



N° 22 March | mars 2010

Send us your articles
in French or in English
concerning the subject
of your interest in the
fields of your choice
before
5 June 2010

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Le mot du Président

Ci vediamo a Parma! See y'all in Charleston!

Dear Friends,
2010 just started, but AIJA has already been very active.
Since the beginning of 2010, our Association has successfully held not less than six seminars in Brussels (Competition Compliance), Riga (Corporate Reorganization), Geneva (Banking Secrecy), Amsterdam (Tax), Düsseldorf (Trademark and Climate Change) and Dubai (Immigration). I hereby express my gratitude to the members of the Organizing Committees who made all of these events happen. [More click here](#)



Le mot du Directeur Exécutif

Dear AIJA Member
Finally, winter is leaving us – at least in the more Southern regions of the world.
And as the spirits lighten, new ideas are filling the minds of legal professionals all around.
Charleston, city of our 2010 Congress, is busy preparing to receive lawyers from all over the world and also our office had the pleasure already to visit this beautiful city and try out the Southern Hospitality that it is famous for. [More click here](#)



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2010 AIJA Yearbook

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2010 AIJA Yearbook

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dès maintenant

L'Association la voie de la Justice: rapport sur la Caravane des Droits de l'Homme

Le barreau du Togo et l'association « la Voie de la Justice » ont organisé une deuxième « Caravane des Droits de l'Homme » au Togo, du 6 au 11 décembre 2009 qui s'est déroulée à l'occasion du congrès de la CIB. Tout comme la première mission, cette mission avait pour but d'apporter une assistance judiciaire aux justiciables les plus démunis, non plus au nord mais au sud du pays, et notamment aux détenus. Elle s'est déroulée devant les juridictions dépendant de la Cour d'appel de Lomé : VOGAN, TSEVIE, ANEHO et TABLIGBO. [Pour en savoir plus, cliquez ici](#)

La Caravane des Droits de l'Homme au Togo du 6 au 11 décembre 2009

Au travers des Yeux de João Nuno PEREIRA

En marge du Congrès international des barreaux de tradition juridique commune (CIB), la « Voie de la Justice » a organisé avec ses partenaires dont l'AIJA, une caravane des droits de l'Homme, au Togo.

L'organisation sur place avait été soigneusement préparée par le Barreau du Togo et son Bâtonnier, Alexis AQUEREBURU. [Pour en savoir plus, cliquez ici](#)



AIJA helps Haïti

AIJA's International Engagements
AIJA helps HAITI

Les engagements internationaux de l'AIJA
L'AIJA soutient Haïti

To promote AIJA



AIJA Pocket Guide is
now available online

Publications: Working Papers

How to find this section



Open Registrations

St-Petersburg 16.04.2010 – AIJA/UIA Seminar on International Contracts [Click here](#)

Malta 22.04.2010 – Trust under attack ([Early Bird deadline 31.03.2010](#)) [Click here](#)

Zurich 22.04.2010 – Marketing the World Cup ([Early Bird deadline 02.04.2010](#)) [Click here](#)

Parma 06.05.2010 – May Conference ([Early Bird deadline 15.04.2010](#)) [Click here](#)

Palma 04.06.2010 – Negotiation Skills ([Early Bird deadline 03.05.2010](#)) [Click here](#)

The May conference in Parma



The May conference in Parma presents AIJA members with the ideal location to explore the interesting and increasingly important topic of food law in a reassuring convivial atmosphere. Parma is home to Parmalat and Barilla and both their Group General Counsels will be speakers during the seminar. Moreover, AIJA members will have dinner at Barilla's premises on Thursday night. [More click here](#)

Charleston Annual Congress

Dalhi Myers & Neil Boyden Tanner

"Charleston is a place where everything is as it should be. You develop a sense of well being, and you feel very much at ease." Faty Chaoui



The August Congress in Charleston will be an historic AIJA Congress, since it will be one of the only Congresses ever hosted in the United States. Participants will have the experience of a lifetime! As the Congress Co-Chairs, we welcome each of you to Charleston, a wonderfully unique, stunningly beautiful, and truly historic American city. [More click here](#)



Charleston save the date

AIJA Administration Info

Budapest Minutes of the Ordinary General Meeting [More click here](#)

AIJA Strategic Plan – August 2009 – August 2012

Strategic planning is the process of defining an organization's strategy or direction and making decisions on allocating its resources to pursue such strategy. It is particularly important for AIJA, considering that membership basis and leadership are constantly changing due to the age limit and to the policies in force regarding the duration of officer's mandates. It is crucial to establish a stable road map that can serve as a general guide for the development of AIJA. [More click here](#)

Commission's News

Commission's Announcement

We are pleased to inform you that the Future of the Profession Commission (FoP) has a new name: **SCILL (Skills, Career, Innovation, Leadership and Learning)**

We believe that this name does much better reflect what our commission actually does, that confusions with the VoP will be avoided in the future and we hope that this will attract further members.

Kind regards.
Beat Brechbühl

Nous avons le plaisir de vous informer que la Commission Avenir de la profession à un nouveau nom: **SCILL (Compétences, Carrière, Innovation, Gestion et Formation)**

Nous estimons que ce nom reflète vraiment mieux les travaux de la Commission, que les confusions seront à l'avenir évitées et nous espérons que la Commission attirera d'avantage de membres.

Meilleures salutations.
Beat Brechbühl

What's new on our Commission's blogs?

Distribution Newsletter n°1 [click here](#)

IBLC Newsletter n° 2 [click here](#)

Litigation Newsletter n°2 [click here](#)

Commission's Call Notice & Minutes

New York Minutes

Antitrust [click here](#)

Corporate Acquisition & Joint Ventures (CCC) [click here](#)

Distribution Law [click here](#)

Humand and Procedural Rights and Responsibilities [click here](#)

International Arbitration [click here](#)

Litigation [click here](#)

Private Clients (PCC) [click here](#)

Parma Call Notice

Corporate Acquisition & Joint Ventures (CCC) [click here](#)



MEMBERS CONTRIBUTIONS



Luxemburg: New set of rules for BtoC commercial practices

Claire Leonelli

With the law of 29 April 2009, Luxembourg has now implemented Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer (BtoC) commercial practices in the internal market. This law contains a new set of rules which clarify and intensify the existing legal framework of the consumer protection. [More click here](#)



Luxembourg: De nouvelles règles encadrant les pratiques commerciales des entreprises vis-à-vis des consommateurs

Claire Leonelli

Avec la loi du 29 avril 2009, le Luxembourg a désormais transposé la directive 2005/29/CE du 11 mai 2005 relative aux pratiques commerciales déloyales des entreprises vis-à-vis des consommateurs dans le marché intérieur. Cette loi contient une nouvelle série de mesures clarifiant et intensifiant l'encadrement législatif déjà existant en matière de protection des consommateurs.

[Pour en savoir plus, cliquez ici](#)



Innovative and Dramatic changes in Arbitration Law and Practice in Israel- effects related International Litigation

Benjamin Leventhal

Israel has recently gone through two major changes, concerning Arbitration, by amending the Israeli Arbitration Act of 1968, now allowing to appeal to an Arbitration Appeal Tribunal, and additionally the Israeli government issued an historic decision to allow Israeli authorities and national institutions to litigate by arbitration and not only in the domestic courts. [More click here](#)



Key US and UK Business Immigration Issues for Employers

Edward Wanambwa - Esther Martin - Scott Malyk – Anthony Siliato

For many employers in the United States and United Kingdom, talented workers from outside the US or Europe respectively are essential to the continued success of the business. However, numerous considerations must be taken into account, and sound legal advice taken, each and every time a non-domestic worker is hired, retained, transferred or even terminated, thanks to the various intricacies of current immigration law in both jurisdictions.



Considerations For US Based Entities



Explore Your Employment Options For Hiring Foreign-Born Individuals

Notwithstanding last year's lengthened period of H-1B availability under the cap, employers were still left with more than a nine month gap (from December 22, 2009 until October 1, 2010) for new H-1B visas to become available for FY 2011, the filing season for which will begin on April 1. So what is your business to do in the meantime? [More click here](#)



Further developments on Brazil's retaliation against the United States: Brazil issues list of goods and public consultation on ip retaliation is expected

Carla Junqueira – Marina Carvalho – Luiz Eduardo Salles

Brazil's Foreign Trade Chamber (CAMEX) issued on March, 08, the list of products that will be subject to tariff increases within 30 days unless both countries can reach an agreement to settle the dispute over U.S. cotton aid considered illegal by the WTO. Brazil is yet to design its "cross-retaliation" program on trade related aspects of intellectual property rights. To that effect, according to CAMEX and the Brazilian Ministry of Foreign Affairs, Brazil is expected to publish by March 23 a public consultation with a separate list worth an additional \$238 million focused on intellectual property rights and services. [More click here](#)



Portugal: Associated Ship Arrest: Does the Corporate Veil No Longer Shield Shipping Groups?

Mateus Andrade Dias

A recent order of the Lisbon Admiralty Court may have paved the way for the arrest of associated ships and piercing the corporate veil in arrest cases.

[More click here](#)



Germany: Effective Notarization of SPAs regarding shares in a GmbH by Swiss Notaries – Change of practice of the courts?

Martin Imhof

The District Court of Frankfurt has recently published a crucial decision on the notarization of an assignment or a pledging of shares in a limited liability company (GmbH) by a Swiss notary, which could constitute the beginning of a new practice of the courts. Pursuant to Sec. 15 Para 3 and 4 of the German Limited Liability Companies Act (GmbHG), the assignment of shares of a limited liability company and the underlying obligatory contract require notarization to become legally effective. [More click here](#)



Russia: impartiality test for arbitrators

Roman Zykov

In 2007, the Russian Supreme Arbitrazh (State Commercial) Court in *OAONK Rosneft v. Yukos Capital S.a.r.l* ruled that arbitrators must disclose their connection to the legal counsel of the other party at the time of their appointment. The facts of the case suggested that arbitrators spoke at a conference organized and sponsored by the law firm representing Yukos Capital S.a.r.l. in the arbitral proceedings. [More click here](#)



Some tax aspects of yacht finance leasing in Malta

Damien Fiott

Malta has one of the largest ship and yacht registries in the world. Over the past years and particularly since Malta's accession to EU membership in 2004, Malta has become a hot spot for the private and super yacht industry. More recently, yacht owners and the yachting industry in general has shown additional interest in Malta thanks to special VAT rules on finance leasing of yachts. [More click here](#)



Denmark: Shareholders meetings in cyberspace

Philip S. Thorsen

Spring is the global season for annual shareholders meetings were annual accounts will be discussed, new management will be elected and proposals from shareholders and Boards will be considered. [More click here](#)



Germany: Attention: Attempt of Commercial Check Fraud

Sven Friedl

Our law firm received a fraudulent offer of an alleged corporation to collect their claims. After doubts arose because of the cause of events, we luckily did not get harmed. However, to ensure, such harmful behavior does not effect other AIJA-members, we want to inform you [more click here](#)



Spain: Redundancies in a time of crisis

Almudena Álvarez Otero

The Spanish Code of Labour Law ("Estatuto de los Trabajadores") sets out a particular type of redundancy known as redundancy based on objective reasons. There are several reasons for which a company could carry out this type of redundancy. We are going to focus on the most common reasons, which usually take place during times of financial difficulty: economic and productive reasons. [More click here](#)

Espagne: Licenciements en temps de crise

Almudena Álvarez Otero

Le Statut des Travailleurs espagnol prévoit différents cas de licenciement pour cause objective. Les plus fréquents en temps de crise, sont les causes économiques et les causes de production. [Pour en savoir plus, cliquez ici](#)



La future Cour européenne des brevets

Marie Pasquier

La dernière version du projet de création d'une juridiction commune des brevets en Europe (en date du 23 mars 2009) vise à créer un nouveau système unifié de règlement des litiges en matière de brevet pour le continent européen. Nous devons nous y préparer car ce projet qui modernisera la PI en Europe a de sérieuses chances d'aboutir. Et pouvoir s'appuyer, dans ce cadre, sur le réseau AIJA sera un réel atout... [Pour en savoir plus, cliquez ici](#)



Duties and Liability of Management Board Members in Latvia

(Overview of legal framework)

Andra Rektina-Hitrova

This article has been prepared to provide an overview of Latvian law provisions in relation to the duties and personal liability of management board members of a Latvian limited liability company, which is the most popular form of incorporation in Latvia. [More click here](#)



Ci vediamo a Parma! See y'all in Charleston!

