with respect to a data message if the electronic signature uses a method to identify the signatory and such method is reliable. There is no standard to determine either the reliability of the method or the type of method to be used. Contrary to the customary form in Mexican legislation, the Amendments simply state that the sophistication of such method to identify the signatory will depend on the contents or nature of the data message. It leaves such determination open to the agreement of the parties and, presumably, to be made before entering into the contract.

The ultimate weight given to digital signatures will depend on the strength of the certification backing the signature, and, for this purpose, the Amendments make the following classification of electronic signatures.

- *Electronic Signatures*: These are the data contained in electronic format in a data message, attached or logically associated to it and that can be used to identify the signatory of the data message to approve its contents.
- *Certified Electronic Signatures*: These are signatures that can be immediately verified through the application of a security procedure (or a combina-

tion of security procedures). The purpose is to identify the signatory of the data message and to identify any alteration to the message. These signatures have to go through a certification procedure by the relevant certifying entity. The Amendments are not clear about the certification procedure, presumably to avoid having outdated legislation due to the rapid advancement of e-commerce and technology. They only refer to the obligation of the certifying entities to use procedures that comply with national and international technical standards to determine if a data message has been altered from a specific moment in time.

- *Numerical Signatures Backed by Certificates*: These signatures are based on a public key security scheme and are backed by a certificate issued by a certifying entity. The Amendments establish that "certifying entities" are those that issue identification certificates related to the cryptographic codes used for numerical signatures.

3. Click-Through Agreements

Neither the Commerce Code nor the Amendments refer to "click-through" agreements. However, if the Amendments are passed and electronic messages are generally recognized, we can view "click-through" agreements as analogous to "adhesion contracts" (which are generally covered under the Mexican Consumer Protection Law). These agreements are generally defined as those in which one of the parties (usually the purchaser) consents to all the terms and conditions contained in a ready-made agreement unilaterally prepared by the service or product provider (i.e., the terms and conditions on a purchase order, a timeshare agreement, waybill agreements, carriage contracts for airline, train and bus tickets, etc.). Such agreements are generally binding under Mexican law if specific conditions are met. Thus their treatment and enforcement could be possible with existing legislation as long as the "click-through" agreement establishes jurisdiction in Mexico. Choosing any other venue would, under current legislation, render such an agreement invalid.

Endnotes

1. UETA § 6(1).
2. S. 761, 106th Cong. (1999).
3. *See* H.R. 1714, 106th Cong. (1999). These two proposals will not become law until Congress submits a unified version to the President and the President signs it.
4. *See* N.Y.S. AO2566, 2566—B, § 5-1709(3) (1999).
5. *See* Title 2.5 § 1633.7.
6. *See* Pa. Senate Bill 555, § 302 (1999).
7. 5 Ill. Comp. Stat. 175, § 1-101 (1999).
8. *See* N.J. No. 3039, 208th Legis. (1999).
9. *See* Commonwealth of Massachusetts Uniform Electronic Transactions Act Draft (26 Oct. 1999) (a copy of this draft can be found at http://www.magnet.state.ma.us/itd/legal/ueta-mass.htm).
10. *See* Conn. Sub. Bill No. 6592 (1999).
11. A.B.A. Section Of Science And Technology Information Security Committee, Digital Signature Guidelines Tutorial. *See* http://www.abanet.org/scitech/ec/isc/dsg-tutorial.html.
12. 5 Ill. Comp. Stat. 175.
13. *See* Founds, *Shrinkwrap And Clickwrap Agreements: 2B Or Not 2B?*, 52 Fed. Comm. L.J. 99, 101 (1999).
14. *See Hotmail Corp. v. Van$ Money Pie, Inc*, 1998 WL 388389 (N.D.Cal.).
15. *See Caspi v. Microsoft Network, LLC.*, 323 N.J. Super. 118 (1999).
16. *See*, *e.g.*, *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir 1996).
17. UETA § 5(b).
18. UETA § 14(2).
19. *See* Civil Code Of California Div. 3 Title 2.5, § 1633.1.
20. *See* Pa. Senate Bill No. 555, Printer's No. 1555, § 301(b), § 307(g)(2) (1999 Session).
21. *See* Commonwealth of Massachusetts Uniform Electronic Transactions Act Draft (26 Oct. 1999) (a copy of this draft can be found at http://www.magnet.state.ma.us/itd/legal/ueta-mass.htm).
22. UCITA § 102(35).
23. UCITA § 112.
24. UCITA § 211.
25. UCITA § 102, reporter's notes (comments on previous draft on parallel provision).
26. *See M.A. Mortenson Co., Inc. v. Timberline Software Corp.*, 970 P.2d 803 (Wash. App. 1999).
27. *Id.* at 811.
28. *See THC Holdings Corp. v. Tishman*, 1998 WL 305639 (S.D.N.Y.) ("The right to indemnification . . . may be based upon an express contract or an implied obligation.) (citations omitted); *Teal v. Pittson Co., Inc.*, 1993 WL 85989 (E.D. Pa.) (noting that under California law, "when parties expressly contract regarding a right to indemnification, the extent of that right is determined solely from the pertinent contract language.").
29. *See Personius v. Butters*, 249 A.D.2d 831 (3d Dep't 1998); *Nat'l Union Fire Ins. Co. v. Williams*, 223 A.D.2d 395 (1st Dep't 1996) ("It is the policy of the courts of [New York] State to enforce contractual provisions for choice of law and selection of a forum for litigation. It is settled that a selection of forum clause affords a sound basis for the exercise of personal jurisdiction over a foreign defendant. Forum selection clauses should be enforced absent a showing that they result from fraud or overreaching, that they are unreasonable or unfair, or that their enforcement would contravene some strong public policy of the forum.").
30. *See Caspi v. Microsoft Network, LLC,* 323 N.J. Super. 118 (1999).
31. *See Groff v. Am. Online Inc.*, 1998 WL 307001 (R.I. Super).
32. *Id* at *6.
33. *Id.*
34. *See Decker v. Circus Circus Hotel*, 49 F. Supp. 2d 743 (D.N.J. 1999).
35. *Id.* at 748.

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APPENDIX A

Current Electronic Signature Legislation

California

ACT: The Uniform Electronic Transactions Act: California Civil Code (adding Title 2.5 (commencing with § 1633.1) to Part 2 of Division 3) & California Financial Code (amending § 18608) (1999 California Senate Bill 820).

STATUS: Enacted 16 September 1999.

COVERAGE: Electronic signatures.

APPLICABILITY: "This title applies to any electronic record or electronic signature created, generated, sent, communicated, received, or stored on or after January 1, 2000."

DEFINITION OF ELECTRONIC SIGNATURE: § 1633.2(h): "'Electronic Signature.' An electronic sound, symbol, or process attached to or logically associated with an electronic record and executed or adopted by a person with the intent to sign the electronic record."

EFFECT GIVEN TO AN ELECTRONIC SIGNATURE: § 1633.7 (a): "A record or signature may not be denied legal effect or enforceability solely because it is in electronic form."

§ 1633.7(d): "If a law requires a signature, an electronic signature satisfies the law."

§ 1633.9 (a): "An electronic record or electronic signature is attributable to a person if it was the act of the person. The act of the person may be shown in any manner, including a showing of the efficacy of any security procedure applied to determine the person to which the electronic record or electronic signature was attributable, (b) The effect of an electronic record or electronic signature attributed to a person under subdivision (a) is determined from the context and surrounding circumstances at the time of its creation, execution, or adoption, including the parties' agreement, if any, and otherwise as provided by law."

Florida

ACT: Electronic Signature Act of 1996, §§ 282.70 *et seq*. (1996 Florida Senate Bill 942).

STATUS: Enacted 25 May 1996.

COVERAGE: Digital and electronic signatures.

APPLICABILITY: Generally applicable to all communications.

DEFINITION OF ELECTRONIC SIGNATURE: "'Electronic signature' means any letters, characters, or symbols, manifested by electronic or similar means, executed or adopted by a party with an intent to authenticate a writing. A writing is electronically signed if an electronic signature is logically associated with such writing."

EFFECT GIVEN TO AN ELECTRONIC SIGNATURE: "[A]n electronic signature may be used to sign a writing and shall have the same force and effect as a written signature."

DEFINITION OF DIGITAL SIGNATURE: "'Digital signature' means a type of electronic signature that transforms a message using an asymmetric cryptosystem such that a person having the initial message and the signer's public key can accurately determine: (a) Whether the transformation was created using the private key that corresponds to the signer's public key; (b) Whether the initial message has been altered since the transformation was made."

EFFECT GIVEN TO A DIGITAL SIGNATURE: Same as an electronic signatures.

Illinois

ACT: Illinois Electronic Commerce Security Act (1997 Illinois House Bill 3180); 5 Ill. Comp. Stat. 175.

STATUS: Enacted 14 August 1998.

COVERAGE: Electronic Signatures, Secure Electronic Signatures and Digital Signatures.

APPLICABILITY: Generally applicable to all communications.

DEFINITION OF ELECTRONIC SIGNATURE: "'Electronic signature' means a signature in electronic form attached to or logically associated with an electronic record."

EFFECT GIVEN TO AN ELECTRONIC SIGNATURE: "Where a rule of law requires a signature, or provides for certain consequences if a document is not signed, an electronic signature satisfies that rule of law." However, these provisions would not apply: "(1) when [their] application would involve a construction of a rule of law that is clearly inconsistent with the manifest intent of the lawmaking body or repugnant to the context of the same rule of law . . . ; (2) to any rule of law governing the creation or execution of a will or trust, living will, or healthcare power of attorney; and (3) to any record that serves as a unique and transferable instrument of rights and obligations including, without limitation, negotiable instruments and other instruments of title wherein possession of the instrument is deemed to confer title, unless an electronic version of such record is created, stored, and transferred in a manner that allows for the existence of only one unique, identifiable, and unalterable original with the functional attributes of an equivalent physical instrument, that can be possessed by only one person, and which cannot be copied except in a form that is readily identifiable as a copy."

DEFINITION OF SECURE ELECTRONIC SIGNATURE: "If, through the use of a qualified security procedure, it can be verified that an electronic signature is the signature of a specific person, then such electronic signature shall be considered to be a secure electronic signature at the time of verification, if the relying party establishes that the qualified security procedure was: (1) commercially reasonable under the circumstances; (2) applied by the relying party in a trustworthy manner; and (3) reasonably and in good faith relied upon by the relying party."

