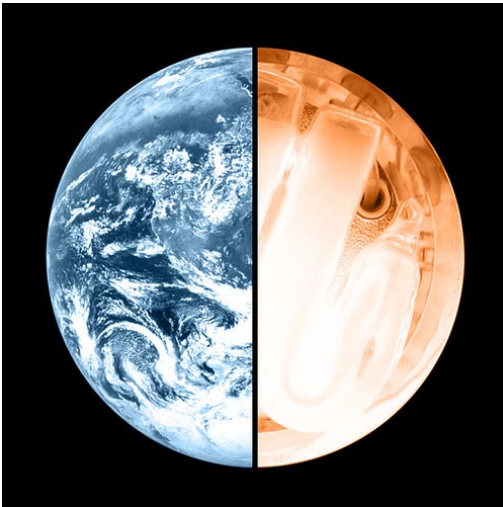




A world of difference

By James N. Dawe, President of World Link for Law

There is a well known, but cynical, quotation from Ogden Nash, the American humorist and poet. He said, "Progress might have been all right once, but it has gone on too long."



The trouble is that progress and development create new challenges to those responsible for managing the process of change and their advisors.

The role of the international lawyer is ever changing, and, as lawyers within an international network of similarly-minded law firms, we need to be very open-minded and flexible in dealing with new challenges, in ways our legal ancestors never faced because their practices were much more parochial.

In an age of globalization, even the small firm in an out-of-the-way location can be called up to act in the international forum. That law firm will be judged by its clients on how it responds to the challenges of the international marketplace.

There are three different ways this can occur: Firstly, there are the non-legal issues that affect international business transactions; secondly, there are specific client expectations, often to be provided within a highly competitive international market for products and services; and thirdly there is the status of varying national and international legal regimes. These are not isolated or discrete – they need to be regularly considered together to suit different situations – and they need to be weighed and balanced according to particular situations. Fortunately, the member law firms of World Link know each other well; and we work together regularly in client cross-border situations on either a bi-lateral or multi-lateral level. At meetings and conferences, we always try to find time to discuss these types of issues.

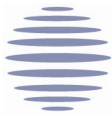
Firstly, our member firms have to deal with various non-legal issues in cross border transactions, insofar as they affect their clients' objectives. The most important are, of course, cultural, social, behavioural and economic factors. Naturally, different nations have different temperaments, etiquettes, standards and expectations which must be acknowledged and respected, particularly in negotiation and contract discussions. For example, to lawyers reared in the European tradition of strict regulation of companies, and close attention to formalities, the American tradition of laissez faire for most company formation and regulation matters can make the United States seem like the Wild West. The astute American lawyer will, at the outset, explain his seeming indifference to many formalities common in Europe.

Secondly, there are client expectations. There was some very recently published research by Martindale-Hubbell, the international legal publisher, into the buying behaviour of European mid-sized companies (with between 50 and 600 employees). Key attributes in the selection of law firms included (in common with many other similar surveys), expertise/specialization; personal chemistry; trust; location; responsiveness; and value for money. Of interest was the difference in priorities from country to country.

Other articles:

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- **UK company law reform: The implications for directors**
- **Illegally registered pharmaceutical drugs in Poland**
- **Czech Republic – draft cross-border mergers legislation**
- **How to secure business in the Ukraine**
- **Romanian company law changes**
- **Brazil's new water and sanitation law and private investments**
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While recognizing that the conclusions are generalized, the research disclosed that Italian mid-sized companies appear to place less importance on responsiveness, efficiency and pragmatism, and also seem less concerned about the need for personal chemistry between their personnel and their legal team. However, absolute price, as opposed to perceived value for money, is far more important to them. Comparatively, mid-sized German companies assess responsiveness, specialization and personal chemistry to be very important, but give a low rating to location; whereas in the United Kingdom, trust and value are more important than specialization; and in France, trust is less important than efficiency and value for money.

In addition, there are legal cultural issues to deal with when it comes to client expectations and relationships, such as the fact that many large Western companies like to deal with their lawyers as quasi-partners, either as "outside" general counsel, or as an extension of their in-house legal teams; whereas in many Asian countries, the "master-servant" model appears to predominate, and the lawyer may not have the easy and intimate connection to the client that is common in the West. Whether this will change remains to be seen.