Dear Friends,

2010 just started, but AIJA has already been very active.

Since the beginning of 2010, our Association has successfully held not less than six **seminars** in Brussels (Competition Compliance), Riga (Corporate Reorganization), Geneva (Banking Secrecy), Amsterdam (Tax), Düsseldorf (Trademark and Climate Change) and Dubai (Immigration). I hereby express my gratitude to the members of the Organizing Committees who made all of these events happen. Particular thanks are due to the organisers of Riga (Tommaso Foco, Eline Girne-Berzina, Agnese Hartpenga and Louis Verstraeten) and Dubai (Nihat Kurt and Yann Mrazek). Riga and Dubai were challenging venues, but both seminars were eventually well attended.

On the **Human Rights** side, AIJA participated actively in the **"Caravane des droits de l'homme" in Togo from 6-11 December 2009**. This operation, organised by the Bar of Togo and the association "la Voie de la Justice" resulted in more than 600 people being able to consult a lawyer, and the release of 49 prisoners. I would like to heartily thank Barbara Koops, Sandra von Salis and **João Nuno Pereira** for representing AIJA on this occasion. This makes us all very proud.

AIJA also reacted promptly to the devastating earthquake that hit **Haiti** in January. We did not want to miss the opportunity to contribute to the reconstruction of the legal system in this country. As you might have noticed on our **website**, AIJA is supporting reconstruction efforts in Haiti and will collaborate with the International Legal Assistance Consortium (ILAC), in whose council AIJA holds a permanent seat.

As to the future, we are now focusing on our next two major events.



The **May Conference in Parma**, the city of Giuseppe Verdi, will offer AIJA members the ideal location to explore the interesting and increasingly important topic of food law in a most convivial atmosphere. Outstanding and prominent external speakers have been secured, amongst them some of the leading experts of food law, EU law and IP law. The social program will be, as customary in AIJA, very entertaining, and will feature samplings of delicious **Parmesan gastronomy**.

The other major event is our **Annual Congress in Charleston**, which shall take place in August. This AIJA Congress will be an historic one, since it will be one of the only Congresses in our history to be held in the United States. You might be interested to know that the United States is now one of the top-ten countries represented in AIJA. This demonstrates how successful the implementation of our strategic plan has been over the years.

I went to Charleston with the Organising Team two weeks ago and am delighted to confirm that everything is ready to make this Congress unique and unforgettable. The academic program is very promising and the social events will be outstanding, in particular the glamorous Gala Dinner. I am not authorised to tell you more...

The Charleston Congress will also provide a unique opportunity to see this particularly beautiful and historic part of America's South. It is also going to be a wonderful opportunity to network with our **American colleagues**.

Make sure you register to participate in Parma and Charleston! You do not want to say, "Unfortunately, I was not there!"

With my warmest regards

Saverio Lembo
saverio.lembo@baerkarrer.ch



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24-28 AUGUST 2010 • Charleston Place Hotel

Le mot du Directeur Exécutif



Dear AIJA Member

Finally, winter is leaving us – at least in the more Southern regions of the world. And as the spirits lighten, new ideas are filling the minds of legal professionals all around.

Charleston, city of our 2010 Congress, is busy preparing to receive lawyers from all over the world and also our office had the pleasure already to visit this beautiful city and try out the Southern Hospitality that it is famous for. It is a truly remarkable place, filled with beauty and sunshine and the Congress program is going to be magnificent. Registrations will open shortly and of course we hope to see you in Charleston as well. Its location and cultural heritage make it an ideal holiday spot for everyone. Check in regularly on our website www.aijacharleston2010.org for more updates.

Before our Congress, however, we will experience Southern Hospitality of a different kind: Parma, our May Conference is just around the corner and our Italian team has put together a gourmet's program for all to enjoy. Registrations are open, hope to see you there!

And for those who think that Parma is still too far away and the seminars leading up to that event aren't really up your alley (speaking only of legal specialty areas of course!), we even have a networking event coming up shortly in New York at the ABA SIL Spring Meeting. From April 13 – 17 we will have a table at the Spring Meeting of our dear friends and will also organize a cocktail function, for which we by the way still look for sponsors. If you are interested in either attending or supporting this event, please look out for the flyers that will circulate shortly.

Apart from our events, AIJA is investing heavily in outreach this year. In conformity with our new strategy we are envisaging a slight remodel of AIJA's 'humanitarian' activities and international engagements. Focusing strongly on networking (lawyer to lawyer, B2B and network to network), AIJA's outreach is looking at stronger collaboration programs with the International Legal Assistance Consortium (ILAC) in Sweden to engage in relief programs targeting the rebuilding of the judiciary in Haiti and other places in the world that need this assistance. On a European level, AIJA will be part of a panel discussion organized by the

European Parliament with the aim to create a pan-European judicial culture, a platform for increased exchange of knowledge, direct participation in EU decision-making processes as well as the creation of an ERASMUS program for young lawyers to effectively gain more international/ European working experience.

You will hear more about all these projects shortly and in more detail. Should you be interested to involve yourself more directly in any of these projects, please do not hesitate to be in touch with our Brussels office. Help is always needed and appreciated. Needless to say that despite the challenging times ahead with respect to the global economy, we are still one of the most active associations worldwide and going strong. And who can we thank for that? YOU, our members. Thank you for still going strong!

Chris Raudonat
Christoph.Raudonat@aija.org

aija email magazine

e-zette

N° 22 March | mars 2010

La Caravane des Droits de l'Homme au Togo du 6 au 11 décembre 2009



En marge du Congrès international des barreaux de tradition juridique commune (CIB), la « Voie de la Justice » a organisé avec ses partenaires dont l'AIJA, une caravane des droits de l'Homme, au Togo.

L'organisation sur place avait été soigneusement préparée par le Barreau du Togo et son Bâtonnier, Alexis AQUEREBURU.

Plus d'une vingtaine de Confrères venant du Togo, du Bénin, du Burkina-Faso, de Belgique, de France, du Luxembourg et de Suisse se sont ainsi mobilisés pour participer à cette caravane - formidable expérience humaine et riche en partage - qui se déroulait cette année dans le sud du Togo et sur une journée dans la capitale, à Lomé.

L'équipe au sein de laquelle j'étais affecté a œuvré essentiellement à Vogon et Tsevie, juridictions dépendant de la Cour d'Appel de Lomé mais où se déplacent rarement les Confrères togolais, en raison de la grande distance séparant ces villes de la capitale et de l'absence de fonctionnement réel de l'aide juridictionnelle.

Notre mission consistait d'une part, à visiter les détenus en détention préventive qui souvent étaient oubliés et n'avaient jamais vu d'avocat, à vérifier la régularité de leur détention, à solliciter une audience auprès de respectivement le juge d'instruction ou le procureur, à déposer des demandes de mise en liberté et d'autre part, à plaider les affaires fixées à l'audience.

J'ai ainsi été mandaté de la défense d'un détenu cité pour vol qualifié et d'un autre pour

vol et escroquerie. Seule la première affaire a pu être plaidée alors que pour la seconde affaire, le détenu n'a pas comparu à l'audience.

Le Code de procédure pénale togolais prévoit la possibilité de demander le pardon judiciaire sous certaines conditions, ce que j'ai plaidé et qu'a retenu le tribunal, permettant ainsi à mon mandant de recouvrer la liberté à l'issue de l'audience.

D'une manière générale, les magistrats prévenus de notre arrivée se sont montrés sensibles à notre initiative et à l'écoute.

Les détenus que nous avons rencontrés étaient, quant à eux, très touchés et nous ont réservé un accueil inoubliable.

Je me souviens par exemple à la fin d'une longue journée d'audience chargée émotionnellement et sous un soleil de plomb, la fête improvisée par des chants et des danses que nous ont fait pour nous remercier les détenus, dans la cour de la prison de Vogon.

En conclusion, nous avons incontestablement été la voix des sans-voix.

Cette aventure humaine a réveillé nos consciences, trop souvent endormies et nous démontre l'utilité d'une telle mission, tout en souhaitant qu'avec le temps, la relève puisse être assurée par les Confrères des pays concernés.

Dans un laps de temps très limité de 6 jours de mission, les résultats obtenus sont plus qu'encourageants.

Ainsi, la « Voie de la Justice » dans son rapport retient que :

- « 78 dossiers ont été plaidés,
- 49 des personnes défendues ont recouvré la liberté,
- 14 relaxes ont été prononcées,
- une dizaine de demandes de mise en liberté ont été accueillies (soit la moitié des demandes déposées) s'agissant de dossiers en cours d'instruction, essentiellement fondées sur l'état de santé des détenus et/ou une détention arbitraire en considération du non respect de la durée de la détention,
- toutes les prisons du sud du Togo ont été visitées et tous les détenus ont pu consulter un avocat soit plus de 600 personnes ».

Vraisemblablement, la prochaine caravane des droits de l'Homme devrait se tenir en République Démocratique du Congo, pays qui accueillera le prochain Congrès annuel de la CIB, en décembre 2010.

Il est dès lors fondamental pour l'AIJA de continuer à soutenir financièrement la « Voie de la Justice » et d'œuvrer de concert avec elle lors de ses prochaines missions, plaçant ainsi les droits de l'Homme au cœur de ses engagements.

Je ne peux que vous inciter vivement à vous joindre nombreux à la prochaine caravane.

Plus nous serons mobilisés, plus les résultats seront significatifs.

João Nuno PEREIRA
koops-pereira@pt.lu



The May conference in Parma presents AIJA members with the ideal location to explore the interesting and increasingly important topic of food law in a reassuring convivial atmosphere.

Parma is home to Parmalat and Barilla and both their Group General Counsels will be speakers during the seminar. Moreover, AIJA members will have dinner at Barilla's premises on Thursday night.

Outstanding external and prominent AIJA speakers have been secured, amongst them some of the leading experts in food law, EU law and IP law.

Food also plays a central role in the social program. While the world recognizes Italy as a nation of culinary excellence, Italians

recognize Parma as having contributed the most to this designation. The quality of Parmesan food will delight everyone's palate during our group dinners at restaurants as well as home hospitality. For the "day out" on *Saturday*, visits have been organized to "*Pio Tosini Spa*"- a real "prosciuttificio" with Parma Ham tasting- and to the traditional winery "*Ariola vigne e vini*".

Last but not least, brace yourselves for a celebration of music! On *Saturday* evening we will be going for dinner at the traditional Corale Verdi, where the twenty seven singers representing the 27 Verdi Operas regularly meet and where a small Verdi concert will be held. And much, much more ...

OC Team

Charleston Annual Congress



www.aijacharleston2010.org



Southern Hospitality

«Charleston is a place where everything is as it should be. You develop a sense of well being, and you feel very much at ease.» Faty Chaoui

The August Congress in Charleston will be an historic AIJA Congress, since it will be one of the only Congresses ever hosted in the United States. Participants will have the experience of a lifetime! As the Congress Co-Chairs, we welcome each of you to Charleston, a wonderfully unique, stunningly beautiful, and truly historic American city.

Charleston has been richly preserved since its settlement in 1670. The city has survived times of extreme poverty, following the US Civil War, and catastrophic disasters, including fires, earthquakes, and hurricanes. Despite those events, many of Charleston's earliest public and private buildings are still in use today.

As you meander through the city's historic district, the classic architecture makes you feel as if you are a character on a movie set. Not surprising, as Charleston's streets have played host to over fifty Hollywood blockbusters, among them, "The Notebook", "The Jackal", "The Legend of Bagger Vance", "The Patriot" and "The Prince of Tides". You will also see spires and steeples of more than 180 historic churches, a reminder of Charleston's early days, when its eight English settlers enticed European friends and family to relocate with the promise of absolute religious freedom. And relocate they did! While many of the early settlers came from England, Charles Town, as it was then known in honor of King Charles' gift to the settlers, became one of the US' first and most beloved homes for adventurous French, Scottish, Irish, and German

immigrants, who made the bustling sea town theirs. Until 1870, Charleston was home to the largest and wealthiest Jewish population in the United States.

Fast forward a few hundred years, and Charleston's beautiful cityscape still echoes with the unmistakable sound of horse-drawn carriages. The streets beckon guests to take a brief tour through centuries-old mansions and carefully tended gardens, overflowing with heirloom plants. Even as you walk down modern Market Street, you feel as if you have stepped back into the pages of genteel American history. Charleston is a spectacular city.