"A qualified security procedure . . . is a security procedure for identifying a person that is: (1) previously agreed to by the parties; or (2) certified by the Secretary of State . . . as being capable of creating, in a trustworthy manner, an electronic signature that: (A) is unique to the signer within the context in which it is used; (B) can be used to objectively identify the person signing the electronic record; (C) was reliably created by such identified person, (e.g., because some aspect of the procedure involves the use of a signature device or other means or method that is under the sole control of such person), and that cannot be readily duplicated or compromised; and (D) is created, and is linked to the electronic record to which it relates, in a manner such that if the record or the signature is intentionally or unintentionally changed after signing the electronic signature is invalidated."

EFFECT GIVEN TO A SECURE ELECTRONIC SIGNATURE: A "'secure electronic signature' satisfies any rule of law that requires a signature and creates a rebuttable presumption that it is the signature of the person to whom it correlates. The effect of the rebuttable presumption is to "place on the party challenging the integrity of a secure electronic record or challenging the genuineness of a secure electronic signature both the burden of going forward with evidence to rebut the presumption and the burden of persuading the trier of fact that the nonexistence of the presumed fact is more probable than its existence."

DEFINITION OF DIGITAL SIGNATURE: "'Digital signature' means a type of electronic signature created by transforming an electronic record using a message digest function and encrypting the resulting transformation with an asymmetric cryptosystem using the signer's private key such that any person having the initial untransformed electronic record, the encrypted transformation, and the signer's corresponding public key can accurately determine whether the transformation was created using the private key that corresponds to the signer's public key and whether the initial electronic record has been altered since the transformation was made. A digital signature is a security procedure."

EFFECT GIVEN TO A DIGITAL SIGNATURE: "A digital signature that is created using an asymmetric algorithm certified by the Secretary of State . . . shall be considered to be a qualified security procedure for purposes of identifying a person . . . if: (1) the digital signature was created during the operational period of a valid certificate, was used within the scope of any other restrictions specified or incorporated by reference in the certificate, if any, and can be verified by reference to the public key listed in the certificate; and (2) the certificate is considered trustworthy (i.e., an accurate binding of a public key to a person's identity) because the certificate was issued by a certification authority in accordance with standards, procedures, and other requirements specified by the Secretary of State, or the trier of fact independently finds that the certificate was issued in a trustworthy manner by a certification authority that properly authenticated the subscriber and the subscriber's public key, or otherwise finds that the material information set forth in the certificate is true."

Minnesota

BILL: 1998 Minn. Chapter Law 321 (1997 Minnesota Senate Bill 2068) (Amends Minnesota Electronic Authentication Act, Minn. Stat. Ann. § 325K).

STATUS: Enacted 23 March 1998.

COVERAGE: Digital Signatures.

APPLICABILITY: Generally applicable to all communications.

DEFINITION OF DIGITAL SIGNATURE: "'Digital signature' or 'digitally signed' means a transformation of a message using an asymmetric cryptosystem such that a person having the initial message and the signer's public key can accurately determine: (1) whether the transformation was created using the private key that corresponds to the signer's public key; and (2) whether the initial message has been altered since the transformation was made."

New York

ACT: Chapter 57A of the Consolidated Laws: The State Technology Law (includes Article I: The Electronic Signatures and Records Act)(1999 New York Senate Bill 6113).

STATUS: Introduced 4 August 1999; Enacted 28 September 1999.

COVERAGE: Electronic and digital signatures.

APPLICABILITY: Generally applicable to all communications, with specific exceptions found in § 107.

DEFINITION OF ELECTRONIC SIGNATURE: § 102-3: "'Electronic signature' shall mean an electronic identifier, including without limitation a digital signature, which is unique to the person using it, capable of verification, under the sole control of the person using it, attached to or associated with data in such a manner that authenticates the attachment of the signature to particular data and the integrity of the data transmitted, and intended by the party using it to have the same force and effect as the use of a signature affixed by hand."

§ 107: "Exceptions. This article shall not apply: (1) To any document providing for the disposition of an individual`s person or property upon death or incompetence, or appointing a fiduciary of an individual`s person or property, including, without limitation, wills, trusts, decisions consenting to orders not to resuscitate, powers of attorney and health care proxies, with the exception of contractual beneficiary designations. (2) To any negotiable instruments and other instruments of title wherein possession of the instrument is deemed to confer title, unless an electronic version of such record is created, stored or transferred pursuant to this article in a manner that allows for the existence of only one unique, identifiable and unalterable version which cannot be copied except in a form that is readily identifiable as a copy. (3) To any conveyance or other instrument recordable under article nine of the real property law. (4) To any other document that the electronic facilitator has specifically excepted, pursuant to the rules and regulations of the electronic facilitator, from the application of this article."

EFFECT GIVEN TO AN ELECTRONIC SIGNATURE: § 104-2: "In accordance with this section unless specifically provided otherwise by law, an electronic signature may be used in lieu of a signature affixed by hand. The use of an electronic signature shall have the same validity and effect as the use of a signature affixed by hand."

§ 106: "In any legal proceeding where the provisions of the Civil Practice Law and Rules are applicable, an electronic record or electronic signature may be admitted into evidence pursuant to the provisions of article forty-five of the Civil Practice Law and Rules including, but not limited to section four thousand five hundred thirty-nine of such law and rules."

DEFINITION OF DIGITAL SIGNATURE: Included in the definition of electronic signatures.

EFFECT GIVEN TO A DIGITAL SIGNATURE: Same as Electronic Signature.

ACT: Electronic Signatures Act (1999 New York Assembly Bill 2566)

STATUS: Introduced 25 January 1999; amended and recommitted to the Judiciary Committee on 21 June 1999; signed into law by the Governor on 29 September 1999.

COVERAGE: Electronic and Digital Signatures.

APPLICABILITY: Generally applicable to all communications.

DEFINITION OF ELECTRONIC SIGNATURE: § 5-1703(2): "'Electronic signature' shall mean an electronic identifier, including without limitation a digital signature, which is unique to the person using it, capable of verification, under the sole control of the person using it, attached to or associated with the data in such a manner that authenticates the attachment of the signature to particular data and the integrity of the data transmitted, and intended by the party using it to have the same force and effect as the use of a signature affixed by a hand."

EFFECT GIVEN TO AN ELECTRONIC SIGNATURE: § 5-1707(2): "In accordance with this section unless specifically provided otherwise by law, an electronic signature may be used in lieu of a signature affixed by hand. The use of an electronic signature shall have the same validity and effect as the use of a signature affixed by hand."

§ 5-1711: "In any legal proceeding, an electronic record or electronic signature shall not be denied into evidence on the ground it is an electronic record or electronic signature."

DEFINITION OF DIGITAL SIGNATURE: Included in definition of Electronic Signature.

EFFECT GIVEN TO A DIGITAL SIGNATURE: Same as an electronic signature.

OVERSIGHT AUTHORITY: § 5-1707 (1): "The electronic administrator shall establish rules and regulations governing the use of electronic signatures."

Pennsylvania

ACT: Pennsylvania Electronic Transactions Act

STATUS: Signed into law on 16 December 1999.

COVERAGE: Electronic signatures.

APPLICABILITY: Generally applicable to electronic signatures relating to a sales transaction.

DEFINITION OF ELECTRONIC SIGNATURES: § 103: "An electronic sound, symbol or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record."

EFFECT GIVEN TO AN ELECTRONIC SIGNATURE: § 303(d): "If a law requires a signature, an electronic signature satisfies the law."

Virginia

ACT: Virginia Code §§ 59.1-467 to -469 (1997 Virginia Senate Bill 923).

STATUS: Enacted 19 April 1997.

COVERAGE: Electronic Signatures.

APPLICABILITY: Applies generally to all communications.

DEFINITION OF ELECTRONIC SIGNATURE: Uses the term "Digital Signature" to refer to electronic signatures. The term "Digital Signature" is defined as an electronic identifier, created by a computer, intended by the party using it to have the same force and effect as the use of a manual signature."

EFFECT GIVEN TO AN ELECTRONIC SIGNATURE: "Where law requires a signature, or provides for certain consequences in the absence of a signature, that law is satisfied by a digital signature."

DEFINITION OF DIGITAL SIGNATURE: Although the term is used, the statute does not restrict the term "digital signature" to those signatures employing specific technology.

EFFECT GIVEN TO A DIGITAL SIGNATURE: See above.

APPENDIX B

E-Commerce Legislation in Latin America

Argentina

- Proposed law on digital signatures.
- Decree 427/98: Digital Signatures for the Public Administration.
- Resolution 212/98: Certification Policies for the Licensing of Certifying Authorities.
- Proposed modifications to the Civil and Commercial Code.

Brazil

- Proposed law on e-commerce and digital signatures.

Chile

- Presidential Decree No. 81 of 1999: use of digital signatures and electronic documents within the administration of the State.
- Proposed law on electronic documents.

Colombia

- Law 527: access and use of data messages, regulation of electronic commerce and digital signatures, and the establishment of certifying entities.

Ecuador

- Proposed law on electronic commerce, electronic signatures and data messages.

Mexico

- Proposed amendments to the Commerce Code regarding electronic commerce and electronic signatures.

Perú

- Proposed legislation regulating electronic contracts and signatures.
- Proposed law on electronic crime.

EU and Irish Internet Law: An Overview

By Anthony Burke

I. Introduction

The Irish economic landscape is rapidly becoming an electronic commerce "platform" to serve the rest of Europe and the world, with many international companies investing significant sums to create e-commerce centers within the country. Ireland's favorable economic climate, the rapidly increasing availability of the necessary bandwidth and attractive governmental assistance coupled with a favorable corporate taxation regime are all factors that have contributed to this investment.

In tandem with economic developments, the Irish Government has endeavored to stimulate investment in electronic commerce by developing a lightly regulated but sophisticated legal framework facilitative of and receptive to electronic commerce. The development of this legal framework is being influenced by developments at EU level. Thus, this outline of some of the relevant legal issues in e-commerce will review and arguably must focus on developments at both the Irish and the European levels.