The point from the perspective of the lawyers of World Link for Law is that they have to be flexible and responsive in providing high quality service, but also in understanding the priorities in a client/lawyer relationship, which can vary from country to country or region to region.

We are also finding that clients are expecting their lawyers to work within the limitations of national and regional laws, but want their lawyers to devise entrepreneurial and pragmatic solutions for meeting client objectives – the phrase often used is "thinking outside the box".

So thirdly, in this respect, our member firms' lawyers have to contend with different legal regimes and economies, which generally can be categorized as:

(a) Developed economies/developed legal systems – these are often complex and highly regulated, with little room to manoeuvre, but with highly competitive market economies;

(b) Emerging economies/emerging legal systems- these can be in various stages of development, often in the process of adopting or translating suitable parts of other developed legal systems - for example former Eastern bloc countries, now within the EU, having to adopt various aspects of harmonized EU law. This can lead to sudden increases in new regulations that are often not completely resolved by national court systems. Consequently, there is greater room for creating new interpretations within the parameters of the law, as we see in this newsletter in the Polish article about pharmaceutical company drug regulations. Generally, in emerging economies and emerging legal systems, there is more potential for a reasonable level of manoeuvrability and flexibility, which can lead to new market and business opportunities for clients. The article in this newsletter from Brazil on public utility restructuring is another good example;

(c) Finally, of course, there are under-developed economies with under-developed legal systems, which can provide significant opportunities, but at the same time provide far less certainty for clients, both in the matters of future enforcement of contractual obligations, and the fickleness of government action. Fortunately, as economies modernize, the need for legal certainty and the rule of law becomes more evident to those responsible for economic growth.

To complicate the lawyer's response, the parties can be operating within different legal systems and economies; and the choice of law may be that of a completely different jurisdiction! Therefore, different expectations have to be matched to suit the ultimate objectives.

As a slightly cynical observation of all the above points, it is 99.9% predictable that clients operating in the most competitive markets with the most theoretically advanced, restrictive and regulated legal systems, involving divergent cultures, will be the most demanding - expecting their lawyers to be the most creative and ingenious to help them find a commercial niche or advantage.

Working as an international lawyer has never been more exciting or challenging!



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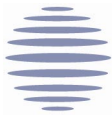
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The Swiss limited liability company – even more attractive than before

It is expected that on July 1, 2007, the new Swiss law for limited liability companies will become effective. This individual-related form of company organization is believed to be highly attractive, namely for middle and small sized enterprises. The new provisions allow custom-made solutions as well as flexible adjustments to different situations. In particular there are following improvements:

Company capital

To support the establishment of small-scale enterprises, the minimal company capital will remain at CHF 20'000. However, the current upper company capital limitation of CHF 2,000,000 will be disposed. The company capital must be fully paid-in at the date of incorporation. The obligation to fully pay-in the company contributions also renounces the present obligation of subsidiary joint liability of members to the amount of the registered company capital. Under the new law, one member will suffice to set up a limited liability company.

Possibility to own several company shares

Each member may own several company shares, as in a stock company. The nominal value of the company shares of an individual member may vary, but must be at least CHF 100. For the transfer of a company share, which currently requires legalization, a simple written instrument of assignment will be sufficient and therefore the marketability of company shares will be much easier. The amount of capital and the quantity of shares a member may hold can always be adapted to changing conditions. New provisions concerning the restriction of transferability will allow a wide spectrum; it will go from outright exclusion of transferability to free transferability, as the members may define by wording in the company's Articles.

Since the voting power of members is regularly measured by the value of their shares, company shares with privileged voting rights may be created; such device allowing the security of the majority vote e.g. in family-managed companies.

Auditors

Considering the needs of smaller companies, there will be no implementation of a general obligation to examine the annual accounts through auditors under the new law. According to the new provisions, limited liability companies (like all companies) shall only be obliged to have audited accounts, in case of the existence of certain conditions. Various criteria, like the size of a company, will determine whether annual accounts have to be examined by auditors.