But, for all its charm, Charleston is no sleepy town. "In Charleston, you can actually feel the rhythm of life!" (Faty Chaoui). So while evening strolls may be made by picturesque gas lamps, they are made to the city's unmistakable beat. Enjoy the sounds of live jazz, blues and country music. Not to mention that Charleston is also one of the homes of Southern Gospel music, a rich vein in the city's incomparable, vibrant heartbeat. And "the shopping and food are great!" (Christoph Raudonat & Judy Lane). Feast on haute cuisine at upscale Southern restaurants, or lose yourself in one of Charleston's many small kitchens, home to some of the finest Southern and distinctive Gullah meals on the planet. Shoppers can enjoy Gucci, St. John, White House/Black Market and Godiva, without ever leaving the hotel, or take a one minute walk outside the main door, and immerse themselves in retail

therapy at Saks Fifth Avenue, Abercrombie & Fitch, Banana Republic, Ann Taylor, The Lucky Brand Jeans store and countless designer boutiques. As well, historic King Street, just steps away, is renowned for designer shoes, custom men's clothier's, and museum-quality paintings and antiques. In addition, outdoor enthusiasts should be reminded that Charleston is a coastal city! One can easily explore the outlying islands and make a quick trip to stunning beaches. This year's Day Out will feature beach activities on a beautiful stretch of Isle of Palms, an indescribably lovely setting for a fun-filled day. We guarantee this Congress will be second to none.

Finally, Charleston, an incredibly sophisticated city, is renowned for its delicate charm (its citizens are considered the most "mannerly" in the US). We have no doubt that you will be awed and pleasantly surprised by the amazing cultural program we have outlined for you this year. As well, the Work Coordinators have prepared an outstanding substantive/scientific program, with approval for Continuing Legal Education Credit.

Come to Charleston, friends. Experience authentic, unfiltered American history. Walk the grounds of an actual southern plantation. Gospel, jazz, blues, the beach. Come and listen as the city sings her incomparable song. There is truly no place like our home! – See y'all in Charleston!

Dalhi Myers & Neil Boyden Tanner

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N° 22 March | mars 2010

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Charleston, 2010

24-28 August 2010
24-28 août 2010

CHARLESTON
Charleston Place Hotel

Welcome to the Annual AIJA Congress 2010 in Charleston

SAVE THE DATE

and visit our congress website today

aijacharleston2010.org



Southern Hospitality



Luxemburg: New set of rules for BtoC commercial practices

With the law of 29 April 2009, Luxembourg has now implemented Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer (BtoC) commercial practices in the internal market. This law contains a new set of rules which clarify and intensify the existing legal framework of the consumer protection.

The law of 29 April 2009 on unfair commercial practices (the "Law of 29 April 2009") applies to unfair business-to-consumer (BtoC) commercial practices harming consumers' economic interests before and after the offer for sale and the sale of any goods or services, including immovable property, rights and obligations.

The consumer is defined by the Law of 29 April 2009 as any natural person who is acting for purposes outside his professional activities. The Law does not cover business-to-business (BtoB) transactions.

The Law of 29 April 2009 applies without prejudice to other laws protecting consumers as well as the law of 30 July 2002 on unfair competition, as amended.

The content of the Law of 29 April 2009, which does not depart from Directive 2005/29/EC, can be summed up as follows:

1. Prohibition of unfair commercial practices

A commercial practice is considered as unfair if the two following conditions are cumulatively met: the commercial practice is contrary to the requirements of professional diligence, and, it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reached or to whom it is addressed.

In line with national case law rendered in the field of unfair competition, this new prohibition does not require a malicious intention from the professional but only an objective breach of professional diligence. In this re-

spect, the possible good faith of the professional does not exempt him from his liability.

2. Misleading practices

The Law of 29 April 2009 distinguishes, as the Directive 2005/29/EC does, between misleading actions (2.1) and misleading omissions (2.2).

2.1. Misleading actions

According to the Law of 29 April 2009, a commercial practice is deemed misleading if it contains false information, or it, in any way, including overall presentation, deceives or is likely to deceive the average consumer.

This definition is close to the one of misleading advertising set forth in the law of 30 July 2002 on commercial practices and unfair competition, as amended, namely "any advertising which, in any way, including its presentation, deceives or is likely to deceive the persons to whom it is addressed, or whom it reaches and which, by reason of its deceptive nature, is likely to affect their economic behaviour or which, for those reasons, injures or is likely to injure a competition".

It remains uncertain how both prohibitions of misleading advertising will work in practice, the scope of application of the above-mentioned law of 30 July 2002 being not limited to BtoB relationships.

2.2. Misleading omissions

The Law of 29 April 2009 states that a commercial practice has to be regarded as misleading if, in its factual context, it omits substantial information that the average consumer needs, according to the context, to take an informed transactional decision and thereby causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise. This new provision generalises the obligation to provide consumers with pre-contractual information contained in special laws and also codifies the case law rendered under article 1116 of the Civil Code concerning fraudulent misrepresentation ("dol").

2.3. Blacklisted practices

The Law of 29 April 2009 contains a list of not less than twenty-three practices that are considered as misleading in any circumstances, such as for instance, bait advertising, refusals to sale, advertorials, and pyramid promotional schemes.

The Law of 29 April 2009 also blacklists the fact to promote a product similar to a product made by a particular manufacturer in such a manner as deliberately to mislead the consumer into believing that the product is made by that same manufacturer when it is not. From a literal reading, the Law does not seem to require that the product be distinctive, original or new. Such construction is likely to interact with trademark and copyright laws according to which a sign or design is only protected if distinctive or original. It is also likely to go against with civil liability principles according to which, in a few words, a copy of a product not protected by intellectual rights is considered as unfair only if the product has acquired a high reputation or holds a particular distinctive character.

3. Aggressive practices

The Law of 29 April 2009 states that a commercial practice is deemed aggressive if, in its factual context, it significantly impairs or is likely to significantly impair, by harassment, coercion, including the use of physical force, or undue influence, the average consumer's freedom of choice or conduct with regard to the product and thereby causes him or is likely to cause him to take a transactional decision that he would not have taken otherwise.

The commercial practices considered as aggressive in any circumstances are listed by the Law of 29 April 2009. It notably includes practices consisting in requiring a consumer who wishes to claim on an insurance policy to produce documents which could not reasonably be considered relevant as to whether the claim was valid in order to dissuade a consumer from exercising his contractual rights.

continued:

4. Sanctions

Fines of EUR 251.- to EUR 120.000.- are incurred in case of breach of the abovementioned prohibitions.

Moreover, any contractual provision which violates the Law of 29 April 2009 is void and such voidness may only be claimed by consumers.

Finally, the President of the commercial branch of the District Court may handle down, at the request of anyone, including consumer associations, and through a summary proceeding, an order to desist from any prohibited commercial practices.

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Luxembourg : De nouvelles règles encadrant les pratiques commerciales des entreprises vis-à-vis des consommateurs

Avec la loi du 29 avril 2009, le Luxembourg a désormais transposé la directive 2005/29/CE du 11 mai 2005 relative aux pratiques commerciales déloyales des entreprises vis-à-vis des consommateurs dans le marché intérieur. Cette loi contient une nouvelle série de mesures clarifiant et intensifiant l'encadrement législatif déjà existant en matière de protection des consommateurs.

La loi du 29 avril 2009 relative aux pratiques commerciales déloyales (la « Loi du 29 avril 2009 ») s'applique aux pratiques commerciales déloyales des professionnels vis-à-vis des consommateurs portant atteinte à leurs intérêts économiques avant, pendant et après l'offre en vente et la vente de tout bien ou tout service, y compris les biens immeubles, les droits et les obligations.

Le consommateur est défini comme toute personne physique qui agit à des fins n'entrant pas dans le cadre de son activité professionnelle. La loi du 29 avril 2009 ne vise pas les relations entre professionnels.

La Loi du 29 avril 2009 s'applique notamment sans préjudice de la loi du 30 juillet 2002 réglementant certaines pratiques commerciales, telles que la concurrence déloyale, la publicité trompeuse ou comparative, telle que modifiée.

Le contenu de la Loi du 29 avril 2009, qui reste fidèle à celui de la directive 2005/29/CE, peut être résumé comme suit:

1. Interdiction des pratiques commerciales déloyales

La Loi du 29 avril 2009 prévoit une interdiction générale des pratiques commerciales déloyales.

Une pratique commerciale est considérée comme déloyale lorsque les deux conditions suivantes sont cumulativement remplies la pratique commerciale est contraire aux exigences de la diligence professionnelle, et, elle altère ou est susceptible d'altérer le compor-

tement économique, par rapport au produit, du consommateur moyen qu'elle touche ou auquel elle s'adresse.

En accord avec la jurisprudence luxembourgeoise en matière de concurrence déloyale, cette nouvelle interdiction ne requiert pas la preuve d'une intention malveillante de la part du professionnel mais seulement un manquement objectif à la diligence professionnelle. Dans cette optique, l'éventuelle bonne foi du professionnel ne l'exonère pas de sa responsabilité.

2. Pratiques commerciales trompeuses

La Loi du 29 avril 2009 opère une distinction, à l'instar de la directive 2005/29/CE, entre les actions trompeuses (2.1) et les omissions trompeuses (2.2).

2.1. Actions trompeuses

Selon la Loi du 29 avril 2009, une pratique commerciale est réputée trompeuse si elle contient des informations fausses ou, si, d'une manière quelconque, y compris par sa présentation générale, elle induit ou est susceptible d'induire en erreur le consommateur moyen.

Cette définition est proche de la définition de la publicité trompeuse donnée par la loi du 30 juillet 2002 relative aux pratiques commerciales et à la concurrence déloyale, telle que modifiée, à savoir « toute publicité qui, d'une manière quelconque, y compris sa présentation, induit en erreur ou est susceptible d'induire en erreur les personnes auxquelles elle s'adresse ou qu'elle touche et qui, en raison de son caractère trompeur est susceptible d'affecter leur comportement économique ou qui, pour ces raisons, porte préjudice ou est susceptible de porter préjudice à un concurrent ».

L'articulation dans la pratique, de ces deux interdictions de la publicité trompeuse demeure encore incertaine, le champ d'application de la loi du 30 juillet 2002 n'étant pas réservé aux seules relations entre professionnels.

2.2. Omissions trompeuses

La Loi du 29 avril 2009 prévoit qu'une pratique commerciale est considérée comme une omission trompeuse si, dans son contexte factuel, elle omet une information substantielle dont le consommateur moyen a besoin, compte tenu du contexte, pour prendre une décision commerciale en connaissance de cause et, par conséquent, l'amène ou est susceptible de l'amener à prendre une décision commerciale qu'il n'aurait pas prise autrement.

Cette nouvelle disposition généralise l'obligation de fournir aux consommateurs des informations pré-contractuelles contenues dans certaines lois spéciales et codifie la jurisprudence rendue sur la base de l'article 1116 du Code civil concernant les manoeuvres dolosives.

2.3. Pratiques classées en liste noire

La Loi du 29 avril 2009 contient une liste de pas moins de vingt-trois pratiques commerciales réputées déloyales en toutes circonstances, tels que la publicité appât, le refus de vente, le publi-reportage, et le système de promotion pyramidale.

Elle vise également le fait de promouvoir un produit similaire à celui d'un fabricant particulier de manière à inciter délibérément le consommateur à penser que le produit provient de ce même fabricant alors que tel n'est pas le cas.

Au sens littéral, la Loi du 29 avril 2009 ne semble pas requérir que le produit soit distinctif, original ou nouveau.

Une telle disposition est dès lors susceptible d'entrer en contradiction avec le droit des marques et le droit d'auteur, qui ne protègent un signe qu'à condition qu'il soit distinctif ou original. Elle semble également être de nature à heurter les principes de la responsabilité civile, selon lesquels, en substance, la copie d'un produit non protégé par des droits de propriété intellectuelle est considérée comme déloyale uniquement si le produit a acquis une certaine renommée ou est pourvu d'un caractère distinctif.

continued:

3. Pratiques commerciales agressives

La Loi du 29 avril 2009 prévoit qu'une pratique commerciale est réputée agressive si, dans son contexte actuel, elle altère ou est susceptible d'altérer de manière significative, du fait du harcèlement, de la contrainte, y compris le recours à la force physique, ou d'une influence injustifiée, la liberté de choix ou de conduite du consommateur moyen à l'égard d'un produit, et, par conséquent, l'amène ou est susceptible de l'amener à prendre une décision commerciale qu'il n'aurait pas prise autrement.