II. The Irish Perspective

A. Electronic Signatures and The Electronic Commerce Consultation Paper

The validity and recognition of electronic contracts is currently being addressed by the Irish Government in the context of implementing the EU Electronic Signatures Directive.[1] In August, 1999, the Irish Government published its *Outline Legislative Proposals on Electronic Signatures, Electronic Contracts, Certification Service Provision and Related Matters* ("the Proposals"), and it is the stated aim of the Government to have an "Electronic Commerce Act" in place by June 2000. The Proposals embrace the provisions of the EU Electronic Signatures Directive and, when implemented, will seek to transpose this Directive into Irish law. However, the scope of the Proposals extends beyond the mere implementation of the Directive in order to further facilitate legal certainty in e-commerce transactions.

The entire thrust of the Government's e-commerce initiative is to provide for the recognition and validation of electronic transactions. The current legal uncertainty in Ireland as to the validity of electronic signatures and electronic contracts will remain until the Proposals become law. Overall, the Proposals adopt a light regulatory approach in dealing with the relevant issues while aiming to be as "technology-neutral" as possible so that any legislation does not become outdated by future technological developments.

Part B of the Proposals deals with electronic signatures and advanced (encrypted) electronic signatures, which are both broadly defined. Section 7.2 of Part B provides that electronic signatures and advanced electronic signatures will have the same effect for the purposes of any law as that of a manual signature. Section 7.3 goes on to provide that the parties to a transaction may agree to exclude these rules relating to the recognition of electronic signatures.

The Proposals list a number of exceptional situations where this equal recognition of electronic and manual signatures will not apply. The exceptions include wills, trusts, power of attorney documents and documents relating to the sale of an interest in real property.

Section 8 of the Proposals deals with electronic writing and deems electronic writing as having the same status as writing in paper form, provided the electronic writing is retained for subsequent reference. Again, this provision is subject to certain exceptions.

Section 9 of the Proposals gives the same legal recognition to electronic contracts that is afforded to contracts in writing, subject to certain exceptions.

Section 9.16 expressly provides for the formation of contracts through an electronic medium. However, this provision does not fully deal with the procedures for the electronic acceptance of offers. In order for this provision to facilitate fully online contracts, it will have to address the issue of online formation and acceptance of contracts in more detail.

The Proposals also address the issue of the electronic delivery of documents. They clarify the issues in relation to the delivery and receipt of electronic documentation and provide that the effect of delivery of a document in electronic form is the same for the purposes of any law as that of delivery by hand of the document in paper form. The Proposals also accord, subject to certain exceptions, parity of legal standing to electronic originals with paper originals.

The Proposals go on to provide for the admissibility of electronic signatures, electronic writing and electronic originals in legal proceedings. These provisions are in accordance with the EU Electronic Signature's Directive and the UNCITRAL Model Law on Electronic Commerce.

Section 16 of the Proposals addresses the issue of the accreditation of service providers and indicates that the Minister may, by regulations, introduce a voluntary accreditation scheme for the providers of enhanced electronic signature certification services.

Section 17.1 of the Proposals provides that Certification Service Providers (CSPs) that issue qualified electronic signature certificates or guarantee an electronic signature certificate will be liable for any damage caused to any person who reasonably relies on such certificates, unless the CSP proves that it has not acted negligently. This draft provision is reasonably fair from the perspective of the CSP, since it creates an important defense to liability for damage caused in the provision of the service by providing that the CSP will not be liable where it has not acted negligently. This means that CSPs will not be strictly liable for any damage caused to persons who rely on its certification services, but rather the CSPs will only be liable in circumstances where they have acted negligently.

Section 17.3 of the Proposals provides that a CSP who has issued a qualified certificate to the public is liable for damages caused to any person who reasonably relies on the certificate. Again, this potential liability is limited in that the CSP will have a valid defense if it can demonstrate that it has not acted negligently. Section 17.4 provides a mechanism whereby the CSP may attempt to limit its liability. Section 17.5 is also helpful in this regard, since it enables the CSP to indicate in the qualified certificate a limit on the value of transactions for which the certificate can be used.

Section D of the Proposals deals with the registration of domain names. The Minister for Public Enterprise has indicated her intention to review the rules governing the registration of the .ie domain names. Section 18 of the Proposals outlines the specific aspects of registration of domain names which the Minister may review.

Section 19 of the Proposals goes on to create an offense for the fraudulent use of electronic signatures. This provision aims to promote a degree of trust in the Irish e-commerce regime.

Perhaps the most contentious aspect of the Proposals is contained in Section 20. It addresses the vexed issue of the interception of electronic communications. It provides for lawful access to evidence only on the basis of a search warrant where an offense or suspected offense under any provision of the proposed electronic commerce legislation has occurred. The Proposals go on to stress that this provision is not "an enabler of mandatory key escrow or key recovery as the Government recognizes industry concerns that making these a feature of the e-commerce regulatory landscape could hinder the development and growth of electronic commerce in Ireland."

Therefore, while the powers of the authorities under Section 20 are not completely clear, the Government appears to be taking pains to highlight the light regulatory approach that they have adopted in the context of e-commerce legislation.

B. Taxation Issues

While the legal validity of electronic contracts has not been addressed by specific legislation to date, Section 209 of the Finance Act, 1999 provides for the electronic filing of tax returns. This provision is not yet in force, since it requires the Minister for Finance to make an order permitting the electronic filing of each category of taxes. There are currently ongoing high level consultations between the Revenue Authorities and professional advisers on how this might be implemented. The provision is illustrative of current government thinking in terms of what steps would be required to file validly an electronic tax return.

C. The Distance Contracts Directive

Ireland is obliged to implement by 4 June 2000 the Distance Contracts Directive[2] for the protection of consumers in respect of distance contracts. This Directive covers, *inter alia,* communications by e-mail and creates a range of obligations for online traders in areas such as prior information, cooling off periods, inertia selling and payment by card where contracts are concluded with consumers at a distance.

The Directive applies to contracts concerning goods or services concluded between a supplier and a consumer under an organized distance sales or service-provision scheme run by a supplier, who, for the purpose of the contract, makes exclusive use of one or more means of distance communication up to and including the moment at which the contract is concluded. Therefore, if the supplier and consumer come face to face prior to the conclusion of the contract, the Directive does not apply.

The term "distance communication" is also defined in the Directive as being communication not involving the simultaneous physical presence of the supplier and the consumer for the conclusion of a contract between those parties.

The Directive does not apply to contracts relating to financial services, although there is a proposal for a Directive in this regard that has not yet been adopted.

The obligations relating to prior information, written confirmation, the right of withdrawal and performance within thirty days do not apply to contracts for the supply of foodstuffs, beverages or other goods intended for everyday consumption or to contracts for the provision of accommodation, transport, catering or leisure services, where the supplier undertakes, when the contract is concluded, to provide these services on a specific date or within a specific period.

Prior to the conclusion of any distance contract, the consumer must be provided with the following information:

- The identity of the supplier and, in the case of contracts requiring payment in advance, his address.
- The main characteristics of the goods or services.
- The price of the goods or services, including all taxes.
- Delivery costs, where appropriate.
- The arrangements for payment, delivery or performance.
- The existence of a right of withdrawal (where applicable).
- The cost of using the means of distance communication, where it is calculated other than at the basic rate.
- The period for which the offer or the price remains valid.
- Where appropriate, the minimum duration of the contract in the case of contracts for the supply of products or services to be performed permanently or recurrently.

The commercial purpose of such communications must be made clear and there are obligations on the supplier to act in good faith.

The consumer must also receive written confirmation or confirmation in another durable medium available and accessible to him of the prior information referred to above. The minimum information required must contain:

- The conditions and procedures for exercising the right of withdrawal.
- The supplier's address to which the consumer may address any complaints.
- Information on after-sales services and guarantees which exist.
- The procedure for cancelling the contract, where it is of unspecified duration or a duration exceeding one year.

For any distance contract the consumer shall have a period of at least seven working days in which to withdraw from the contract without penalty and without giving any reason. The only charge that may be made to the consumer because of the exercise of the consumer's right of withdrawal is the direct cost of returning the goods.

Certain contracts are excluded, such as the sale of video or audio equipment, newspapers, and goods or services, the price of which is dependent upon fluctuations in the financial market.

Unless the parties have agreed otherwise, the supplier must execute the order within thirty days from the day following that on which the consumer forwarded his order to the supplier. Member States must ensure that appropriate measures exist to allow a consumer to :

- request cancellation of a payment where fraudulent use has been made of his payment card in connection with distance contracts covered by this Directive;
- in the event of fraudulent use, to be recredited with the sums paid or have them returned.

Member States are also required to take the measures necessary to:

- prohibit the supply of goods or services to a consumer without the goods or services being ordered by the consumer beforehand, where such supply involves a demand for payment;
- exempt the consumer from the provision of any consideration in cases of unsolicited supply in the absence of a response not constituting consent.

D. General Principles of Contract Law and the Formation of Electronic Contracts

Currently there is no specific legislation or legal provisions dealing with the formation of electronic contracts in Ireland. Therefore, recourse must be made to the traditional common law principles. In order for a valid and enforceable contract to exist at Irish law, certain requirements must be fulfilled, *viz*, there must be an offer, acceptance and consideration and an intention to create legal relations. There is no reason that these requirements cannot be satisfied in an electronic forum. However, the electronic medium does present particular issues which must be considered.

1. The Offer

Irish law creates a distinction between an "offer," which is a clear and unequivocal statement of the terms upon which a person is willing to contract, and an "invitation to treat" which is a mere invitation to receive offers. This is an essential distinction for electronic contracts. It is possible that casual representations made from a Web site or by e-mail could be sufficient to amount to an offer.

To avoid any such problems, the site must clearly indicate the procedural steps which are required to be taken prior to any contract being concluded. If the other party is clearly made aware of these requisite contractual steps, the Web site or electronic communication posted by the seller will be merely an "invitation to treat." It will therefore be the other party who makes the offer, which the seller can choose either to reject or to accept in accordance with the express terms of its contract. There-

fore, the seller can maintain control of the contractual process.

2. Acceptance

Under Irish contract law, acceptance of the offer must be unconditional. Any conditional acceptance amounts to a counteroffer. A company must therefore ensure that none of its electronic contracts can be amended by the other party prior to execution. The use of appropriate cryptographic technology can ensure the integrity of contracts sent to the other contracting party.

Unlike the position in the U.S.,[3] there is no Irish case law in relation to "clickwrap" contracts. However, there is no reason to suspect that they will not be enforceable, provided that the necessary contractual formalities are met.

Irish law also recognizes that acceptance can take place by performance. Therefore, where a contract's terms have been agreed online between two companies, the fact of delivery of goods or services may be sufficient to indicate acceptance.