The management and the right of inspection

Domicile and nationality restrictions for the members of the Board and the management of the company will be practically abolished. Only a single individual, who is authorized to represent the company, must have his/her domicile in Switzerland.

Members with minority holdings will be protected by a range of information rights. Each member has the right, contrary to the shareholders in a stock company, to receive full information on all matters of the company.



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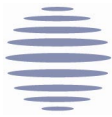
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New tender law in The Netherlands

The government is a large consumer of goods. It services and commissions the execution of building projects. There are special procedures for choosing the companies that will be allowed to execute government assignments. The tender procedures are often compulsory on the basis of EU legislation or jurisprudence.

As of 1 December 2005 the "Besluit Aanbesteding voor Overheidsopdrachten" (i.e. Resolution Tender Rules for Government Assignments) also known as BAO, is effective in the Netherlands.

As a consequence of the commencement of this resolution, the European Tender Directive (2004/18/EG) has come into effect, replacing three earlier general tender directives. The Dutch legislator decided not only to implement the regulations of this directive, but also to convert this directive into the BAO. This is a matter of active implementation. In doing so, the Dutch legislator has set a (new) course for tender law in the Netherlands. The freedom the directive gives to member states for their own interpretation of national tender law, has already been utilized in several places. The Dutch legislator, for instance, decided to implement all new purchase techniques from the directive by means of the BAO. For example, competitive dialogue, outline agreements, dynamic purchase systems, and electronic auctions, are dealt with in the BAO. All EU countries used the freedom given by the directive to interpret their national tender law differently. It is therefore necessary now, for example for companies from other EU states, to get acquainted with the Dutch national tender law before participating in a tender procedure in the Netherlands. As tender law is very formalistic legislation, even a small mistake can lead to exclusion of a participant.



Therefore active implementation of the directive by the Dutch legislator does not mean – in spite of the clarity that is provided on certain points – that entering into a tender procedure becomes any easier. Good counselling and attention to detail by the contracting party are imperative.

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UK company law reform: The implications for directors

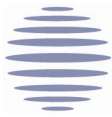
In November 2006, the UK Parliament passed a new Companies Act, intended to update and consolidate UK company law. The various parts of the Act come in to force on different dates, between January 2007 and November 2008. The new Act imposes significant changes with relation to company directors. This article concentrates on how the new law will affect the duties of Directors.

For the first time, the duties of directors are codified into the law. The new Act requires directors to act in accordance with their powers and at all times in compliance with the constitution of the company. Directors are required to act in a manner which they believe, in good faith, would promote the success of the company for the benefit of the members as a whole. They are required to take into account the following:

- The likely consequences of their decision in the long term.
- The interests of the company's employees.
- The impact on the company's business relationships with third parties, for example suppliers and customers.
- The effect of the company's actions on the community and the environment.
- The effect on the company's reputation for high standards of business conduct.
- The interests of the company's creditors.
- The need to act fairly as between the members.

Already a principle of common law, the Act also codifies the principal that directors are required to exercise reasonable care, skill and diligence. The standards will be different according to the individual director.





In general, a director will be required to exercise the care, skill and diligence that would be exercised by a reasonably diligent person with the knowledge and experience that might reasonably be expected of a person carrying out the duties of that director. In addition, the director's actual skill, experience and knowledge will be taken into account. For example, if a director is an experienced professional then his level of care, skill and diligence will need to take into account his experience and specialist knowledge and it would therefore be higher than an inexperienced lay director.

Directors will be required to declare their interests at Board meetings. While this has always been the case, failure to do so will become a criminal offence. Directors will, however, be able to vote on matters in which they have an interest, if the company's articles permit it.

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Illegally registered pharmaceutical drugs in Poland

Nearly each day in daily newspapers in Poland one may find media articles concerning so-called 'ghost medicines'. In fact, this may be one of the most difficult problems that the Polish pharmaceutical industry and local regulatory bodies are about to face in the near future and, even worse, it may contribute to a growing conflict between innovative pharmaceutical companies and Polish firms manufacturing generic drugs.