Les pratiques commerciales agressives réputées déloyales en toutes circonstances sont listées par la Loi du 29 avril 2009. Elle vise notamment des pratiques consistant à obliger un consommateur, qui souhaite demander une indemnité au titre d'une police d'assu-

rance, à produire des documents qui ne peuvent raisonnablement être considérés comme pertinents et ce, dans le but de le dissuader d'introduire une telle demande.

4. Sanctions

Toute violation des dispositions mentionnées ci-dessus sera punie d'une amende de EUR 251.-, à EUR 120.000.-

En outre, toute clause d'un contrat conclue en violation de la Loi du 29 avril 2009 est réputée nulle et non écrite. Cette nullité ne pourra être invoquée que par le consommateur. Enfin, le Président du tribunal d'arrondissement siégeant en matière commerciale peut ordonner, à la requête de toute personne, y compris des associations de consommateur, par une procédure en référé, la cessation des actes contraires à la Loi du 29 avril 2009.

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Innovative and Dramatic changes in Arbitration Law and Practice in Israel- effects related International Litigation

Israel has recently gone through two major changes, concerning Arbitration, by amending the Israeli Arbitration Act of 1968, now allowing to appeal to an Arbitration Appeal Tribunal, and additionally the Israeli government issued an historic decision to allow Israeli authorities and national institutions to litigate by arbitration and not only in the domestic courts.

Both changes provide an all new perception concerning arbitration In Israel and/or with Israeli entities altogether.

For more then 40 years, since the enactment of the Israeli Arbitration Act of 1968 (hereinafter: "The Arbitration Act") (which was actually almost a duplicate of the British arbitration act of 1889), lawyers and litigants experienced the flaws of arbitration in Israel, implemented under the past existing rules, flaws namely noticed by the actual inability to over through an arbitral award, even in cases of great injustice or irrationality of an award, since the previous version of the law provided that ONLY extremely limited circumstances may provide grounds to challenge an arbitral award in domestic courts, (circumstances such as incompetence of the arbitrator authority, exceeding the realm of the arbitration, fraud etc.).

Given the above fact, which drove businesses and lawyers away from arbitration and arbitration agreements, and given the fact Israeli governmental institutions were bound from attending any arbitration whatsoever, even in commercial related issues, one can easily realize why arbitration was NOT a primary course of action to settle disputes, despite

the known and evident advantages of arbitration.

However, it now seems that the times have changed and the world of arbitration in Israel and related to Israeli players even in the international field, has taken a positive turn. During 2009 the Israeli parliament finalized the amendment of the Israeli Arbitration Act, adjusting the Law to meet the needs of businesses and the legal community, by *enabling parties to appeal an arbitral award* at an appellant arbitral tribunal (with one or three arbitrators), provided the parties agreed preliminarily in writing on the option of such an appellant tribunal. This option was NOT legally possible in Israel before the recent amendment of the Arbitration Act.

Moreover the recent amendment also provided that an arbitral award *must include the reasoning of the award* (which was not mandatory in the past) and not only the resulting relief itself.

The said amendments provides an innovative and to date approach towards the commercial players in Israel or related to trade and business with Israelis and/or in/with Israel, and their fundamental needs, as well as legal rights, to receive reasoning of a legal outcome that involves their issues, to receive objective legal supervision over arbitration awards, and the inherent somewhat constitutional right to appeal an unjust, irrational or even just an unfair arbitral award.

Consequently, the amended law also makes arbitration more attractive and less "risky" for litigants or parties to business, while the ar-

bitration option still remains a practical and efficient method to settle dispute, as professional and worthy as in the court of law and sometimes even more so.

The above seems to be the reason that led the Israeli government and Attorney General, consequentially to recently issue decision that the State of Israel and its national institutions will now on, consider settling disputes via arbitration, in adequate and relevant cases, opening, in itself a whole new world of efficiency and options to litigate in Israel, as states are one of the largest scale litigants.

The above mentioned changes in the legal aspect of arbitration law and practice in Israel is bound to have a great impact also over international and/or foreign entities and parties (out of Israel) which either have a commercial dispute with the State of Israel or Israeli businesses or chose for any reason whatsoever, to hold arbitration in Israel, since all the above makes arbitration not only more attractive but more reasonable to engage in.

Hence, I Advise all colleagues, both to keep in mind the dramatic changes concerning the arbitration option in Israel or with Israel related entities, and to consider drafting adequate arbitration clauses into business agreements, in order to provide our clients all and the best options the law allows concerning arbitration in Israel.

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Key US and UK Business Immigration Issues for Employers

For many employers in the United States and United Kingdom, talented workers from outside the US or Europe respectively are essential to the continued success of the business. However, numerous considerations must be taken into account, and sound legal advice taken, each and every time a non-domestic worker is hired, retained, transferred or even terminated, thanks to the various intricacies of current immigration law in both jurisdictions.

This article aims to provide a brief overview of some of the most important and pertinent issues that must be considered, firstly for those employers based in the US, and then for their UK counterparts, before commenting on an issue of equal importance in both jurisdictions.

Considerations For US Based Entities

Explore Your Employment Options For Hiring Foreign-Born Individuals

Notwithstanding last year's lengthened period of H-1B availability under the cap, employers were still left with more than a nine month gap (from December 22, 2009 until October 1, 2010) for new H-1B visas to become available for FY 2011, the filing season for which will begin on April 1. So what is your business to do in the meantime? While there are a limited number of options presented by the "alphabet soup" of temporary visa categories currently available under the law, there are, indeed, viable alternatives for potential hires for whom you cannot (or will not) wait until October 1, 2010 to employ (e.g. B-1 in lieu of H-1B, O-1, E-2, H-3).

Consider Strategies To Expedite Hiring

The following are strategies that may be available to an employer to expedite the employment of foreign national workers:

- **H-1B portability:** Visa portability provisions allow a foreign national accorded H-1B status to begin working for a new

H-1B employer as soon as the new employer files a "nonfrivolous" H-1B petition on behalf of the foreign national. Such portability provisions relieve the foreign national from the need to await approval notification from US Citizenship and Immigration Services ("USCIS") before commencing his/her new H-1B employment.

- **The availability of premium processing:** USCIS established a premium processing program to expedite the adjudication of certain employment-based petitions and applications within fifteen calendar days upon payment of the premium processing fee. The following non-immigrant visa categories are eligible for premium processing: E-1/E-2, H-1B, H-2B, H-3, L-1, O-1, P-1/P-2/P-3, Q-1, R-1, and TN.

Plan Ahead For "Administrative Processing" Delays At US Consulates Abroad

When an employee is required to travel outside of the US, it will be necessary for that employee to have the appropriate valid visa prior to re-entering the US. Such visa must be obtained from a US Consulate abroad after a personal interview. Due to a rise in "administrative processing" delays at US consulates abroad, you should prepare your employee and your business for such a delay. Indeed, even without an "administrative processing" delay, it could take a month or longer to obtain a visa appointment. Thus, the employee should plan ahead for their trip abroad.

While these delays are generally unavoidable, there are a few steps to minimize the work interruption should an employee become subject to administrative processing:

- **Confer with immigration counsel** to ensure that the written materials the employee will bring to his/her interview are complete and up-to-date and that the employee has completed the necessary steps to schedule the interview at the US Consulate within the appropriate time period;
- **Inform the employee's supervisor** of the possibility of a delay in visa issuance on

account of security checks; and

- **Develop an alternative work plan:** With today's technology, it is often possible for your employee to work abroad during such delays. If your employee has the ability to do so, he/she should bring the necessary devices/materials on his/her trip abroad.

Have A Policy In Place For Terminating The Employment of Foreign Nationals

Of course, lay-offs are a fact of life, especially so in today's economic environment. In circumstances involving a reduction in force, US company policies typically offer a few weeks of "severance" (with the date of termination effective immediately) in lieu of providing the employee with notice of the actual termination. While such severance packages may be fair, they (often unknowingly) present a unique set of problems to employees working pursuant to a work visa, since most work visa classifications are "employer specific". This means that the foreign national worker is not only dependent upon his/her employer for wages, but for his/her ability to remain in legal status in the US. Indeed, the US Department of Homeland Security considers a foreign national worker to be "out of status" as of the date of termination – regardless of the duration or amount of severance.

As such, for a terminated foreign national to remain in the US in an authorized period of stay, an application for an extension of stay (assuming new employment is found) or a change of status to another non-immigrant classification (e.g. B-2 visitor for pleasure) must be filed prior to or contemporaneous with the termination of one's employment. This is true not only for the worker, but also for his/her family. A failure to do so will likely render the entire family "out of status" and subject to removal from the US.

To ameliorate these harsh effects, employers should consider providing their foreign national employees with a fair period of notice before they are actually terminated from employment.

continued:

Considerations For UK-Based Entities

Establish Which Rules Are In Force

Since the UK Border Agency ('UKBA') introduced its new points-based system ('PBS') in late 2008, there have been several amendments made to both the immigration rules themselves and their accompanying guidance. Although these have been largely welcomed, there have been 'teething problems', and it is sometimes difficult to keep track of which rules are currently applicable to the situation in hand.

For example, several major changes to the PBS will be taking place on 6 April 2010. It is therefore important to ensure that relevant staff receive regular and adequate training to avoid inadvertent breaches of the UK immigration rules, and if you are unsure as to the nature or source of the new rules, that specialist legal advice is taken from immigration counsel.

Should The Entity Become A Registered Sponsor?

There are pros and cons to each available route under the PBS, which will require careful analysis before any role is offered to an employee who is not a citizen of a European Economic Area state or Switzerland. A larger international organisation hiring non-EEA/Swiss employees on a regular basis may prefer to use the Tier 2 sponsorship route, where available, as once the initial administrative hurdle of becoming licensed by the UKBA has been overcome, time will be saved when each qualifying migrant employee is offered a role.

This route is not a method of avoiding the strict points requirements for business mi-

grants however, and the initial registration process can be cumbersome and expensive. Ongoing sponsor compliance obligations and duties are also onerous and the UKBA will often monitor licensed organisations closely.

Smaller entities or those offering a one-off role to a non-EEA/Swiss employee should therefore consider other routes. For example, although the Tier 1 scheme is aimed towards individuals, this can also be very useful for employers not wishing to become registered sponsors.

What Is Best For The Employee?

A happy workforce is invaluable, and it is therefore not simply the employer's best interests that will be relevant in most cases.

Communication with the employee in question will often be vital, so that all bases are covered but also to ensure that their family and future needs are considered. For example, if they wish to eventually settle in the UK, a particular PBS route may facilitate this for them, whilst another PBS route may not.

Keeping Internal Records Up To Date

Finally, whichever route is chosen by the UK organisation to employ foreign workers, essential housekeeping of personnel files must be done on a regular basis. This means HR organisation in terms of, for instance, keeping track of which employees require visas and the dates on which those visas are due to expire, to avoid any inadvertent breaches of the immigration rules.

The UKBA has powers to issue warnings and both civil and criminal penalties, and fines will be issued of up to £10,000 per illegal migrant employed by an organisation, which can prove extremely costly. In addition, spon-

sorship status will be demoted or revoked, and individuals can be deported and banned from re-entering the UK if found to have breached the immigration rules.

An Important Consideration For Both US And UK Based Entities

Develop Long-Term Immigration Strategies For Your Workforce

To help accomplish your staffing goals and thus remain competitive in today's global economy, it is the role of immigration counsel, in partnership with business owners and/or human resources personnel, to focus on "the bigger picture" for key, foreign-born personnel to ensure that those individuals are in a position to gain entry to and then remain in the US or UK for as long as necessary to achieve the goals of the business. Such long-term strategies should be discussed prior to (if necessary), or at the time of, hiring each foreign national (leaving sufficient time to collect relevant documents and submit immigration applications), and should be revisited over the course of the business' employment relationship with each such employee. These plans should never be left to the eleventh hour as poor planning will likely result in short-changing your long-term employment options with a valuable employee.