Two areas to note in this section are lapse of the offer and revocation of the offer. The Web site owner should be careful to specify the time for which the offer remains open and in what instances the offer may be revoked. Further, under the EU Distance Contracts Directive referred to above, for any distance contract the consumer has a period of at least seven working days in which to withdraw from the contract without penalty and without giving any reason.

3. Consideration

Since the contractual terms will include the amount and method of payment, there would not appear to be any particular difficulties in this regard. Provision should also be made for the amendment of prices prior to the conclusion of the contract or in the event of mistake. Recently the Argos superstore chain in the UK received much negative publicity for refusing to honor online purchases of Sony television sets which were mistakenly offered for sale for £3 instead of £300. This matter may culminate in litigation, since there were thousands of attempted purchases of the televisions at the stated price before Argos became aware of the mistake.

4. Intention to Create Legal Relations

Provided the contract terms are made explicit to the other contracting party, any doubt as to legal intention can be overcome. To minimize any risk, the other party should be required to scroll through the contract terms and conditions before clicking on a button containing words along the lines of

> *I understand and accept these contract terms, which I understand are legally binding.*

E. Data Protection

The current rules governing data protection in Ireland are enshrined in the Data Protection Act, 1988. However, new legislation in this area is expected soon, since Ireland is well over a year late in implementing certain EU Data Protection legislation. The 1988 Act applies to "Data Controllers" and "Data Processors" and sets out comprehensive duties for such individuals and companies.

Section 2 of the Act sets out the Data Controller's duties. It provides that :

- The data must have been obtained, and must be processed, fairly. Information will not be regarded as being unfairly obtained if the unfairness only relates to the fact that the data subject was not informed that the data were to be used for any purpose, provided that the data are not used in such a way as to cause damage or distress to the data subject.
- The data must be accurate and kept up to date. This will not apply to back-up data, which are defined as data kept only for the purpose of replacing other data in the event of them being lost, destroyed or damaged.
- The data must be kept for only one or more specified and lawful purpose. It is unclear what the specified purpose means. This will probably be the purpose specified in the register, but it is likely and advised that entries in the register be drafted as broadly as possible to prevent difficulties of this type.
- The data must not be used or disclosed in any manner incompatible with that specified purpose or purposes. It should be noted that the word "disclose" does not include disclosures made to an employee of the data controller or processor where the disclosure is made in order to allow the employee to carry out his duties.
- The data must be adequate, relevant and not excessive in relation to the purpose or purposes specified.
- The data must only be kept for as long as is necessary for the specified purpose. This will not apply to personal data kept for historical, statistical or research purposes.
- The data controller must preserve the data by using appropriate security measures against unauthorized access to the data and by taking steps to prevent any alteration, disclosure or destruction of the data and against their accidental loss or destruction.

It should also be noted that § 7 of the 1988 Act provides that, for the purpose of the law of torts, a data controller or data processor owes a duty of care to the data subject with regard to the collection of personal data or information intended for inclusion in such data or with regard to the dealing in the data.

The following points should also be noted in relation to the provisions of the Data Protection Act.

- Under § 16(1)(b) of the Data Protection Act, 1988, data controllers who are financial institutions, insurers or persons whose business involves direct marketing, providing credit references or collecting debts are required to register with the Data Protection Commissioner.
- The Act creates a number of criminal offenses, which include knowingly furnishing false and misleading information in an application for registration.
- Registration can only last for one year and at the end of the year the entry must be removed from the register unless it is continued.
- The data subject has numerous rights under the 1988 Act, which include a right to establish the existence of personal data and a right to access personal data in certain circumstances.
- The 1988 Act contains provisions that allow transfers of data outside Ireland to be controlled by the Commissioner, who may in certain circumstances prohibit the transfer of data outside the State. In deciding whether to prohibit the transfer, the Commissioner must have regard to the provisions of Article 12 of the Strasbourg Convention (the Data Protection Act, 1988 owes its origins to said Convention). Article 12 provides that a party to the Convention must not prohibit or subject to special conditions the transfer of data between parties to the Convention, if the sole reason is to protect privacy. The objective of this is to ensure that States do not use protestations about their citizens' rights to privacy as a disguise for the restriction of trade. The Commissioner must not prohibit the transfer of data outside the State unless he believes that the transfer would lead to a contravention of the basic principles for data protection as set out in Chapter 2 of said Convention.
- If the Commissioner decides to prohibit the transport of data, then he may issue a "prohibition notice" to the person who wishes to transfer the data. Such a notice may either prohibit the transfer of data absolutely or specify conditions that must be complied with before the transfer can take place.

F. Export Controls and Encryption Technology

Ireland has been attracting high technology companies, including software design companies, for a number of years. Generally, there are no legal restrictions on the establishment of design and manufacture facilities for encryption-related products in Ireland. However, encryption products are regarded by some as akin to military products, due to the high degree of security which they can provide for many types of communication and information systems. Consequently, a number of countries, spearheaded by the US, have jointly attempted to control the export of certain types of encryption products. As a result of these international efforts to control encryption technology as well as other types of technology which may be used in a military context, the Wassenaar Arrangement came into existence.

Established in July 1996, the Wassenaar Arrangement is an alliance of thirty-three countries that maintain unified export controls on conventional arms and dual use goods (i.e., goods which have both civilian and military uses) and technologies, including computer systems and information security technology. Ireland was one of the founding members of the Wassenaar Arrangement. Under the Wassenaar Arrangement (which, since it is an arrangement and not a treaty, is not directly binding on the thirty-three States that are party to it), a comprehensive list of military and dual use products has been compiled and is updated occasionally. The framework for implementing the Wassenaar Arrangement into EU law is contained in Council Regulation 3381/94 and the Irish Government incorporated the first list of dual use products into Irish law pursuant to this Regulation by passing the Control of Exports Order in 1996. There has also been a number of EU Council Decisions amending the original list of military and dual use goods which have been applied by the Government in implementing Irish export control policy.

If an exporter, based in any state which is a member of the Wassenaar Arrangement, intends to export any product which appears on the list of military and dual use products compiled under the Wassenaar Arrangement, then such an exporter will have to comply with that state's export control regime before it may export such a product.

The list of dual use products subject to the Irish export licensing regime is divided into two categories: dual use goods which are highly sensitive and dual use goods which are not highly sensitive. Irish exporters will be required to apply for an export license when exporting highly sensitive dual use goods anywhere outside the state or when exporting dual use goods which are not highly sensitive to destinations outside the European Union and the following exempted countries: Australia,

Canada, Japan, New Zealand, Norway, Switzerland, and the United States.

In other words, export licences are not required for the movement within the European Union of dual use goods that do not come within the category of highly sensitive. The only obligation on exporters in these circumstances is to indicate on the relevant commercial documents that the goods are subject to control if exported outside the European Union. However, such exporters of dual use goods (not highly sensitive) to other EU States must comply with certain notification and record maintenance obligations.

The first time that an exporter sends controlled dual use goods (not highly sensitive) to an EU country or to one of the exempted countries the exporter must notify the Department of Enterprise, Trade & Employment export licensing unit in writing of the exporter's name and the address where its export records may be inspected. This notification must be made before, or within thirty days after, the first such export.

Exporters are also obliged to keep detailed records of transactions concerning the export of controlled dual use goods. Such records must be kept in respect of all transfers of dual use goods, including non-highly sensitive dual use goods. They must, in particular, include commercial documents such as invoices, transport and other dispatch documents which enable identification of the description of the goods, the quantity of the goods, the name and address of the exporter and the consignee and the address of the end-user. Such records must be kept for at least three years from the end of the calendar year in which the export took place.

If, on the other hand, an Irish exporter intends to export dual use goods which fall into the highly sensitive category to anywhere outside Ireland, then the exporter must apply for an export license irrespective of the destination of the goods. Category 5, part 2 of the list of dual use products is entitled "information security" and designates products listed therein as highly sensitive. These provisions deal with encryption technology and provide that encryption software and hardware will generally require an export licence where it is being sold outside the state.

However, there are a number of specific exemptions contained in this section in addition to a general exemption for encryption technology which meets a number of conditions. The general exemption is contained in a cryptography note attached to the list of dual use products and which has recently been amended. According to this general exemption, encryption products are not subject to export control when accompanying their user for their user's personal use. Additionally, controls on a number of items have been removed, such as all goods performing authentication and digital signature functions and receiving equipment for radio broadcast or paid television.

In spite of recent changes to the list of encryption products subject to export control that took effect on 18 April 1999, many powerful encryption products continue to remain on the list of highly sensitive dual use products, and thus their export will require a license. It is advised that, before any company embarks on the export of technology involving the use of encryption products, such company should ascertain whether the export of such technology is caught by the export control regime. The licensing regime itself, if applicable to the particular product, is uncomplicated and the entire process is both prompt and efficient. It should be noted that serious penalties are prescribed in Irish law for any failure to comply with the export control legislation.

III. International Jurisdictional Framework and Applicable Law

A. Brussels Convention

Ireland is a signatory of the Brussels Convention on Jurisdiction and Enforcement of Judgements in Civil and Commercial Matters, 1968, as amended. The Brussels Convention was drafted before the inception of online trading and, in its current form, does not specifically address electronic contracts.

Currently the Brussels Convention is being revised following the adoption of the Amsterdam Treaty, which provided for the Brussels Convention and the Rome Convention on applicable law to be adopted into EU law by EU Regulations. To date, the EU Commission has published a draft Regulation that would reform the rules concerning the recognition and enforcement of judgments in the EU. The text of the draft Regulation introduces a number of changes, some of which are intended to take account of new technological developments and to apply without ambiguity the specific rules on consumer contracts to e-commerce.

In its current form, the Brussels Convention lays down the principle of the jurisdiction of the state where the defendant is domiciled, but adds a number of alternative means for determining jurisdiction. In particular, there are special rules covering consumer contracts. Here the Convention provides that, in the event of a dispute, the consumer has the option of suing his contracting partner either in the courts of the state of the consumer's domicile or the contracting partner's domicile, whereas the consumer may only be sued before the courts of the state where the consumer is domiciled. Article 13(3) of the Convention requires that, before this provision protecting consumers applies,

(a) in the State of the consumer's domicile, the conclusion of the contract was preceded by a specific

invitation addressed to him or by advertising; and,

(b) the consumer took, in that State, the steps necessary for the conclusion of the contract.