The ghost medicines problem has its origin in the Treaty on Accession of Poland and other countries to the European Union which resulted in Poland's accession to the EU on 1 May 2004. When the Treaty was negotiated, representatives of the Polish state found it necessary to obtain a transition period for the Polish pharmaceutical industry to adapt to the EC rules on registration of drugs. It was obvious that manufacturers of several medicines registered in Poland would not manage to adjust registration dossiers for the binding requirements of the European Community, before the date of the accession. Therefore, Poland presented a list of all medicinal products granted marketing authorisations before the accession which were given additional time (at the latest until 31 December 2008) for collecting necessary documentation or performing extra trials, in order for them to achieve complete compliance with EU law.

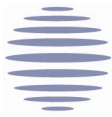


Due to the duration of negotiations, this list was drafted several months before the accession took place and therefore it contained also medications which were not registered yet, but which were supposed to be registered by the accession. Surprisingly, not all of them were granted marketing authorisation before 1 May 2004 and hence their manufacturers faced a threat of being excluded from the transitional period's benefits. Nevertheless, it soon became obvious that the list of medications registered before the accession (in April 2004) was getting longer and longer with each following month after Poland joined the European Union; and now it contains over twice the amount of medicines than it originally contained.

This amazing growth in the number of drugs registered before the accession was caused by the Polish registration authorities, adding more and more medications to the list of drugs registered in April 2004 in order for them to benefit from the transitional period. If, as sometimes happened, a manufacturer of a medication was not able to present required documents or trial results even a few months after the accession, it could nevertheless obtain a marketing authorisation – albeit conditional. Such registration decisions allowed for the marketing of a medicine provided that the marketing authorisation holder collected the lacking documents and submitted them to the registration bodies within a specified term.

Unfortunately, those practices of the Polish registration bodies and, in particular, conditional registration decisions, are probably contrary to Polish law. Issuing such decisions is contrary to the public interest, too, since they





allow for registration of medications which may not be sufficiently tested for quality and safety. Nevertheless, sometimes drugs registered with conditional decisions were introduced into the market or covered by the state reimbursement system, despite the fact that conditions for registration stipulated in a decision might not have been fulfilled, at the time when a given drug was put on sale.

Soon the doubts regarding registration of several medicines came to the attention of innovative pharmaceutical companies which, thanks to conditional decisions, obtained rights to hundreds of new competing (and most often – generic) drugs within the Polish market. At first the Polish authorities refused all the companies access to registration data concerning medicines registered in April 2004. However, the case of ‘ghost medicines’ was becoming widely known and is now within the interests of the Supreme Chamber of Control, which has issued a devastating report for the registration bodies in its criticism regarding ghost medicines. The case has even been submitted to the attention of the European Commission and perhaps the European Court of Justice will be entrusted with the task of deciding on this issue.

The outcome is presently unclear. However, the case of ghost medicines is likely to deteriorate relations further between foreign innovative companies and the Polish state bodies.

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Czech Republic – draft cross-border mergers legislation

The Czech Ministry of Justice has published draft amendments to the Commercial Code which should enable cross-border mergers of companies. Such legislation is needed to implement relevant EU directives and also to reflect recent ECJ case law.

Major changes introduced by the draft amendment include:

- Cross-border mergers are generally admissible, but can be implemented only between companies with specified legal forms and a seat in an EU member state.
- A general partnership (*v.o.s.*) or limited partnership (*k.s.*) may participate in a cross-border merger with a foreign partnership or an equivalent entity.
- A limited liability (*s.r.o.*) or joint stock company (*a.s.*) may participate in a cross-border merger with a foreign limited liability or joint stock company. In connection with cross-border mergers of joint stock companies, extensive consultation with employees will be required in line with EU law.
- As a part of a cross-border merger, the seat of the successor company may be located in any member state.
- Cross-border mergers are further regulated for cooperatives (with a cooperative with a seat in another member state) and for European Economic Interest Groupings (with an EEIG with a seat in another member state). An EEIG may also be converted into a general partnership (*v.o.s.*) with a seat in the Czech Republic.
- Neither a Czech investment fund, nor management company (*investiční společnost*) may take part in a cross-border merger.

It is assumed that the draft shall be subject to further technical debate. The new legislation should become effective by 15 December 2007.