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Further developments on Brazil's retaliation against the United States: Brazil issues list of goods and public consultation on ip retaliation is expected

São Paulo, March 12 2010

Brazil's Foreign Trade Chamber (CAMEX) issued on March, 08, the list of products that will be subject to tariff increases within 30 days unless both countries can reach an agreement to settle the dispute over U.S. cotton aid considered illegal by the WTO. Brazil is yet to design its "cross-retaliation" program on trade related aspects of intellectual property rights. To that effect, according to CAMEX and the Brazilian Ministry of Foreign Affairs, Brazil is expected to publish by March 23 a public consultation with a separate list worth an additional \$238 million focused on intellectual property rights and services.

The list of goods was established after a public consultation on a preliminary list containing 222 product codes. In establishing the final list, CAMEX excluded most products which had been listed preliminarily and were shown to be important for Brazilian industries. An initial analysis of the final goods retaliation list indicates that Brazil is more willing to retaliate against big-ticket items in the agricultural sector than in the manufacturing goods sector. The most valuable U.S. agriculture exports were included in the list.

CAMEX increased import tariffs on 102 U.S. origin goods. The new tariff rates shall apply for 365 days, they vary from 12% to 100% (in most cases, the level of tariffs would be either doubled or tripled if the sanctions take effect) and apply on, for instance, automobiles, cosmetics, agricultural products and electronic equipment (such as mobile phones fridges and stoves).The largest

single item in terms of 2008 imports was wheat, which in that year totaled \$318 million. The tariff on wheat imported from the United States would triple from 10 percent to 30 percent, according to the sanctions list. The new Brazilian tariffs are expected to be applied in thirty days counting from March 08. Unless an agreement is reached between Brazil and the U.S. until April 07, all imports to Brazil of U.S. goods included in the list shall be subject to an extra tariff rate. According to CAMEX, the list would represent retaliation worth US\$ 591 million.

According to the WTO authorization, as interpreted by the Brazilian government, Brazil would still be entitled to retaliate up to the amount of US\$ 238 million for this year on intellectual property (IP) rights and services in order to reach the full authorized amount of US\$ 829 million. CAMEX remains to decide the measures that would be adopted on IP rights and services.

On February 10 2010, as we anticipated in the previous Brazilian ILO update, the Brazilian Executive branch enacted a Provisional Executive Order (*Medida Provisória 482/2010*) authorizing CAMEX to suspend concessions or other obligations related to IP rights, subject to and circumscribed by the terms and conditions set forth by the WTO. The Provisional Executive Order covered a wide range of options including (i) suspension and/or limitation of IP rights, (ii) change of measures for compliance of rules related to IP rights, (iii) change of measures for obtaining IP rights, (iv) temporary suspension of payment

of royalties and (v) application of commercial duties on payments directed to IP right holders. The Provisional Executive Order includes, as IP rights that may be subject to retaliation, for instance: trademarks, patents, copyrights, software, geographical indications, trade secrets and industrial designs.

However, the Provisional Executive Order is merely authoritative. Therefore, the full contours of retaliation on IP rights are yet to be drawn. According to a joint statement by the Ministry of Foreign Affairs and CAMEX, a public consultation (similar to the one already performed in relation to the list of goods) will be held on the sectors and measures to be included. CAMEX is expected to initiate the consultation before its next meeting, scheduled for March 23 2010. Based on the Brazilian experience with the design of the retaliation program on U.S. origin goods, there would be a thirty-day deadline for interested parties to participate, defending their interests before and providing clarifications to CAMEX. This would certainly be the major opportunity for private parties to become involved in the retaliation process, in order to avoid potentially negative consequences to their businesses, in particular the pharmaceutical sector which is expected to be a prime target.

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Portugal: Associated Ship Arrest: Does the Corporate Veil No Longer Shield Shipping Groups?

February 03 2010

A recent order of the Lisbon Admiralty Court may have paved the way for the arrest of associated ships and piercing the corporate veil in arrest cases.

Facts

A yard signed an agreement with several companies in a shipping group to build four product tankers, referred to as vessels 2, 3, 6 and 7. The yard completed vessels 2 and 3 and delivered them to the owners. However, vessels 6 and 7 were never delivered to, or accepted by, the owners. As a result, the yard was forced to sell them for less than the price agreed with the intended owners. As a result, an outstanding sum of around \$12 million remained to be paid to the yard in respect of the agreed price of vessels 6 and 7.

The yard applied in Portugal for the arrest of vessels 2 and 3, which at the time of the arrest application and order had been named and flagged and time chartered to a Portuguese company. The court found that the vessels were owned by a company which was part of the same group as the owners of vessels 2 and 3 (ie, the company that had originally contracted with the yard for the four tankers). The natural person in control of the shipping group was also named in the arrest proceedings as a respondent.

Among other things, the arrest was based on the statement in the order that:

"it has... been summarily proven by the documentation attached and the oral statements produced that the respondents' companies are part of the shipping group... being Mr/Mrs... - the armador⁽¹⁾ and the person responsible for entering into the shipbuilding contract for the four vessels, and for the non-payment of instalments related to [vessels] 6 and 7."

The ships were released pursuant to an out-of-court settlement agreement.

Comment

The contractual framework underlying the dispute was complex and involved several entities. It is debatable whether the judge would have been able to grant an arrest order for claims relating to the four vessels as being part of the same contractual relationship or linked relationships, regardless of the vessels' subsequent ownership.

However, the judge did not attempt to take this approach. He appears to have accepted that the contracts for the four vessels were entered into by companies of the same group that were controlled by the same natural person. The arrested vessels had been renamed and were owned by compa-

nies that were not party to the shipbuilding contract, but were part of the same shipping group and were ultimately controlled by the same person. Their arrest suggests that the judge pierced the corporate veil, disregarding a formal separation in corporate structure and instead considering the links between the companies' shareholders, sister companies and controlling interest. In any event, the judge ordered the arrest of associated ships, owned by an entity within a group, in connection with a claim relating exclusively to other group companies and to ships that the latter companies owned (or would have owned under the terms of the contract in dispute).

Although the approach is comparable to that applied in South Africa, the decision breaks new ground in terms of ship arrest in Portugal and may increase the possibility of arrest in the Portuguese jurisdiction. However, the order was not tested on appeal - similar orders in future cases may be further examined by a higher court.

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⁽¹⁾ Under Portuguese law, the term 'armador' means "the person or entity that executes all the material and legal acts necessary for the ship to be in a position to start its voyage". The owner, the second registered owner (in a double registration situation) and the demise charterer are assumed to be the ship's armador.



Germany: Effective Notarization of SPAs regarding shares in a GmbH by Swiss Notaries – Change of practice of the courts?

The District Court of Frankfurt has recently published a crucial decision on the notarization of an assignment or a pledging of shares in a limited liability company (GmbH) by a Swiss notary, which could constitute the beginning of a new practice of the courts. Pursuant to Sec. 15 Para 3 and 4 of the German Limited Liability Companies Act (GmbHG), the assignment of shares of a limited liability company and the underlying obligatory contract require notarization to become legally effective. These regulations have the purpose to impede the trade of shares and to create legal clarity.

Due to cost reasons, assignments of shares of limited liability companies were frequently notarized by Swiss notaries in the past. According to the jurisdiction of the Federal Court of Justice, the notarization of assignments of shares of limited liability companies in foreign countries is effective if the office of the foreign notary and the foreign notarization procedure are “equivalent” to German notarizations. So far the courts, particularly for Swiss notaries operating in the German-speaking Swiss cantons, have approved this kind of notarization abroad, although it required approval for each canton separately. The District Court of Frankfurt has explicitly approved this legislation once again. However, due to amendments to assignments

of shares in the German and Swiss Limited Liability Company Acts, the District Court of Frankfurt has also questioned this equivalence for transactions as of 2008.

Pursuant to Swiss corporate law, a written transfer agreement, together with the shareholder meeting’s approval where a shareholder meeting is not excluded from the company’s statutes (Para 785, 786 OR), suffices for the assignment of shares of a limited liability company as of 1 January 2008. As a result of this amendment the requirements by the Swiss Code of Obligations no longer conform to the requirements for effectiveness under Sec. 15, Para 3, 4 of the German Limited Liability Company Act (GmbHG). Moreover, the German MoMiG (Act to Modernize the Law Governing Private Limited Companies and to Combat Abuses), which came into effect on 1 November 2008, strongly enhanced the significance of a limited liability company’s list of shareholders, which must be ratified, notarized and submitted to the Commercial Register by the collaborating notary after the notarization of amendments of share ownership ratio pursuant to Sec. 40 Para 2 of the German Limited Liability Company Act (GmbHG).

Against the background of differing substantive formalities for assignment agree-

ments and additional official duties of German notaries, the District Court of Frankfurt expressed serious doubts about the effectiveness of notarizations of assignments of shares and pledges of a limited liability company (GmbH) by Swiss notaries. The District Court particularly refers to a Basel notary who due to not fulfilling Germany’s official competencies, did not meet the newly regulated obligations for a notary involved in the assignment of shares pursuant to Sec. 40 Para 2 Limited Liability Company Act (GmbHG). In the opinion of the District Court of Frankfurt an equivalence of notarizations in line with the notary form requirements of German law would no longer apply. A concluding assessment of the effectiveness of form was not given by the judges in the case as such an assessment had not been asked for.

In practice this means that legal certainty will only be established in this matter once a decision has been made by the Federal Court of Justice. Until then there is the risk that notarizations in Switzerland will be considered ineffective. Weighing the pros and cons, it seems not worth taking the risk of ineffectiveness of the assignment of shares just in order to save costs.

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Russia: Impartiality test for arbitrators

In 2007, the Russian Supreme Arbitrazh (State Commercial) Court in *OAo NK Rosneft v. Yukos Capital S.a.r.l.* ruled that arbitrators must disclose their connection to the legal counsel of the other party at the time of their appointment. The facts of the case suggested that arbitrators spoke at a conference organized and sponsored by the law firm representing Yukos Capital S.a.r.l. in the arbitral proceedings.¹

Russian law stipulates that an arbitrator must disclose any circumstances which may give rise to justifiable doubts as to his impartiality or independence.² Based on such disclosure, a party to the arbitration may decide whether to challenge the arbitrator. The arbitrator's failure to provide such information at the time of his appointment may serve as grounds for appealing an arbitral award in the future.³ Based on the law and the facts of the case, the court set aside the arbitral award on the ground that arbitrators failed to disclose circumstances which could give rise doubts as to their impartiality or independence. However, the court did not explicitly say that the participation of an arbitrator in a conference organized and sponsored by one of the parties' counsel amounts per se to a circumstance giving rise to justifiable doubts as to his impartiality or independence. This led to a vivid discussion among practitioners over whether arbitrators are biased if they appear at academic events organized and sponsored by the opposite party's counsel (law firm).

There was no subsequent case law regarding this matter until the recent decision of the Court of Cassation of the Moscow Federal Circuit in the *Erick van Egeraat Associated*

Architects B.V. (Netherlands) v Capital Group LLC (Russia) case, which involved a similar set of facts.⁴ In this case Capital Group LLC asked the court to refuse the enforcement of the Swedish arbitral award (rendered under the SCC Arbitration Rules) alleging that a co-arbitrator appointed by the claimant was biased because she had once spoken at a conference organized and sponsored by the law firm of the opposite party's counsel. In support of its argument that the co-arbitrator was biased, Capital Group LLC also relied on the fact that the counsel representing Erick van Egeraat had spoken at the same conference.

The court rejected Capital Group LLC's argument and based its ruling on two specific grounds. First, it was established that the law firm acted only as a so-called 'information sponsor' (promoting the conference among its clients and partners) and certainly had no influence on either the program of the conference or on the speakers' list. Second, the participation of the co-arbitrator in the conference did not create any dependence on, or commercial interest with, the counsel (law firm). The court found that the arbitrator fulfilled the impartiality requirements set forth by international legal acts⁵ and the SCC Arbitration Rules (which governed the arbitration proceedings.).

Comments

The decision of the Court of Cassation of the Moscow Federal Circuit is timely and welcome as it brings some clarity to the impartiality requirements for arbitrators in Russia.

Russian courts had adopted the position that an arbitrator's involvement in academic events organized by the law firm of the parties' counsel must be disclosed to the other party and failure to disclose such circumstance is a ground for setting aside the award. Yet, the courts had not answered the main question of whether the mere participation in such a conference biases the arbitrator.