Article 15(c) of the new draft Regulation that would reform the Brussels Convention will permit consumers to bring proceedings before the courts of their own state of residence where the seller "directed its activities" toward the state in which the consumer is resident and the contract "falls within the scope of such activities." Recital 13 of the draft makes it clear that these provisions will apply to the electronic sale and advertising of goods or services in the EU. Therefore, to avoid the threat of multi-state litigation the electronic goods or service provider will have to specify that its products are not intended for consumers domiciled in certain states.

It has been strongly argued that the draft Regulation will amount to a cost barrier to smaller companies involved in e-commerce, as they would be required to do a legal diligence in all fifteen Member States of the EU prior to launching their e-commerce Web sites. This would contrast with the pro-e-commerce approach taken in respect of the proposed E-Commerce Directive and the Electronic Signatures Directive.

B. Rome Convention on Applicable Law

The EU Commission has also proposed similar changes to the Rome Convention. While Article 3 of the proposed amendment to the Rome Convention allows the parties freedom to choose the applicable law of their contract, a choice of law made by the parties can not have the result of depriving the consumer of the protection afforded to the consumer by the mandatory rules of the law of the country in which the consumer has his or her habitual residence. Therefore, as with the proposed Brussels amendments, if the conclusion of the contract was preceded by a specific invitation addressed to the consumer or by advertising (including a Web site), and the consumer had taken in that country all the steps necessary on his or her part for the conclusion of the contract, the applicable law will be that of the consumer's place of habitual residence.

IV. The Perspective in Other EU Countries

A. The United Kingdom Perspective

The final text of the Electronic Communications Bill was represented to the House of Commons on 18 November 1999. Previous drafts of this Bill caused significant controversy due to provisions which enabled police and intelligence agencies to serve written notices on individuals or bodies requiring the surrender of the cryptic information or cryptographic keys. These contentious provisions have now been dropped, but are now likely to be part of a new Home Office Bill for the regulation of investigatory powers.

The Electronic Communications Bill provides for a statutory approvals regime for providers of cryptography services—although the Government is in the process of negotiating a self-regulatory scheme applicable to providers of cryptography services. The statutory approvals regime will only be developed by secondary legislation if the self-regulatory scheme fails to meet the expected standards.

The Bill also provides for the admissibility of electronic signatures in legal proceedings. The Bill has been criticized from some quarters for its failure to address issues such as the liability of Internet service providers and the regulation of unsolicited commercial e-mail. These issues will be addressed by the Government at a later stage. However, overall the Bill is an opening for providing legal recognition of electronic signatures and the power to facilitate the use of electronic communications.

At present, there are a large number of legal provisions in England which require the use by companies of paper. The Government is proposing to allow the appropriate Minister to modify such requirements so that a company can rely on electronic means to deliver corporation communications. However, such modifications will not be allowed if the relevant Minister is not satisfied that it will be possible to produce a record of what is done by electronic means.

The proposed approvals' regime for cryptography service providers is voluntary, so that providers that choose not to apply for approval can still lawfully provide the service. The Bill also contains certain proposals in relation to telecommunications licenses, which will only affect telecom operators with individual licences. Overall, the Electronic Communications Bill may be regarded as an effort to increase consumer confidence in the electronic trading environment.

B. Germany

On 1 August 1997, the German Digital Signature Law came into force. The law is designed to establish general conditions under which digital signatures are deemed secure and sets forth a voluntary technical standard, which is intended to be secure for all applications. The main legal innovation of this law is that it provides that use of the technical standard defined by law will cause a digital signature to be "deemed secure." Even so, there is no impediment to a court granting the same evidentiary value to other digital standards as to the statutory standard (e.g., based on an agreement by the parties). The advantage at present of using the statutory standard is that users thereby enjoy a legal presumption without having to agree upon it in advance, which can also save costs by not requiring the court in each case to hear evidence about the security of the standard used.

In June 1999, the German Government announced its policy on encryption. The statement is significant for its strong position against restrictions on the circulation and use of cryptology. It thus continues the trend in Europe against the restriction of cryptology, following liberalization in France and the UK.

C. France

In an address in August 1999, Prime Minister Lionel Jospin announced that the Government would present a major new law on information society in 2000. The new law will attempt to implement the recommendations of the Council of State report (July 1999). The main objectives of the new law will be to address the issues of freedom of communication (including cryptology and the protection of content and copyright) and the security of electronic transactions.

The Draft Bill on Electronic Signatures was introduced in September 1999 and it is presently before the Senate. It adapts evidence law to deal with new technologies and electronic signatures. It will considerably alter the French Civil Code by extending the definition of a written document to encompass electronic documents.

D. Spain

The Royal Decree Law 14/1999, on digital signatures, was passed by the Spanish Government on 17 September 1999. The Decree provides for the legal recognition of digital signatures. It also deals with the supervising regime to which undertakings providing certification services for digital signatures will be subject. The Decree is a piece of primary legislation that must be developed further by secondary legislation. That secondary legislation has yet to be enacted.

Article 3 of the Decree provides that the digital signature will be afforded the same legal status as its written counterpart where:

- It is an "advanced digital signature," *viz*, a digital signature identifying the signatory and issued by means held under the exclusive control of the signatory;
- the signature was produced by a "secured device"; and
- the signature is based on a "recognized certificate" which for these purposes should contain certain information and be issued by a provider of certification services complying with the requirements of the Decree. Where the Digital signature does not comply with the above requirement, it will be denied legal effect and will be excluded as evidence in any judicial proceedings.

Providers of certification services need to register as such before rendering their services to the public. The Decree sets out in detail the duties applicable to certification services. These include the duty to keep an up-to-date register of any certificates which it issues, with details on any circumstances affecting their validity and a duty to refrain from saving or otherwise copying any cryptographic keys or codes private to the applicant, except if specifically requested by the latter. The Decree goes on to provide that such certification service providers must keep any information and documentation regarding a particular recognized certificate for a term of fifteen years and that they must guarantee the provision of a fast and secure service, in particular concerning any request for access to the providers registry for certificates issued as well as to ensure a secure and immediate cancellation of certificates.

The Decree also provides for a fee recognition in Spain of certificates issued by foreign providers established in a country other than an EU member state. It provides that such certificates will be acknowledged in Spain whenever one of the following conditions is met :

- The foreign provider meets any requirements for digital signatures set up at a European level and is a certified provider pursuant to any system available in any Member State of the European Union.
- The foreign certificate is guaranteed by an EU provider which complies with any regulations established at a European level on digital signatures.
- Either the foreign certificate or the foreign provider are recognized pursuant to a Treaty between the European Union and the relevant third country or countries or international organizations.

The Decree goes on to set out a comprehensive list of infringements by certification service providers, classified as very serious, serious and minor offenses depending on matters such as the nature of the infringement. The Decree also provides that any certification service providers already established in Spain before the Decree that were rendering its services pursuant to specific legislation shall adapt to the provisions in the Decree within a year after its entry into force.

E. Italy

Digital signature legislation was enacted in March 1997 via Italian Law No. 59, Art. 15, c.2, 15 March 1997.

F. Netherlands

The Government adopted an "Information Technology: Electronic Commerce Action Plan" in March 1998. The objective of this action plan is to develop the Netherlands into one of the leading nations in the field

of electronic commerce so that it will become the "Information Gateway to Europe."

G. Denmark

A Draft Bill on Digital Signatures is currently before the Danish Parliament.

V. The European Perspective

A. The Digital Signatures Directive[4]

The European Parliament and Commission signed this Directive into law last year. The Irish Government's Consultation Paper discussed above aims, *inter alia*, to provide for the implementation of the provisions of this Directive. The broad aims of the Directive are to encourage the recognition of digital signatures within the EU and to avoid Member States adopting divergent national legislation.

Like most legislation is this area, the Directive is drafted in order to allow for emerging technologies and future international developments. It does not aim to go beyond facilitating a harmonized legal framework for the provision of electronic signatures and related services. In keeping with the evolving nature of the subject matter, the Directive also establishes a consultation Committee to review the requirements for "certification service providers" (CSPs) laid out in Annex II of the Directive and to issue from time to time generally recognized standards for electronic signature products.

The main provisions of the proposed Directive are as follows.

1. Recognition of Public/Private-key Cryptography

The Directive refers to *signature creation data* and *signature verification data*, which are defined in Article 2. Both terms explicitly recognize the public-key/private-key solution, while leaving open the option of other uniquely configured physical devices.

2. Allowance for Voluntary Accreditation Schemes

Under Article 3 of the Directive, Member States may not make the provision of certification services subject to prior authorization. Any accreditation schemes established in Member States must be voluntary.

3. No Harmonization of Contract Law

The Directive does not attempt to address the divergent contract laws of Member States, although this issue is addressed in the Proposed E-Commerce Directive.

4. Legal Validity of Electronic Signatures

The Directive purports to give legal effect to all electronic signatures, whether or not they are based upon a "qualified certificate." Where an electronic signature is based upon a qualified certificate issued by a CSP and the CSP fulfils the criteria set out in Annex II, Member States must ensure that such signatures are recognized as satisfying the legal requirements of a handwritten signature and that they are admissible as evidence in legal proceedings in the same manner as handwritten signatures.[5]

5. Harmonized Liability Rules

CSPs will be *prima facie* liable for the accuracy of information contained in the qualified certificate, the authenticity of the private key (or other signature creation device) and the compatibility of the public and private keys (or the signature creation and verification data used) unless the CSP proves that it has not acted negligently.[6] Annex II of the Directive lays down the minimum criteria for CSPs operating in the EU.

There is also provision for the CSP to limit its exposure by limiting the uses for which a particular certificate may be made or by limiting the value of transactions for which the certificate is valid.[7]

6. Respect for Data Protection Legislation

The proposed Directive includes a requirement that CSPs comply with the existing Data Protection Directive (95/46/EC). The explicit requirement to comply with Directive 97/66/EC (the processing of personal data and the protection of privacy in the telecommunications sector) was removed from an earlier draft of the Directive.

7. Investigation of Criminal Offenses

Other than in relation to the disclosure of pseudonyms, the Directive does not address the issue of legal access by authorized bodies to encrypted information for the purposes of criminal investigations. This is surprising, since the conflict between privacy and law enforcement is at the core of the entire electronic commerce debate. For example, recently there have been suggestions that the proposed UK E-Commerce Bill will contravene the European Convention on Human Rights due to its lawful access provisions.