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How to secure business in the Ukraine

Ukrainian business is a blend of the Soviet legacy and Ukrainian entrepreneurial spirit but contained within in a rather complex legal framework. Business in Ukraine continues to move ahead and often presents unprecedented opportunities. The country has a well developed industrial base, rich agricultural resources and is close to existing relatively un-tapped markets. Many huge high-tech military and industrial plants of the USSR were situated in the Ukraine which resulted in a highly skilled engineering work force with a large capacity. Doing business in Ukraine is not easy but guaranteed to be exciting!. But once you get past any initial barriers, you can conduct business as you would in any other country in the world.

Growing foreign investments reflect foreigners' positive expectations from Ukraine's economy. The country becomes more market-oriented and open. Both Western corporate and private investors are interested in putting their money into Ukrainian governmental projects as well as private companies. The great potential for growth and the government's efforts to improve the investment climate is attracting more foreign investors.

Due diligence

In such a climate where there is a good opportunity to achieve good returns from contracts, good due diligence can be a vital tool in success. It is important to carry out the necessary checks prior to establishing any business or financial relationships. Prior to establishing a business relationship you need to define whether your prospective partner (a company or individual) is providing you with full and accurate information. The aim is to confirm the 'bona fides' of your prospective partner.

Due diligence enquiries are essential today for a variety of reasons. At a very basic level it ensures that the person you are dealing with (or intend to deal with) actually exists. This may be a very fundamental matter; but there have been a few situations when the company turned to be fictitious. Secondly, even if the person or entity exists, it is not reasonable to take what they say for granted. Without due diligence, you could risk losing money and reputation. Just make sure you are not involved in relations with persons who could cause compliance problems and financial losses.



The sea port, Odessa, Ukraine

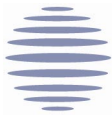
What do you do if your Ukrainian business partner fails to fulfil their obligations?

There have been various situations when a formal claim, sent to the counterparty directly from a Ukrainian law firm is sufficient for the Ukrainian party to fulfil its obligations. Of course, sometimes, this tactic does not work and if there is no security upon the agreement, then, it is generally advisable to bring the case before a competent court as soon as possible.

Usually parties agree on applicable law and include competent court or arbitration terms. But if there is no corresponding clause in the contract, and the claim is filed in the Ukraine, usually the case is determined by the commercial court in the place where the Ukrainian party has its registered office. Then, applicable law is decided according to each particular case.

In a recent case, the Ukrainian commercial court decided a dispute using the Laws of the England. Of course, in this case it took time and extra funds to receive an official statement from the UK lawyers on the substance of the English law to be applied.





If appropriate, it is also useful to file an application to the court to take necessary precautions until the judgment is executed. These can be:

- Attachment of the debtor's funds;
- Attachment the debtor's movable and/or immovable property;
- Imposing a ban on doing certain specified actions.

Another important matter to bear in mind is that the burden of proof of the case's circumstances lies on the parties. So, the preliminary negotiations (before filing the claim) play a significant role in the further course of the hearing.

So, doing business in Ukraine, it makes sense beforehand to spend money on consulting lawyers and experts. In the long run, this can save money. The bureaucratic process can be complicated, so make sure your contracts are simple, straightforward and comply with Ukrainian standards. The more complex; the easier it will be for someone to find a way to break them.



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Romanian company law changes

The Romanian Company Law (Law no. 31/1990) has been modified substantially by the Law no. 441/2006, which entered into force on December 1, 2006. The recent legislative changes mainly concern joint stock companies, but also to other companies where noted.

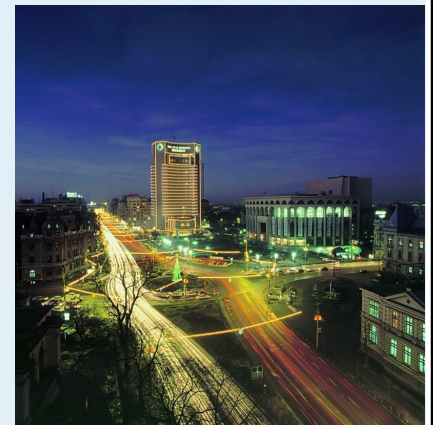
The first change concerns **the share capital**. Although the minimum legal threshold has not been changed, it is now measured against the national currency, thus the minimum capital shall be "at least lei 90,000" (approx. Euro 25,000). This way, from now on, even if the amount is not changed in itself, the share capital is measured in Euros only. However, the Government can modify, at most once every two years, the minimum value of the share capital so as not to fall under the equivalent of 25,000 Euros.