The recent decision illustrates that the impartiality test is based on establishing whether or not any interaction creates dependence or commercial interest between the counsel (law firm) and the arbitrator. It is within the court's discretion to decide whether, in a specific case, any form of sponsorship for the conference in which an arbitrator participated gives rise to justifiable doubts as to his impartiality. In this particular case, the court ruled that 'information sponsorship' does not create any special relationship between the counsel (law firm) and arbitrator.

Furthermore, the court held that the fact that the arbitrator and counsel spoke at the same conference does not necessarily give rise to justifiable doubts as to his impartiality. The court also underlined that the impartiality requirements also depend on the applicable arbitration rules. Thus, in our opinion, any applicable rules or guidelines of the arbitration institution chosen by the parties on the arbitrators' impartiality are of significant relevance for setting aside or enforcement proceedings in Russia.

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¹ *Ruling of the Supreme Arbitrazh Court of 10.12.2007 N 14956/07, cases N A40-4576/07-69-46, A40-4581/07-69-47.*

² *Article 12.1 of the Federal Law on International Commercial Arbitration, 07.07.1993, N 5338-1.*

³ *Article 34.2.1. (3) of the Federal Law on International Commercial Arbitration, 07.07.1993, N 5338-1.*

⁴ *Resolution of the Federal Arbitrazh Court of the Moscow Circuit, № KG-A40/8155-09, case No. A40-51596/09-68-437, 27.08.2009*

⁵ *The court did not refer to a specific international legal act. However, it can be understood that the reference is made to Article 5.1 (d) of the New York Convention, which in turn, in the absence of the agreement between the parties on the subject, refers to lex arbitri, i.e. the Swedish Arbitration Act.*



Some tax aspects of yacht finance leasing in Malta

Malta has one of the largest ship and yacht registries in the world. Over the past years and particularly since Malta's accession to EU membership in 2004, Malta has become a hot spot for the private and super yacht industry. More recently, yacht owners and the yachting industry in general has shown additional interest in Malta thanks to special VAT rules on finance leasing of yachts. These rules, coupled with excellent yacht servicing and maintenance facilities and Malta's strategic location in the Mediterranean have led to a significant growth in the Maltese yachting business over the past years.

VAT treatment

Maltese VAT legislation contains special rules dealing with finance leasing of yachts – in short, these rules represent an interesting tax planning opportunity for owners and financiers and a reduction on the VAT incidence on finance leasing of vessels. These rules are particularly attractive for yacht owners who wish to use Malta as a base for the importation or purchase of a new yacht into or within the EU.

Finance leasing is a contract which provides for the lease of a yacht by the lessor to the lessee in return for a fee and also provides for an option by the lessee to purchase the yacht at the end of the lease period at a price which is typically calculated as a percentage of the value of the vessel. A service consisting in the leasing of a yacht takes place where the lessor is established for VAT purposes. Where the lessor is established in Malta and registered for VAT in Malta, the lease will be subject to Maltese VAT.

Due to Malta's proximity to non-EU waters, many yachts that are leased in Malta are effectively used within non-EU waters and therefore Malta treats leasing services as subject to Maltese VAT to the extent that their effective use and enjoyment is within the EU. Owing to the objective difficulty in establishing the time spent by the yacht within and outside EU waters, Malta has adopted a simplified method to determine the duration of

the use of the yacht within and outside EU waters. This method is based on the length of the yacht and the method of propulsion as illustrated below:

Type of vessel	Deemed EU use	Effective Maltese VAT rate	VAT saving
Motor yachts and Sailing yachts exceeding 24 metres in length	30%	5.4%	12.6%
Sailing yachts between 20.01 and 24 metres long Motor yachts between 16.01 and 24 metres long	40%	7.2%	10.8%
Sailing yachts between 10.01 and 20 metres long Motor yachts between 12.01 and 16 metres long	50%	9%	9%
Sailing yachts up to 10 metres long Motor yachts between 7.51 and 12 metres long (if registered in the commercial register)	60%	10.8%	7.2%
Motor yachts up to 7.5 long (if registered in the commercial register)	90%	16.2%	1.8%

The lease payments are subject to the standard Maltese VAT rate of 18% but VAT is charged on the portion of the lease payments that is attributable to the use of the yacht in EU waters.

In order to qualify for the above reductions in VAT, the rules prescribe a number of conditions, mainly :

- the lessor must be a Maltese person or a Maltese company and required to register for VAT in Malta
- the maximum duration of the lease is 3 years
- the lease contract must provide for an option of the lessee to purchase the yacht at the end of the lease at a percentage of the value of the yacht - this option to purchase is taxable at the standard rate of 18%
- the finance lease agreement and the value of the yacht must be approved by the VAT Department prior to the commencement of the finance lease.

At the termination of the finance leasing arrangement, the VAT Department will issue a certificate to the lessee confirming that full Maltese VAT has been paid on the yacht provided that all VAT has been duly accounted for and paid.

Income tax issues

The chargeable profits realised by the lessor company are subject to corporate tax at 35%. Chargeable profits will typically consist in the overall mark-up realised by the lessor less expenses incurred in the production of the income. Upon a distribution of dividends by the Maltese lessor company to the shareholders, the latter qualify for a refund of part of the tax paid by the company on the distributed profits. The refund is 6/7ths (or 30%) of the tax paid by the company and therefore, the expected overall tax burden will be in the region of 5%.

Other issues

Maltese law does not provide for a possession tax on yachts nor is a transfer of a yacht subject to duty or other taxes.

This VAT finance leasing rules should be of interest to owners of EU and non-EU new and second hand yachts as well as to financiers and yacht agents and brokers. For further information, please contact Damien Fiott.

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Denmark: Shareholders meetings in cyberspace

Spring is the global season for annual shareholders meetings were annual accounts will be discussed, new management will be elected and proposals from shareholders and Boards will be considered.

Recently the world's first fully electronic shareholders meeting took place in Denmark in the company Sparindex listed on the Copenhagen Stock Exchange. I was appointed chairman of the meeting and shall below share some of the first experiences and impressions as chairman at a fully electronic shareholders meeting, where participation could only take place via the internet.

Legislation

In Denmark a provision in the Company Law already in 2003 provided for the possibility of conducting either fully or partly electronic shareholders meetings. This requires that the Statutes of the company contain relevant provisions in regard to this issue. However, for several years no companies appeared to take advantage of this possibility, at least not in regard to the fully electronic shareholders meetings. I am aware that several other countries have also contemplated introducing the possibility in their company laws, but the practical interest for this model still appears to be relatively limited.

According to the Danish Company Law, it is the Board of a company that determines the specific requirements to the electronic systems, which shall be used at a partly or fully electronic shareholders meeting. The invitation for the shareholders meeting must contain information in this respect and it must also appear from the invitation, how the shareholders will register for the meeting and how they can obtain information about the procedure in regard to the electronic participation at the shareholders meeting.

In Denmark it is the responsibility of the Board to ensure that the shareholders meeting will be conducted in a reassuring manner. The system applied must be designed with functions that ensure that the requirements in the Danish Company Law in regard to the

shareholders meeting are observed including the shareholders' right to participate and express themselves and vote at the shareholders meeting. The system applied shall additionally in a reliable manner be able to determine, which shareholders participate in the shareholders assembly, which capital and which voting right they represent as well as the result of the votes.

In my opinion the chairman must assess the electronic system, which the Board has chosen.

In continuation of my usual introductory opinion expressed about the lawfulness and the competence of the shareholders meeting at the meeting I chaired, I consequently added that by testing the system prior to the shareholders meeting, I had established that the system appeared to be satisfactory in regard to conducting the shareholders meeting. It is obvious that it will be difficult for a chairman, which is not notified in advance of his appointment, to assess the ability of the chosen system, without a prior test of the system.

In companies where the chairman of the meetings are selected at the meeting, it must moreover be ensured that the system is able to authorise the respected computer of the chosen chairman in order to perform the specific functions, which the chairman – as oppose to the other participants – must be able to use (determining the list of speakers, opening and closing items on the agenda, initiating voting etc.).

The Meeting

In principle an electronic shareholders meeting, whether it is a fully or partly electronic meeting, may be conducted more or less on the same manner as a traditional shareholders meeting.

However, in many organisations and companies it will be relevant to make use of a possibility to combine the actual electronic shareholders meeting with a prior electronic Q & A session of e.g. a couple of weeks, where

shareholders/members may pose questions to the management via a platform on the website. This enables the management to obtain an opportunity to enter into a dialogue already prior to the shareholders meeting, but also a possibility to establish in advance, which specific topics may be expected to attract the major interest at the actual shareholders meeting. Moreover, it may be considered to upload material as e.g. the annual report, various presentations and guides about participation prior to the shareholders meeting. The Danish Companies Law contains specific provision in this respect.

Prior to the shareholders meeting the Board must assure that all the registered participants will be given access on the day of the shareholders meeting on a computer by in advance sending a username and a password. The system must enable identification of all participants and their votes, and the information in this respect must be available for the chairman of the meeting.

It is obvious important that all the participants in advance have been made familiar with the requirements for the programs on the respective computers in order for all presentations to be shown and material to be downloaded during the meeting.

At the shareholders meeting it is probably an advantage that the chairman and the management will physically be located in the same room, but it is not a requirement. All the participants will log on, on the basis of a password and code sent to them, and participants may during the meeting log off and on as they please during the entire meeting.

Sparindex had chosen a system developed by the Danish Company VP Securities A/S and had prior to the shareholders meeting videotaped an opening speech by the chairman, which was played via the system at the beginning of the shareholders meeting. Subsequently, the chairman was chosen.

The report of the chairman of the Board and the annual report were also presented by video, which was played simultaneously to all participants. Subsequently, the par-

continued:

ticipants had the opportunity to raise comments and pose questions via a list of speakers, which the chairman managed. Questions are posted in writing directly online and the chairman or the management may then subsequently answer the questions, which may then be seen by all participants.

At the shareholders meeting in Sparindex, there were a number of proposals for changes to the Statutes. These were presented by sending out the motivation for each proposal, subsequently the specific proposed wording for each proposal. After each item there was a possibility for submitting a vote electronically on the basis of prefixed options in the system; "yes", "no" or "blank" for each item.

Conducting the votes is a specifically smooth and quick way of voting on the electronic system compared to the large and physical shareholders meeting, where the collection and counting of votes may sometimes be a very time consuming business.

The votes are commenced by the chairman and may be set to last for e.g. 2 minutes. Immediately after all the votes have been counted, the system provides the chairman with the result, which the chairman then publishes to all participants.

All standard texts which the chairman broadcasts during the shareholders meeting may be typed in advances in a word document, whereby the chairman at the shareholders meeting as it goes along can copy-paste the text before submitting the messages to the participants.

Relevant for your clients?

Of course the possibility of conducting a fully or partly electronic shareholders meeting requires the necessary legal basis. However, in the countries where this is now a possibility, I will certainly encourage corporate lawyers to propose the possibility to their clients. Obviously, a certain cost is connected to buying a license or to developing a suitable it-system for the purpose, and a company must also consider whether its less it-experienced shareholders de facto will be prevented from participating. However, far more participants may be attracted, as there is not travelling time or travelling costs connected to participating in the shareholders meeting. Shareholders may take a break from their job or sit at home, or abroad and participate in either the entire meeting, or in just parts of it. Conducting meetings electronically, should enhance investor involvement and interest,

especially in regard to companies with shareholders from several countries.

A bigger involvement may be expected via the initial Q & A phase prior to the shareholders meeting and larger involvement may also be expected at the shareholders meeting, as it requires less courage to send a question or a comment from one's own computer than from the floor in a large assembly. On the other hand you do as a chairman to some degree lose the possibility of sensing the atmosphere at a shareholders meeting, when you are sitting at a distance in cyberspace behind the computer screen.

In my opinion, the majority of larger companies and associations will provide more democracy for the shareholders/members by introducing electronic assemblies, but this is of course not in all managements an aim in itself.

Personally, I expect to see a strong increase in electronic shareholders meetings in the coming years, and I encourage colleagues to explore the possibilities and discuss it with the clients, if this is an option in the jurisdiction.