8. Supra-national Approach

The Directive recognizes certificates issued by CSPs established in a third country that fulfil the requirements of the Directive or are recognized under international agreements. The EU is endeavoring to negotiate bilateral and multilateral agreements with third countries and international organizations in this regard.

Member States are also obliged to keep the Commission abreast of the accreditation bodies and the accredited CSPs operating in their jurisdiction.[8]

B. The Proposed Electronic Commerce Directive[9]

The Proposed Electronic Commerce Directive is currently going through the co-decision procedure with the European Parliament and the Council of Ministers. On 7 December 1999, the EU Internal Market Ministers ham-

mered out a political agreement on the provisions of this proposed Directive. These proposals will soon be sent back to the EU Parliament for a second reading. In it current form, the proposed Directive enshrines the principle of allowing information society services unimpeded movement and subjects the services to the legal requirements of the country of origin.

The proposed Directive addresses the following five key issues.

1. Information Society Service Providers

In order to be as technology-neutral as possible, so that the legislation does not quickly become outdated, the proposed Directive rarely refers to set technologies such as Internet, the World Wide Web or Internet Service Providers. Rather, the Directive will apply the idea of an "Information Society," in which consumers and businesses interact.

An Information Society Service is one which is normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services. This is a wide definition and covers both business-to-business and business-to-consumer e-commerce. The proposed Directive will only apply to Information Society Service Providers who are established within the EU.

Under the proposed Directive, a service provider will be subject to the national rules of the EU country where it has a fixed establishment for an indeterminate duration (the "country of origin" principle). This in turn means that the Member State being targeted will not be entitled to place obstacles in the way the Information Society Services. The Directive will not apply if there is no such establishment within the EU.

However, a series of exceptions to the country of origin principle have been included in the proposed Directive. Member States may take steps to impede Information Society Services if they create a risk of undermining the following objectives: protection of human health, public safety, law and order, respect for human dignity and consumer protection (including investors, an exception that allows financial services to be included). Annex 1 of the proposed Directive enumerates additional situations where the country of origin principle may be waived.

The definition of an Information Society Service Provider is designed to build on existing European jurisprudence relating to the free movement of services. So, for example, where a service provider merely has its registered office outside the EU, but it has a fixed establishment within the EU, it would be caught by the proposed Directive. As against this, merely hosting a web page or Web site or allowing access to your Web site or even targeting services to one particular Member State will not be sufficient to bring you within the Directive, unless the fixed establishment and indeterminate duration criteria are met.

In order to facilitate access to services on the Internet, the proposed Directive prevents Member States from putting up any formal barriers to entry to Information Society Service Providers. This provision has been dubbed the "right to a site."

The proposed Directive also requires that certain general information must be provided by a service provider, a sort of standard online letterhead, containing the service provider's name, address, e-mail address, trade registration number, memberships of any professional bodies, and VAT number. In order for this information to be easily accessible, one would be looking at hyperlinks to this general information which are clearly identifiable to browsers of the site. This provision is without prejudice to the Distance Contracts Directive.

2. Commercial Communications

The second area addressed by the proposed Directive is commercial communications. Again, the principle here has been to place a generic description on the interaction that takes place when a business promotes itself on the World Wide Web, by e-mail or in any traditional manner.

Commercial Communications are defined in Article 2 of the proposed Directive as being any form of communication designed to promote, directly or indirectly, the goods, services or image of a company, organization or person. While this obviously covers advertising and sponsorship, it is a very broad definition and does not restrict itself to electronically transmitted communications. Therefore, communications will include e-mails, Web sites, advertisements, direct marketing and spamming.

Article 6 of the proposed Directive is designed to oblige distributors of commercial communications to identify the commercial nature of their communications and Article 7 allows consumers the option to opt out of any junk mail or direct marketing schemes.

3. Online Conclusions of Contracts

Lawyers around the world have been vexed by the issue of how and when an online contract is concluded. While there has been some case law in various jurisdictions that adapts traditional contract law principles, such as the Postal Rule and the Receipt Rule, the area is vague at present. The proposed Directive attempts to clarify the stages that are required to conclude an online contract.

Article 11 attempts to clear up the moment at which an electronic contract is concluded. Under Article 11.1, where a recipient, in accepting a service provider's offer,

is required to give his or her consent through technological means such as clicking on an icon, the following principles apply.

- Firstly, the contract is concluded when the recipient of the service has received from the service provider, electronically, an acknowledgement of receipt of the recipient's acceptance.
- Secondly, acceptance of the offer and acknowledgment of receipt are deemed to be when the parties to whom they are addressed are able to access them.
- Thirdly, acknowledgment of receipt by the service provider shall be sent as quickly as possible.

Acceptance of the offer and acknowledgment of the acceptance are deemed to be received when the other party is able to access them. This solution is a sort of a mix of the traditional postal and receipt rules with which every contract student is familiar.

4. Liability of Intermediaries

Articles 12-15 of the proposed Directive are designed to protect ISPs and other intermediary service providers from liability for content over which they have no direct control. The principle behind these articles is that the manufacturer of information should bear the primary responsibility for its content. The proposed Directive goes on to provide that Member States may not impose requirements on intermediaries to monitor the information it stores and transmits. In order to reach agreement on this issue the Presidency of the EU has proposed to review this provision in view of technological developments three years at the latest after the legislation has been adopted.

5. Implementation

The fifth area covered in the proposed Directive relates to enforcing the provisions throughout the EU, in particular, through the use of codes of conduct, administrative co-operation and legal redress.

C. The Data Protection Directives

Directive 95/46/EC was supposed to be implemented by the Member States by 24 October 1998. However, a number of states, including Ireland, have failed to implement this legislation to date. This Directive aims to facilitate the free flow of personal data in the EU while protecting an individual's right to privacy. This Directive extends to the processing of personal data on the Internet and applies to all data controllers established in the Member States and to processing carried out by equipment in Member States unless it is only "used for the purposes of transit through the Member State."

The Directive prohibits the transfer of personal data outside of the EU unless the country to which it is transferred provides "an adequate level of protection" for personal data. It should be noted that the relationship between the US and the EU in this regard is set out in *The Joint Report on the Data Protection Dialogue to the US/EU Summit, 21 June 1999.*

The specific Directive 97/66 on the Protection of Privacy and Personal Data in the Telecommunications Sector complements Directive 95/46 by establishing specific legal and technical provisions for the telecommunications sector. The provisions of this Directive apply to the processing of personal data in connection with the provision of publicly available telecommunications services in public telecommunications networks in the EU.

VI. Conclusion

The efforts being made at the EU and Member State levels to harmonize and facilitate by way of a light regulatory framework the recognition and enforceability of contracts on-line are gaining greater momentum. It is hoped that within the next twelve months (i) a framework will be in situ in the European Union that will bring about greater certainty and equate contracts on-line with normal oral or written agreements; and (ii) no impediment will occur by reason solely of the medium by which contracts are entered into.

Such developments are to be welcomed. Naturally, practitioners will still have to assess whether contracts made online, and the terms of those contracts, are valid and enforceable in the same way as they have always had to do with written contracts.

Endnotes

1. Directive 1998/0325EC of the European Parliament and of the Council on a Community Framework for Electronic Signatures (No OJ reference available at time of writing).
2. Directive of the European Parliament and Council on the protection of consumes in respect of distance contracts (97/7/EC).
3. *See, e.g., Hotmail Corporation v. Van Money Pie Inc.*, reported at www.computerlaw.com.au.
4. Directive 1998/0325/EC of the European Parliament and of the Council on a Community Framework for Electronic Signatures (no OJ available at time of reference).
5. Article 5.
6. Article 6.1.
7. Articles 6.3 and 6.4.
8. Article 11.
9. Proposal for a European Parliament and Council Directive on Certain Legal Aspects of Electronic Commerce in the Internal Market (1999/C 30/04) (text with EEA relevance) COM(1998) 586 final - 98/0325(COD).

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The Euro One Year After

By James P. Duffy, III

I. How the Euro System is Functioning

On 1 January 1999, the eleven Member States of the European Union listed in Appendix A below launched the Euro to serve as their single currency. During an initial three-year transition period ending on 31 December 2001 the national currencies of these countries become just different units of the Euro and are theoretically different units of one another, since the exchange rates among them are now irrevocably fixed. During this period, transactions in Euro are neither required nor prohibited.

By convention, the symbol for the Euro is €. The Commission of the European Union ("European Commission") has irrevocably fixed the official exchange rates for the constituent currencies to six significant places, and these rates, to six places, must be used in all banking and financial transactions. They are also set forth in Appendix A. These rates remain in effect until the national currencies disappear as separate currencies on 31 December 2001, and existing notes and coins cease to be legal tender on 30 June 2002.

Because each constituent currency is now merely a different unit of the Euro (and, thus, of one another), theoretically any constituent currency could be used to satisfy an obligation in Euros or any other constituent currency. In practice, however, this is not how things have been working during the transition period. For example, the European Commission has been very vigilant to address what it considers overcharging by banks and others involved in currency exchange in the constituent currencies. However, there is still a significant additional cost to dealing in currencies other than the Euro or the currency of the transaction. After the transition period, the question of constituent currencies becomes academic. In fact, most governments around the world have specifically negated this possibility, as will be noted further below.

During the transition period, no one can require a counter-party to pay in Euros, nor may anyone refuse to accept Euros in payment of a debt denominated in the national currency of the transaction, unless there is a specific contractual arrangement to the contrary. Similarly, absent contractual arrangements to the contrary, anyone may pay in the national currency of the transaction or in the Euro. Since there will be no Euro notes or coins before 1 January 2002, the Euro is still a "book currency" or a "virtual currency" that can only be used by issuing checks, in credit card transactions, in bank transfers, and the like. The only notes and coins in circulation until 1 January 2002 will continue to be those of the national constituent currencies.

As already noted, when the initial transition period ends on 31 December 2001 national currencies will disappear both as units of the Euro and as currencies themselves. However, existing notes and coins of the constituent currencies can still be used for another six months. But after 30 June 2002 the notes and coins of the constituent national currencies will no longer be valid tender. All that will then remain will be the Euro as the only legal tender. Thus, financial, commercial, consumer, public, and all private transactions will have to be settled in Euro, and only Euro, because the former national currencies will no longer exist as legal tender.