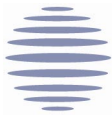
A very important change brought by the new law is the **minimum number of shareholders**, which is now 2 instead of 5. By abolishing an artificial impediment regarding the number of shareholders, this change encourages the establishment of stock companies that benefit from regulations that appear more refined than for other types of companies such as limited liability companies.

As regards the **Ordinary General Assembly**, there are new quorum and voting requirements, meaning that for the valid deliberations of the General Assembly, instead of requiring the presence of shareholders representing at least half of the share capital, the new regulation provides for the presence of the shareholders representing at least one quarter of the voting rights. As regards the voting majority, the new law clarifies the fact that decisions are taken with a simple majority, meaning the majority of the votes cast.

The **Extraordinary General Assembly** has undergone several changes too, the first of them also concerning the quorum and voting majority. In this respect, the quorum for the first convocation drops from three quarters of the share capital to one quarter of the voting rights, and for the second convocation drops from half of the share capital to one fifth of the voting rights.

It is obvious that the legislator prefers a new system now for both Ordinary and Extraordinary Assemblies. It does not measure the majority against the share capital anymore, but against the voting rights, which can be less than the share capital if the company has issued priority shares without the right to cast a vote. In this way, the decisional process becomes more effective, since only the presence of the members that can actually vote is accounted for.





However, there are specific fields (i.e. modification of the main object of activity, decrease or increase of the share capital, change of the legal form, merger, division, and dissolution), where the decisions can only be passed with a very high and imperative majority: two thirds of the voting rights. Decisions passed without observing this mandatory requirement could be challenged as null and void. Both the shareholders and management of the company are required to pay a special attention to these important matters.

More flexible decision-making

The regulation of the hearings of the Assembly has been complemented with provisions regarding **the agenda**. Amendments to the agenda can be proposed by shareholders representing, individually or jointly, at least 5% of the share capital. Once this participation limit is fulfilled, the board of directors has the obligation to include the new issues in the agenda. This provision is meant to eliminate the possibility of a director calling a meeting to censor or to refuse to satisfy the shareholders' demand of amending the agenda. Furthermore, a director has the obligation to publish the modified agenda at least 5 days prior to the debate.

The Assembly is called by the management, whenever necessary, or when a specific number of shareholders request it. In the revised form, the law regulates that this portion of the shareholders must represent 5% of the share capital, and not 10% as it did before. This modification benefits in particular to the minority shareholders within companies.

Regulations concerning a prohibition of **voting agreements** have also been relaxed. The new law prohibits only the agreement to vote according to the instructions or proposals of the company or its representatives. This means that any other voting agreement is from now on considered valid and binding. *This provision also applies to the other types of companies.*

Another significant improvement concerns the **structure of the board of directors**. Concordantly with the trend among the members of the European Union and the principles of corporate governance, the new company law offers two administrative systems: **the unitary (monistic) and the dualistic system**. In outline, the monistic approach is basically the system that existed before, when the company is run by one or more directors (the board of directors coordinated by the chairman), while the dualistic system implies a both a directorate and a supervisory council.

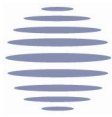


However, even the monistic approach has been updated to reflect the recent developments observed in other members in the European Union. This is why, at this moment, the directors are not an homogeneous category anymore, but the law regulates executive as well as non-executive directors, and even independent directors, specifying what attributions fall under the competence of each of them and the relations between the categories. Since delegation is a key to good management, the new version specifies that the board of directors can delegate the management of the company to one or more executive directors.

The fact that the board has the ability to choose between delegating to either one executive director or a directing committee, offers the flexibility to choose the most appropriate solution considering the size of the business and its practical needs. Additionally, the option of appointing independent directors introduces greater flexibility and makes the delegation easier to implement. If the delegation takes place, then the directors only have the prerogative of supervising the executive directors, and therefore have a non-executive function. The possibility of delegation has deep implications also in the prerogative of representation, since the directors are the legal representatives of the company when there is no delegation. However, in the presence of the executive directors, these are the ones that lawfully represent the company.