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Germany: Attention: Attempt of Commercial Check Fraud

Our law firm received a fraudulent offer of an alleged corporation to collect their claims. After doubts arose because of the cause of events, we luckily did not get harmed. However, to ensure, such harmful behavior does not effect other AIJA-members, we want to inform you about the modus operandi:

An alleged foreign corporation (in our case: Japanese) asks the law firm to collect claims, for instance in Europe, which are allegedly based on the deliveries. The alleged debtor will be asked by the company to execute the payment onto the account of the law firm. Shortly afterwards, the law firm receives a check, which shall be cashed onto the account of the law firm. At least in Germany, the credit entry on the law firms' account is done immediately. After the discount of the agreed fees, the remaining amount shall be forwarded to the account of the alleged company, which is only specified after the law firm receives the check. Although the check regularly is a counterfeit, the law firm might not uncover this until the check is returned

by the foreign bank as fraudulent, which can take weeks or months in international payment transactions. Months after the law firm forwarded the remaining amount according to the agreement with the alleged client, the bank informs the law firm that the check is a counterfeit with the consequence that the account of the law firm is then debited with the amount of the check. As the major amount of the check sum has already been transferred to the bank of the fraudster, the law firm faces a huge loss of money. In our case, we received a check of 290,000 USD of a Canadian Bank, which should be the payment of a Dutch company. As receiver – as mentioned – was named a Japanese company, which's fax number mysteriously had the area code of Tbilisi in the Georgian Republic. We informed the German authorities of this scheme and realized that similar actions are mentioned on the website of the FBI (<http://www.fbi.gov/cyberinvest/escams.htm>).

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Espagne: Licenciements en temps de crise

Le Statut des Travailleurs espagnol prévoit différents cas de licenciement pour cause objective. Les plus fréquents en temps de crise, sont les causes économiques et les causes de production.

Tout d'abord, analysons les caractéristiques principales du licenciement pour cause objective :

1. Le travailleur a droit à une indemnité équivalente à 20 jours de salaire par année travaillée, alors qu'en cas de licenciement sans cause justifiée, le travailleur a droit à 45 jours de salaire par année travaillée. Le licenciement pour cause objective est donc nettement plus intéressant financièrement pour l'entrepreneur.
2. Le travailleur a droit à un préavis de 30 jours, pendant lequel il percevra son salaire et pourra s'absenter jusqu'à 6 heures par semaine afin de trouver un nouvel emploi.

Si l'employeur le souhaite, le travailleur pourra quitter immédiatement son emploi après avoir reçu la lettre de licenciement, à condition qu'il perçoive immédiatement l'indemnité correspondante, ainsi que le salaire équivalent aux 30 jours de préavis non respecté.

Le travailleur a droit à 20 jours de salaire pour chaque année travaillée, avec une limite de 12 mois de salaire maximum.

Ensuite, il convient d'exposer brièvement les causes économiques-productives, qui per-

mettent à l'entrepreneur de procéder à un licenciement par causes objectives.

1. **Causes économiques** : une situation économique mauvaise réelle et actuelle, doit affecter l'ensemble de l'entreprise. Les pertes doivent être reflétées dans les comptes annuels, une diminution annuelle des bénéfices n'étant pas suffisante.
2. **Causes de production**: la diminution de la production de l'entreprise liée à l'absence de commandes représente une cause suffisante pour réaliser un licenciement pour cause objective, à condition que cette diminution soit due à des causes extérieures à l'employeur. Il ne sera cependant pas nécessaire de prouver une situation déficitaire de l'entreprise pour attester la cause de production.

Si l'entrepreneur décide de licencier un travailleur sur la base de ces causes, celui-ci devra préparer une lettre de licenciement le plus détaillée possible. La lettre de licenciement doit en effet, rapporter les faits précis et faire référence aux articles du Statut des Travailleurs visés. De plus, la lettre doit contenir l'information numérique des pertes, c'est à dire les données contenues dans les comptes annuels, ainsi que les données numériques des commandes des années précédentes, au cas où il existe également une baisse de la production.

La lettre de licenciement doit respecter toutes ces conditions, sinon, le licenciement

pourrait être déclaré nul, et, en conséquence, le travailleur devra être réintégré à l'entreprise et devra percevoir les salaires depuis la date du licenciement. De plus, lorsque l'entrepreneur délivre la lettre de licenciement, celui-ci doit également remettre au travailleur un chèque avec l'indemnité correspondante, ainsi que les 30 jours de préavis, au cas où celui-ci n'aurait pas été respecté. Si le travailleur n'accepte pas le chèque, la présence de deux témoins sera nécessaire pour prouver, lors d'une éventuelle procédure judiciaire, que l'entrepreneur a bien mis à disposition du travailleur l'indemnité correspondante et que celui-ci n'a pas voulu l'accepter. La consignation judiciaire de l'indemnité prévue pour les licenciements abusifs est actuellement utilisée pour les entreprises qui réalisent des licenciements pour cause objective, car de cette façon l'entrepreneur évite une réclamation ultérieure des salaires, susceptible d'avoir lieu dès lors que l'entrepreneur n'ait pas mis à disposition l'indemnité correspondante.

Face à la situation actuelle de crise économique, ce type de licenciements est en principe le plus intéressant pour les entreprises, chaque fois que les conditions ci-dessus exposées soient bien réunies.

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La future Cour européenne des brevets

La dernière version du projet de création d'une juridiction commune des brevets en Europe (en date du 23 mars 2009¹) vise à créer un nouveau système unifié de règlement des litiges en matière de brevet pour le continent européen. Nous devons nous y préparer car ce projet qui modernisera la PI en Europe a de sérieuses chances d'aboutir. Et pouvoir s'appuyer, dans ce cadre, sur le réseau AIJA sera un réel atout...

La mise en place de cette Cour européenne qui traitera des brevets européens et communautaires s'inscrit dans le cadre des relations entre le système du brevet européen et le droit communautaire².

Rappelons donc tout d'abord qu'en vertu de la Convention de Munich³, un inventeur peut obtenir par une procédure de guichet unique, la délivrance d'un brevet couvrant - au choix du déposant - tout ou partie des

36 Etats européens parties⁴ au système. L'examen et la délivrance d'un tel « brevet européen » sont assurés par l'OEB. Si l'OEB décide de délivrer le brevet, celui-ci pourra faire l'objet d'une opposition par un tiers (dans les neuf mois de la date de délivrance); par contre, sauf révocation par une division d'opposition de l'OEB, ce brevet possèdera ensuite tous les effets d'un brevet national dans chacun des pays pour lequel sa délivrance a été demandée. Aussi, ce sont les juridictions nationales qui statueront chacune sur la validité ou la contrefaçon de la partie nationale de ce brevet.

Par conséquent, la particularité juridique de ce système du brevet européen est qu'il n'est pas complètement intégré, comme l'est par exemple celui de la marque communautaire (qui est un titre unique, soumis au seul droit communautaire⁵).

C'est pour remédier à cette situation qui crée, par exemple pour le contentieux, des risques de divergences de jurisprudence entre les tribunaux nationaux, que de nombreux efforts ont été entrepris depuis des années pour parvenir à un système totalement intégré en Europe.

Ces discussions ont concerné d'une part, la création d'un véritable brevet communautaire⁶, pour lequel existent à ce jour la Convention de Luxembourg – non entrée en

vigueur⁷ – du 15 décembre 1975 (modifiée par l'accord de Luxembourg du 15 décembre 1989), et plus récemment, en 2000 puis 2009, la nouvelle proposition de règlement sur un brevet communautaire⁸; d'autre part, les principaux Etats membres de l'OEB ont proposé la création d'une juridiction spéciale destinée à trancher les seuls litiges relatifs aux brevets européens, par le biais d'un nouveau traité international (complétant la Convention de Munich) appelé EPLA⁹.

Mais aucune de ces deux voies n'est parvenue à réunir un consensus politique suffisant: d'une part, la création d'un brevet communautaire se heurte toujours notamment à la question des traductions de ce brevet dans toutes les langues des pays de l'Union; et d'autre part, le projet EPLA suscite l'opposition des institutions européennes qui ne veulent pas que les Etats membres constituent une juridiction totalement indépendante de l'Union.

Aussi, entre un système entièrement communautaire et une juridiction indépendante, cette voie médiane d'une Cour européenne des brevets pourrait permettre de sortir du blocage actuel.

Les principales caractéristiques de la nouvelle Cour

Le système juridictionnel proposé statuerait sur les actions fondées sur les brevets européens et sur les (futurs) brevets communautaires. Elle comporterait deux niveaux d'instance, réparti entre des divisions de

¹ Draft Agreement on the European and Community Patents Court and Draft Statute Council of the European Union, Brussels, 23 March 2009, 7928/09/PI 23/COUR 29

Il s'agit plus précisément d'un projet d'accord entre la Communauté européenne, ses Etats membres et d'autres Etats parties à la Convention de Munich sur le Brevet européen. Cet avant-projet élaboré par le groupe de travail réuni sous l'égide du Conseil est le résultat de différentes moutures élaborées en 2008 et début 2009.

² Règlement n° 40/94 du 20 décembre 1993 sur la marque communautaire; Règlement n° 6/2002 du 12 décembre 2001 sur le dessin ou modèle communautaire Directive n° 2001/29 du 22 mai 2001 sur l'adaptation du droit d'auteur à l'environnement numérique.

Dans le domaine des brevets, les seuls textes adoptés par l'Union européenne concernent la brevetabilité des inventions biotechnologiques (directive 98/44 du 6 juillet 1998) et un règlement d'exemption concernant les accords de transfert de technologie et les licences de brevet (n° 772/2004 du 7 avril 2004). Le projet de directive sur les inventions mises en œuvre par ordinateur (les fameux « brevets logiciels ») a été abandonné après plusieurs années de débats, notamment au Parlement européen.

³ L'Office européen des brevets (OEB) a été créé par la Convention de Munich sur le brevet européen (CBE), adoptée le 5 octobre 1973; il est sans lien avec l'Union européenne.

⁴ Les pays ayant adhéré à la convention de Munich sont les 27 membres de l'Union européenne, la Norvège, la Suisse, la Turquie, Monaco, l'Islande, la Macédoine (ex-Rép. Yougoslave), Saint Marin, la Croatie et le Liechtenstein.

⁵ Notons cependant qu'à ce jour, le contentieux des marques et des modèles communautaires reste encore confié à des juridictions nationales sélectionnées appliquant localement le droit communautaire; ces juridictions sont appelées « tribunaux des marques et des dessins ou modèles communautaires ». En France, c'est le TGI de Paris qui a été désigné.

⁶ Qui serait entièrement soumis au droit communautaire, mais qui, pour des raisons pratiques, resterait délivré par l'OEB pour l'ensemble des pays de l'Union.

⁷ Seuls les Etats suivants ont adhéré : la France, l'Allemagne, la Grèce, le Danemark, le Luxembourg, le Royaume-Uni et les Pays-Bas.

⁸ Revised proposal for a Council Regulation on the Community patent, 11417/09/PI 62, Council of the European Union, Brussels, 25 June 2009, (Interinstitutional File: 2000/0177 (C_S)).

⁹ European Patent Litigation Agreement, dont la dernière version date du 13 décembre 2005 (accessible sur le site de l'OEB : www.oeb.org).

continued:

première instance (à trois juges¹⁰) et une Cour d'appel (en formation de cinq juges¹¹).

En première instance, le contentieux serait traité par des divisions locales installées dans chaque Etat¹² (notamment pour les actions en contrefaçon) ainsi que par une division centrale, qui aurait des compétences notamment pour accueillir des actions directes en contestation de la validité des brevets mais aussi pour se voir renvoyer certaines des actions reconventionnelles en nullité.

Outre des juges permanents installés au siège de chacune des divisions locales ou régionales, un *pool* de juges comprenant notamment une grande diversité de juges de formation technique (afin de couvrir les différents domaines techniques) serait constitué afin que ceux-ci puissent siéger – en fonction des besoins – au sein des différentes divisions de première instance (locales, régionales et centrale).

La Cour d'appel devrait connaître des recours contre les décisions de première instance, les nouveaux faits et preuves ne pouvant être apportées (dans l'état actuel du projet) que s'ils ne pouvaient être raisonnablement connus et produits en première instance.

Il n'existerait pas de recours en cassation, mais une simple possibilité pour les juges de première instance ou d'appel de saisir la Cour de justice de l'Union européenne d'une demande d'interprétation d'un point de droit communautaire dont dépendrait la solution du litige.