The rationale behind the Euro goes back to the concepts that gave rise to the Treaty of Rome in 1957. This treaty sought to assure the free movement of goods within what was then the six-member group called the Common Market. It soon became apparent that this objective could not be fully achieved without also providing the free movement of services, capital, and people. Most of these objectives have now been implemented in the much larger European Union. However, the Euro is an enhancement of the notion of the free movement of capital and represents a blending of the economic and political futures of the eleven countries participating in the Euro.

The rationale for the Euro is that, without a single currency in the European Union, the costs, risks, and inconvenience of moving capital between and among its member states would seriously hamper the objective of free movement of capital as well as the other objectives. But even though the Euro substantially eliminates the exchange rate risk for constituent currency foreign exchange ("forex") transactions within the Euro zone, as noted above, many Euro zone banks are still charging what the European Commission considers excessively large fees for handling transactions in constituent currencies other than national currencies. Thus, the European Commission has been coming down hard on those banks that have not substantially reduced their foreign exchange transaction fees, which still are often about 3.5% of the value of the transaction. The European Commission has insisted that Euro zone banks must pass the savings resulting from the elimination of forex risk to the consumer. Obviously, the banks are not too happy about this. They were managing the forex risk reasonably well and were realizing substantial

profits in the process. They have not been willing to give up these profits.

There is a small cost, but virtually no forex risk, to handling the notes and coins of the constituent Euro currencies. (The notes and coins have to be counted, safely stored, transported, etc.) But these costs and risks are nominal compared to the potential for the pre-Euro forex risk. An example illustrates the point: Before the Euro, when a bank took French francs in exchange for German marks, there was a possibility the value of these two currencies would change before the bank could clear the transaction. Thus, by the time of clearing, the number of French francs received for the number of German marks paid out might buy fewer German marks than were paid out. If so, the bank would have to book a loss on the transaction. Of course, the opposite could be true, and the bank might book a gain. Banks, being risk averse, naturally tried to price forex transactions so as always to assure a profit. Hence the additional cost, which was perceived as being a serious impediment to the free movement objectives of the European Union. However, in recent practice, with the European Monetary Union and other attempts to link the constituent currencies of the Euro, such as the French effort to link its franc with Germany's mark, this risk was often more theoretical than actual.

Of course, there will be forex risks in converting the Euro into other currencies such as the Dollar, the Japanese Yen, the British Pound, the Canadian Dollar, etc. However, from the perspective of U.S. business, so long as you have one constituent currency of the Euro, you effectively have, presumably at very little cost or risk, any other constituent currency. Thus, if a French customer pays in francs, you can use those francs to buy lira, theoretically at little cost and no risk, to pay an Italian supplier who wants to be paid in lira. More importantly, if the French customer will pay in Euro (by agreement or otherwise), you can use those Euro to pay an Italian supplier at no forex cost or risk, provided the Italian supplier has not contracted that it may only be paid in lira. This is because the payor can pay in Euro, unless there is a specific agreement with the Italian supplier to pay only in lira. Thus, there can be significant benefits for U.S. companies doing business in the Euro zone.

Germany and Japan, in particular, have been pressing the United States to make an agreement to assure "stability" in the exchange rates among the world's major currencies, mainly the Dollar, the Euro, the Japanese Yen, the British Pound, and the Canadian Dollar. Thus far, the U.S. has strongly resisted these attempts, and they appear dead for the moment. Former U.S. Treasury Secretary Rubin had outright dismissed much of this as unworkable in the current environment. Simply put, the U.S. is not prepared to allow its fiscal and monetary policies to be dictated by external needs, such as the value of the Euro or any other currency. Nor is the U.S. going to bind itself to a political agreement that is driven primarily by European needs and interests. Thus, in the current environment, the value of the Euro vis-à-vis other major currencies will have to be based on fundamentals, market conditions, political conditions, and the reaction of markets to those fundamentals and conditions. Simply put, the U.S. wants Europe and its other major trading partners to have sound economies on their own, as the U.S. says it will as well. The U.S. does not want to undertake the responsibility or the burden for assuring sound economies in its trading partners; they have to do this themselves. This, the U.S. believes, will be the best way to achieve stable exchange rates. So, for the time being, the major world governments do not seem ready even to begin to talk about what would seem to be the logical next step, a single world currency or even a single currency among the major trading nations of the world.

II. Practice Implications of the Euro System

As lawyers we have had to consider the changes the Euro has brought both on existing transactions and future transaction. This need was particularly true in the case of older, long-term obligations, such as debentures or mortgage notes, long-term supply agreements, and the like that called for payment in a national currency that is now part of the Euro. Many such instruments were drafted so long ago there is no mention of the Euro or any other reference to the specified payment currency disappearing. Fortunately, these contractual obligations have not been impaired because most major countries have, well in advance of the advent of the Euro, passed laws dealing with the introduction of the Euro and the preservation of the validity of contracts denominated in one of its constituent currencies. In addition, some states of the United States have done likewise, as discussed below. This, therefore, gave a statutory assurance of validity. There is also a body of law that tends to protect the validity of contracts where there is a change, such as a change in currency, if the change is a substantial equivalent and is commercially reasonable.[1] Thus, there is comfort in the case law as well. By definition, the Euro is the full equivalent of its constituent currencies and is, therefore, a commercially reasonable substitute. Finally, while the constituent currency will cease to exist as a separate currency, it will still be part of the Euro, and its value can readily be expressed in terms of a fixed number of Euros for a fixed number of units of the old currency. Thus, the payments called for in the old constituent currency can easily be determined in Euro. Accordingly, the substantial equivalency test can also be met.

If you do not want to accept payments in Euros, in some jurisdictions you can still contract for a brief period more to receive payment in a constituent currency, and only that currency. These provisions will no longer work after the initial transition period. This is because the Euro will be the only medium of exchange after the initial transition period, and the national currency will not be legal tender. Most clients have already learned to deal with the Euro, and only the Euro, even before the transition period is over. Most banks are able to work in Euro and have suitable structures for dealing with Euro should they be received or need to be paid out. Lawyers and clients dealing with forex also have computer software and other systems in place that accommodate the Euro. Also, for clients with foreign branches where a constituent currency is the reference currency, it is easy to make the Euro the reference currency and to express books and records in Euro. Thus, most people would no doubt say the introduction of the Euro, in terms of structure, has posed no practical problems, and in most cases has facilitated transactions where multiple currencies are involved.

There are advantages and opportunities in dealing with the Euro as well. In the commercial world, as well as in large segments of the tourism industry, prices are now being quoted in both the national currency and the Euro. Sometimes this leads to startling results. With a Euro price to compare, one can see the true difference in the price of goods in each market. It was very easy to believe, for example, that certain goods were cheaper in Germany than in Italy, but because of the ever-changing exchange rate between the German mark and the Italian lira and the forex costs, it was not always easy to see the difference precisely. Now, with prices quoted in Euros and the ability to pay in Euros (by check, credit card, or bank transfer), these differences are exact and concrete. Moreover, it is much easier to realize the benefit of that difference because the German mark and the Italian lira are now simply different units of the Euro. U.S. business people, in particular, should be alert to this and try to take advantage of it whenever possible. Forex issues are no longer as important in the Euro zone, and the best price in Euros, subject to shipping costs, terms, and other non-forex business factors, will usually now be the best price. Moreover, as noted above, if a client specifies all payments in Euros, those Euros can be used to purchase anywhere in the Euro zone without forex issues.

There have not been any serious drafting issues associated with contracts that are to be performed during the transition period or thereafter. Whenever possible, most people would seem to prefer the Euro. Choosing the Euro has kept the language more concise and eliminated the need to discuss transition issues in the contract. There seems little point in incurring legal costs or wasting negotiating resources to deal with transition issues when it is so easy and simple to move directly to the Euro. This sort of issue should not be, and has not been, a serious part of the bargain. Quite properly, nothing substantial has been given up on either side for the designation of the Euro as the currency of the agreement.

As noted above, New York, like many governments, had anticipated the development of the Euro and adjusted its laws accordingly. General Obligations Law §§ 5-1601 through1604 assists in providing predictable implementation, pending further developments at the federal level. General Obligations Law § 5-1601 contains a definition of the Euro that is expansive. General Obligations Law § 5-1602 provides for the continuity of contracts and specifically declares that the Euro is a commercially reasonable substitute for the former constituent currency and a substantial equivalent of that currency. Even though the other constituent currencies should likewise be commercially reasonable substitutes and substantial equivalents, New York does not permit this.[2] This may be shortsighted since, conceptually, one can theoretically look at a twenty German mark note as being about a ten Euro note, and a fifty French franc note as being about a ten Euro note, and the lira as a small coin—i.e., different denominations of the same currency—as long as these currencies still remain legal tender. An interesting strategy making use of this concept is the Greek drachma. Many people attribute the recent substantial gains in the Greek stock market as being a good "Euro play": Greece hopes to join the Euro next year, and buying drachma now may be a cheap way to get Euro should the drachma become included in the Euro as most people think it will. Thus, the financial world really does not seem to be making the distinctions the legal world has made regarding the Euro and its constituent currencies.

III. The Prospects for the Euro

The more serious issue for the U.S. to consider is the future of the Euro as a reserve currency that might replace the Dollar. A front-page article in the 2-3 January 1999 *International Herald Tribune* (the first edition printed after the introduction of the Euro) trumpeted in its headline: "Euro Mints New Questions Over Dominance of the Dollar." The article did not exactly say, "The Euro is here, the Dollar is dead," but many read it that way. On introduction, the Euro opened at 1.17 Euros to the Dollar. It quickly traded up to about 1.19. However, just a few weeks later, it was down more than five percent to barely more than 1.10, and the trend has been downward ever since. Today, the Euro stands at essentially parity to the Dollar, with predictions it will soon be worth less than the Dollar.[3] This is extraordinary movement for a "major world currency" that was touted as soon replacing the Dollar. It seems, despite all the bullish predictions for the Euro as a replacement for

the Dollar, that the Dollar is not dead yet. Nor is it likely to be any time soon. We will try to analyze what happened, why so many people were off the mark in their assessment of the Euro, and what the future for the Euro looks like, now that we have a year's experience to draw upon.

With the initial euphoria surrounding the introduction of the Euro, there was a plethora of prognostications about the long-term adverse consequences to the Dollar. While the Dollar is by no means immune to loss of luster, it now seems clear the Euro is not going to be looked upon more favorably than many of its constituent currencies, which include a number of traditionally weak currencies, such as the Italian lira, the Spanish peseta, and the Portuguese escudo—with more coming before too long. Moreover, the issues that surrounded the selection of the head of the European Central Bank had signaled that the Euro might be a highly political currency after all. On top of this, with a change of government in Germany, and the new government coming to the rescue of a failing major construction company, the Germans signaled that they too were willing to place politics ahead of sound monetary policy. Germany, you may recall, had built its reputation on the solidity of the Deutsche mark above all else, even to the point of causing great temporary hardship for its people. Thus, the strong possibility exists that the Euro will look much more like the old Italian lira than the old German mark. If this happens, it is likely that the Dollar could become even more important as a reserve currency. The Euro will have taken away the Deutsche mark, the Swiss franc is just not expansive enough to serve as a reserve currency, and the yen is still very much in question. Thus, by default, the Dollar would seem to be the only logical choice.

What has happened thus far is explicable, if not predictable. The Euro was introduced with a great deal of enthusiasm and fanfare. Many people wanted to get experience with it, and, as in any market driven by supply and demand, with the demand high for the Euro and the effective supply low, the price went up. However, this enthusiasm quickly abated and people began to take a more realistic view of the Euro. That view did not look all that good after all, and the decline was far greater than the run up. And, as will be discussed more below, the decline may be far from over yet. The reality is that there are still many serious problems in Europe that the introduction of the Euro will not, and cannot, solve. These problems must be dealt with through traditional means—as Wim Duisenberg, the Chairman of the European Central Bank, warned when he reduced interest rates earlier this year to try to help boost economic activity in Europe. Also, Europe has yet to experience the consequences of regional payments imbalances that will undoubtedly develop, since national governments can no longer coin their own money or make their own monetary policy.

We have these problems in the United States, even today, but we have lived with them for so long that we are able to take them in stride most of the time. If jobs are soft in the Northeast, it is relatively easy for someone there to relocate to some other U.S. region where jobs are more plentiful. While this is theoretically possible in the Euro zone, Europe is far more segmented then the U.S.. An Italian worker who can not find work in Italy can not, for cultural, linguistic, social, and a whole host of other reasons, easily go to Spain or Germany where there may be more plentiful or higher paying jobs, and vice versa. Moreover, it is even more difficult in Europe, if the structures even exist to accomplish this, to tax people in one country for economic development in another, something that Washington does all the time as it allocates federal resources among the various states without regard to what those states contribute to the federal coffers. Each Euro zone country has given up significant sovereign rights to be part of the Euro. Thus, if a European member state's economy needs inflating to produce jobs, that member state has lost many of the weapons once available to deal with this. As a result, the choice for the European Central Bank may be to inflate generally in order to stimulate locally. This could lead to an extremely volatile, weak Euro. Alternatively, if the European Central Bank follows a more German philosophy, it will be more concerned about inflation than creating pockets of recession, many of which could be sizable in their scope, similar to what France experienced when it tried to link the franc to the Deutsche mark. This action drove unemployment in France through the roof. If the only effective way to keep inflation in check is to cause serious recessions in significant parts of the Euro zone economy, this could also adversely affect the prospects for the Euro.

One key concept of the European Union is the free movement of goods. Put another way, the price of the same item should likely, over time, become uniform throughout the entire European Union, subject to small regional differences reflecting non-trade barriers such as transportation costs, differences in taxes, and the like. This tends to heighten the importance of what economists call the purchasing power parity (PPP) approach to valuing a currency. Simply put, a currency is worth realistically what it can buy in standard terms. There are many PPP indexes, some whimsical, and others more serious serious. One of the more whimsical is the "Big Mac Index" of the *Economist*. This index simply equates the purchasing power of a currency to the cost of a Big Mac hamburger in that currency. Using this Big Mac Index, at the time of writing this paper, the Euro is worth about U.S.$0.95. There are more serious indexes, such as one that Hofstra University Professor Irwin

Kellner likes to talk about.[4] His index is based on a basket of a number of representative items ordinary people in developed Western economies use most every day. Hamburger meat is in the index as are things like toothpaste, toilet paper, gasoline, electrical power, etc. Using Professor Kellner's index, as of early November 1999, the Euro was worth, on a PPP basis, somewhere between U.S.$0.92 and U.S.$0.95. This tends to confirm the more whimsical Big Mac Index and might make people considering investment in Euro denominated securities a little leery, particularly if their reference currency is not the Euro.

What does this tell us? Basically, the Euro either has to go down more, or the Euro zone economies must, as Wim Duisenberg has warned, reform the structures of their economies to eliminate the forces that are driving costs to unacceptably high levels. For example, France has enacted a thirty-five-hour workweek with retirement in some industries at age fifty. Contrast this to the U.S., where the average workweek exceeds forty hours and many people work well past age sixty-five. In addition, many Euro zone countries have unemployment policies that make it far more appealing, and also possible, for workers to remain on unemployment for long periods than to seek work, not to mention that these workers would not consider relocating, even to an adjacent part of their own country, to find work. Every country in the Euro zone is significantly more socialized than the U.S., whose Dollar is the principal protagonist to the Euro as a future reserve currency.

There are very strong psychological barriers to Euro parity with the Dollar in currency trading markets. The Euro has shown strong resistance to penetrating the parity barrier for long. However, there are fundamentals at work that could make people pay a high price for respecting these barriers. Euro investors who bought at 1.17, or higher, to the Dollar know exactly what artificial valuations on the Euro mean. They probably regret their decision today, and, should they continue to hold their Euro investments, they could regret it even more. If the fundamentals do not change, and, if the parity barrier is broken, the Big Mac Index and other PPP indexes show that there is still considerable room for the Euro to decline further. Keep in mind that even relatively small movements in inter-currency rates can be very significant when mature major currencies are concerned. Viewed this way, a decline in the Euro from parity to $0.95 or less would be enormous. A decline from 1.17 to those levels is even more so.

Despite these problems, it is not wise to dismiss the importance of the Euro, particularly for the long term. It is the currency of a huge market that, although not as cohesive as the U.S. market, is still a very powerful and vibrant one for the most part. In fact, the Euro zone market is larger, in terms of population, than the U.S.. It would be unwise to assess the Euro as a currency that can be, or should be, disregarded. However, it need not be feared either. After a splashy start, the Euro is demonstrating that it is just like any other currency. It will be stronger and weaker from time to time, and prudence will dictate that, before markets desert the Dollar as a reserve currency, Euro will have to prove its worth over time. Moreover, as former Treasury Secretary Rubin has said, it is the fundamentals that will count in the long run. The Euro will not earn respect just by being there. It will earn respect through the perception of how well the European Central Bank manages the fundamentals of the new Euro zone economy, how well the constituent governments accept the role of the European Central Bank, and whether the people of those countries will accept the European Central Bank as a political institution that will have a significant impact on their day-to-day lives. Far more importantly, the politics of the Euro zone are going to have to come to grips with the reality of an increasingly smaller world with declining barriers to trade. The highly socialized structures of the Euro zone relative to the rest of the world will have to be revised to become more competitive with those elsewhere. In most cases, this will mean a major reorientation of social objectives. This process will no doubt be extremely unpopular and will result in considerable political criticism for the politicians proposing the necessary reforms. Also, some of these changes cannot occur quickly unless governments are prepared to deny vested rights, which is contrary to our well-ingrained legal principles. For example, once a government has permitted a person to retire at age fifty with a government-guaranteed pension, it is not possible to insist that he or she go back to work for another fifteen years. The government that permitted this will have to figure out how to fund that person's pension for the remainder of his or her increasing life span. The consequences of this are a whole other discussion, for Europe's population growth is declining and the most rapidly growing demographic segments of population are the older segments. In some countries, therefore, there will likely be more people retired than there are working.

IV. Resources

There are a number of useful resources readily available on the Internet that can be consulted for learning more about the Euro and what needs to be done to deal with it. The following is a partial list, with some brief comments on each site.

- *The Bank of England's Euro Page*: www.bankofengland.co.uk/euro.htm. This page, sponsored by the Central Bank of the United Kingdom (which has elected to remain out of the Euro for the moment), has extensive English language materials explaining the Euro and how it works,

etc. It is a very fast site with extremely well-prepared and authoritative up-to-date information. See also the Bank's Practical Issues site below.

- *The Association for the Monetary Union of Europe*: amue.lf.net. This site is in English and is another comprehensive, up-to-date site with authoritative information about the Euro. It offers some detailed guides on the steps companies should take to deal with the Euro.
- *The ABN AMRO Euro Site*: www.abnamro.com/euro. This is another site with authoritative information about the Euro. For those who do not know it, ABN AMRO is a major Dutch bank that is very active internationally.
- *IBM's Euro Home Page*: www-5.ibm.com/euro/index.html. This site, sponsored by a major U.S. company with a global market, has a wide body of information that is not as well organized as some sites. However, it does have a lot of information on how you can be sure your computers and programs are "Euro ready."
- *The (privately-sponsored) European Monetary Union News Site*: www.euro-emu.co.uk/gateway.shtml. This site collects current news and information about the Euro and has good links to other possible sites of interest.
- *The (English-language version) European Commission Euro Site*: europa.eu.int/euro/html/home5.html?lang=5. This is the official Euro site of the European Commission. It can sometimes be very slow. It has a good Euro converter and good information about the coming Euro coins and notes, including pictures of what they will look like.
- *The Bank of England Practical Issues Papers*: www.euro-emu.co.uk/offdocs/boe.shtml. This page gives access to the Bank's acclaimed Practical Issues texts as well as easy access to other resources.

Endnotes

1. *See, e.g., United Equities Company. v. First National City Bank*, 383 N.Y.S.2d 6 (1st A.D., 1976).
2. Since this presentation was given in January, the Euro has indeed gone below parity with the Dollar.
3. See note 2.
4. Professor Kellner is the former chief economist of Chase Bank.

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Appendix A

Country	Currency	Units per Euro
Austria	shilling	13.7603
Belgium	franc	40.3399
Holland	guilder	2.20371
Finland	markkaa	5.94573
France	franc	6.55957
Germany	mark	1.95583
Ireland	punt	0.787564
Italy	lira	1936.27
Luxembourg	franc	40.3399
Portugal	escudos	200.482
Spain	pesetas	166.386

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INTERNATIONAL LAW PRACTICUM

The *Practicum* is a publication of the International Law & 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.

ISSN # 1041-3405

International Law and Practice Section
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Albany, NY 12207-1002

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