Aussi, cette nouvelle Cour européenne des brevets ne peut pas, actuellement, être considérée comme une juridiction communautaire – du moins tant que le brevet communautaire n'est pas mis en œuvre – mais simplement comme une juridiction *sui generis* établie entre différents Etats membres de cet accord à venir, dont les Etats membres de l'Union européenne.

C'est donc un dispositif de transition, qui soulève des interrogations juridiques et pratiques.

Les questions en suspens

Concernant la validité des brevets, c'est le droit européen issu de la Convention de Munich qui sera appliqué pour le brevet européen (et bien-sûr, s'agissant du brevet communautaire, ce sont les dispositions du futur règlement communautaire qui seront utilisées). En revanche l'appréciation de la contrefaçon ne pourra s'appuyer que sur les dispositions du texte qui créera cette nouvelle Cour - et ainsi que sur l'application de la directive "Contrefaçon" n°2004/48 du 29 avril 2004 (notamment sur les possibilités de saisie-contrefaçon, de droit d'information, ...) - puisque la Convention de Munich, comme rappelé plus haut, ne contient aucune disposition en ce sens, en raison du traitement national sur la validité et sur l'atteinte aux titres ainsi délivrés.

Les autres questions sensibles (qui ont déjà donné lieu à des premiers commentaires¹³) portent surtout sur l'organisation procédurale du contentieux devant cette nouvelle Cour, et par exemple :

- Concernant les **modalités de la représentation** devant cette Cour¹⁴ : sera-t-elle réservée aux avocats seulement, ou bien les mandataires européens en brevets pourront-ils également plaider ?

- Sur la **langue de procédure**¹⁵ : celle-ci serait la langue de la division (nationale ou régionale) de première instance devant laquelle serait porté le litige. Mais devant la division centrale de première instance, c'est la langue dans laquelle le brevet a été délivré par l'OEB qui serait toujours utilisée et qui pourrait à la demande des parties être retenue devant les autres divisions de première instance¹⁶.
- S'agissant de la **nature et du contenu** détaillé des règles de procédure applicables devant cette nouvelle juridiction, une voie pourrait être de se référer le plus souvent possible aux règles de procédure de la CJUE et du TPI et de renvoyer, pour le reste, à l'application des règles procédurales nationales¹⁷. A l'inverse, les instances communautaires semblent vouloir instaurer un "code" de procédure spécifique à cette Cour.
- Quant à la **possibilité de disjoindre la question de la nullité** (demandée reconventionnellement) du litige de contrefaçon¹⁸, faut-il adopter cette pratique qui existe par exemple en Allemagne, alors que dans de nombreux autres Etat membres, un même juge tranche - ensemble - ces questions, au motif notamment que la validité du titre conditionne la possible contrefaçon ?

Et maintenant ?

Il est fort probable - et il faut s'en réjouir ! - que cette future Cour européenne des brevets européens et communautaires voit le jour, même si l'adoption d'un tel accord est formellement suspendue à l'avis que rendra

¹³ Pour une synthèse des travaux du groupe de travail constitué au sein de l'Institut de recherche en propriété intellectuelle – Henri Desbois (IRPI), voir Jean-Christophe Galloux & Bertrand Warusfel, « Aspects juridictionnels et procéduraux des brevets européen et communautaire », *Propriétés intellectuelles*, janvier 2009, n° 30, p. 9.

¹⁴ Le CCBE s'est déjà prononcé (sur des versions antérieures dudit projet de mars 2009) pour que les mandataires ne puissent qu'assister les avocats dans ces procédures et non les remplacer. Cf. *Projet de tribunal du brevet communautaire européen : prise de position du ccbe concernant l'article 28 – Représentation, Conseil des barreaux européens – Council of Bars and Law Societies of Europe*, 19 février 2009.

¹⁵ Rappelons que la question linguistique est encore aujourd'hui un obstacle majeur à l'adoption du règlement sur le brevet communautaire.

¹⁶ Les positions divergent entre l'intérêt qu'il peut y avoir à discuter techniquement le contenu du brevet dans la langue où il a été rédigé et le principe qui veut que le défendeur puisse se défendre dans sa propre langue.

¹⁷ Voir dans ce sens, Galloux & Warusfel, *op. cit.*, pp. 10-12.

¹⁸ La question de la nullité serait alors renvoyée vers la division centrale de première instance. Voir, Galloux & Warusfel, *op. cit.*, p. 18.

¹⁰ En principe, deux juristes et un technicien, dont deux seraient de nationalité "locales", et le 3ème d'un autre Etat partie à l'Accord.

¹¹ En principe, trois juristes et deux techniciens.

¹² Les divisions pourront être régionales, si plusieurs Etats décident de partager une division commune

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fin 2010 la Cour de Justice de l'Union Européenne, qui a été saisie pour se prononcer sur les conditions juridiques dans lesquelles l'Union européenne pourrait mettre en œuvre une telle réforme, puisque cette future juridiction ne trancherait pas que des questions de droit communautaire mais également des questions relatives à des brevets européens (soumis à la Convention de Munich, système non communautaire).

Par ailleurs, la Commission a émis le 20 mars 2009 une recommandation invitant le Conseil à lui donner le mandat de négocier avec les Etats membres et avec les pays contractants de la Convention de Munich un tel accord¹⁹.

L'hypothèse envisagée dans la recommandation de la Commission serait la conclusion d'une « convention communautaire »

conformément à la procédure de l'article 300 du Traité CE, c'est-à-dire un accord international qui serait ouvert à la signature des Etats membres et des Etats signataires de la Convention de Munich et à laquelle la Communauté européenne serait également partie.

Si ce projet de Cour devait être adopté, il établirait une période transitoire de sept années durant lesquelles les parties pourraient continuer, si elles le souhaitent, à saisir les tribunaux nationaux.

Ce système serait donc opérationnel d'ici une dizaine d'année ; ne laissons pas passer la chance de nous préparer à cette évolution majeure de la PI en Europe !

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¹⁹ Recommendation from the Commission to the Council to authorise the Commission to open negotiations for the adoption of an agreement creating a Unified Patent Litigation System, SEC(2009) 330 final, 20 mars 2009



Duties and Liability of Management Board Members in Latvia

(Overview of legal framework)

This article has been prepared to provide an overview of Latvian law provisions in relation to the duties and personal liability of management board members of a Latvian limited liability company, which is the most popular form of incorporation in Latvia.

1. Management board duties

The management and the day-to-day operation of a Latvian limited liability company are vested in the company's management board. According to the Latvian Commercial Law, management board is responsible for the management and the proper conduct of the operations of the company. The management board is also responsible for the company's bookkeeping and financial matters (including payment of taxes).

The management board members shall fulfill the duties which are stated in the Latvian Commercial Law, company's articles of association and resolutions of the general meetings of shareholders.

1.1. Duty of loyalty towards the company

Members of the management board have the duty of loyalty towards the company (non-compete obligation), i.e. according to Article 171 of the Latvian Commercial Law, without permission/acceptance of the supervisory board (if there is no supervisory board, without permission/acceptance of the general meeting), he/she may not:

- be a complementary in a partnership, or a shareholder with supplemental liability in a capital company which is engaged in the field of commercial activities of the company;
- conclude transactions in the field of commercial activities of the company in his/her name or in the name of a third person;
- be a member of the management board of another company which is engaged in the field of commercial activities of the

company, except in cases when both companies are affiliates of the same group of companies.

Members of the management board have specific liability for the breach of the non-compete obligation (see Section 2.1. below).

Members of the management board have the obligation not to disclose the commercial secrets of the company.

1.2. Duty of care

Members of the management board have a general duty to act and perform their duties as diligent and prudent managers (Article 169, para. 1 of the Latvian Commercial Law).

2. Civil and administrative liability of a management board member.

2.1. Liability towards the company

According to Article 169 of the Latvian Commercial Law, the management board member is liable for the damages caused to the company unless he/she has acted as diligent and prudent manager. Burden of proof is placed on the management board member, i.e., the member must prove that he/she has acted as diligent and prudent manager taking all measures appropriate under the circumstances.

The central element in determining management board liability under Latvian Commercial Law is the standard of conduct in accordance with which the management board member should have acted. When a person is appointed as a management board member of the company he/she is entrusted with certain powers and discretion to decide what is in the best interests of the company. Taking into account that commercial activities as such are related to certain risk, management board members are not held liable for each and every loss that the company may suffer. Management board members are liable for losses only if their activities are not in compliance with a standard of diligent and prudent

manager which may be reasonably expected for the respective type of business and under respective circumstances (for example, different standard of care may apply during times of financial downturn and during times of upward going economy).

According to Article 171 para. 2 of the Latvian Commercial Law, if a member of the management board violates non-compete obligation (Article 171 para 1 of the Latvian Commercial Law; see Section 1.1. above), the company is entitled to request a compensation for damages or recognition of the relevant transactions (agreements) as being concluded in the name of the company, and to transfer to the company the gained income or the right of claim to the gained income.

The statute of limitation period for the said claims shall be three months from the date when any other member of the management board or any member of the supervisory board (if any) finds out about the breach, however, not longer than five years from the date the breach occurred).

2.2. Administrative liability

In certain cases administrative fines may be imposed directly on the management board member, for example:

- for failure to submit documents to the Commercial Registry within the term provided by the law;
- for the submission of false information to the Commercial Registry;
- for failure to accept legal currency as means of payment.

2.3. Liability towards third parties (including company's creditors)

Normally there is no direct liability of the management board members towards third parties involved in dealings with the company, including company's creditors. However, in certain exceptional cases management board members may be held liable towards third parties (including company's creditors). Such liability for damage caused to third parties is specifically conditioned upon

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a violation of the provisions of the Latvian Commercial Law or the company's articles of association (activity by the member of the management board which is ultra vires), i.e., breach of the general duty of care would not form sufficient grounds for direct third party claims towards the members of the management board.

2.4. Type of liability

Members of the management board are jointly and severally liable for the damages they have caused to the company. Namely, in case it is determined that several management board members have caused damages to the company, anyone of them may be required to compensate the full amount of the damages (with the subsequent right of redress to the other members of the management board).

2.5. Discharge from liability

Latvian Commercial Law provides for two cases in which member of the management board may be discharged from liability towards the company:

- member of the management board has acted in good faith within the framework of lawful resolution of the general meeting;
- member of the management board has been discharged from the liability by the general meeting or the settlement agreement is entered into with regard to the specific action of the management board member disclosed at the general meeting.

Blanket discharge from liability is not possible, i.e., it is allowed only in relation to specific actions undertaken and disclosed to the general meeting. Also the fact that action of the management board has been approved by the supervisory board (if any) does not

preclude the liability of the management board towards the company.

2.6. Actions necessary to bring civil claim against members of the management board

The claims against members of the management board of the company for breach of their duties would be brought by the company itself, based on the decision of the general meeting taken by a simple majority of votes or based on the request of minority shareholders representing at least 1/20 of the share capital or investment of LVL 50,000. The action against the members of the management board is maintained by the supervisory board of the company or in cases where there is no such – by the representatives of the company appointed by the general meeting. In case no action against the management board is brought by the general meeting within a month after qualified minority shareholders request, minority shareholders are entitled to bring the action themselves.

More importantly, however, there are certain circumstances under which a creditor of a company who cannot obtain satisfaction for his/her claim against the company may bring an action for the benefit of the company against the company's management board members if such have caused damages to the company but have not compensated them.

The right of creditors to bring an action survives even if:

- the company has withdrawn its action against the guilty management board members;
- a settlement has been entered into with the guilty management board member; or
- the damages have been caused by the

management board member in the course of fulfillment of a decision of the general meeting or the supervisory board.

The creditors are entitled to bring claims within a period of five years from the date when the right to such claim has arisen.

3. Criminal liability of a management board member

Further to Latvian Criminal Law, individual management board members may be personally liable for damage caused by acts or omissions that are held to constitute a criminal offence, subject to condition that such act or omission has been performed by using the authority of the management board member to act on behalf of the company, for example:

- in case due to intentional actions, by maliciously using or exceeding the authority, the management board member causes substantial damage to lawful interests of the company or other persons;
- in case as a result of negligent performance of duties substantial damage is caused to lawful interests of the company or other persons;
- in case due to negligence the company becomes insolvent, as a result of which substantial damage is caused to lawful interests of other persons;
- in case false information to the Commercial Registry was submitted.

The penalties for the above offences range from monetary fines and public labor up to imprisonment for 3 years.

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