The new modifications have also **extended the liability of the directors**, censors, auditors and all other persons involved in running the company. It is now possible for a minority shareholder(s) representing individually or together at least 5% of the share capital, to initiate proceedings, on behalf of the company, against any of those persons, in case the company itself does not take appropriate measures. Although the new provisions extend





the persons whose liability can be engaged by a minority shareholder to the censors, auditors and other persons involved in running the company, it establishes also a requirement regarding the participation of the respective shareholder(s), which was not applicable in the past. *This provision also applies to the other types of companies.*

Pre-emption rights: Similar to the old provisions, the law prescribes that the new shares issued to raise the share capital will be offered for subscription firstly to the existing shareholders, proportionally with their quota of the share capital. The former regulation provided that the pre-emption right was not applicable if the new shares were contributions in kind, but this article has been abolished and therefore such pre-emption right applies now regardless of the type of contributions. In compensation, the new regulations create a more flexible procedure, after which the shares may be offered for subscription to third parties.

Authorized capital is also now introduced so that the board of directors can raise the subscribed share capital, in a period of maximum 5 years from the registration of the company up to a predetermined value (the authorized capital), by issuing new shares in exchange of the contributions.



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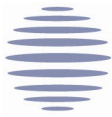
Brazil's new water and sanitation law and private investments

In Brazil, Law 11.445/07 was enacted in January 2007, setting the basis for the national policy on water and sanitation. The new law changes the background for private investment, given the former regulations over public concessions in this field, which failed to provide a safe business environment, representing a major cause of concern for the conditions of the sanitation infrastructure in the country.

The relevance of the subject gets clear as we analyze the statistics of Brazil's water and sanitation system. In urban areas, over 12 million people lack drinking water and 36 million aren't served with adequate sewerage systems; statistics are similar in rural areas. It is estimated that investments of around 90 billion US dollars would be needed to generalize these services within the country along the next 20 years, or an increase of the current 0,22% to 0,66% of the national GDP every year - amounts that government entities alone cannot bear. This, combined with the provisions of the new law, provides the potential for private investments in the country's water and sanitation market.

The new law states that the major guidelines for the sector will be the maximization of access to water and sanitation services, protection of the natural environment, respect for local peculiarities, use of appropriate technology and interaction with development programs. Despite some negatively perceived interventions by President Lula, who vetoed some awaited tax incentives for investments in sanitation, the law has opened a wide field to be explored by investors. Services to be implemented include water treatment, construction of sewerage networks, drainage of rainfall in urban centers, city sanitation and the management of solid waste.





The law seems to have solved a problem that has been hindering investments for a long time. The problem with the assignment of powers across states and municipalities derives from the Constitution, which fails to clearly determine which member of the federation should be in charge of water and sewage services. Government entities, eager for the political and economic gains of running sanitation companies or contracting the private sector to do so, have never come to terms on the subject. The vagueness on the text of the Constitution has set the ground for judicial disputes which have delayed the implementation of important projects.

The issue of who owns the regime of providing water and sewerage systems, which has been under litigation at the Supreme Court (STF) for several years, has been wisely addressed in the text of the new law, which sets forth rules and deadlines for indemnities in case one of the government entities – the one eventually declared responsible for providing the services– takes over a concession granted to another entity.

Investors will need to rely on the thorough surveillance of the services by a suitable regulatory entity, not just at federal level, but also at state and local level. At the moment, for example, water and sewage companies establish prices at their own discretion. When an independent agency assumes responsibility for the rendering of water and sanitation services, companies and consumers will depend not on a political agenda, but rather rely on technical criteria.

Other than making it possible for companies to benefit from the potential of investments in an area currently so underdeveloped, the government and society as a whole should benefit from the new rules, both directly and indirectly. For example, it is estimated that every Real spent on sanitation programs means four times as much in savings with healthcare.

In similar sectors in the last decade, private capital investment has brought great improvements to the services formerly rendered by the government, also translating into benefits for consumers, with services of higher quality and for lower prices, for example in telecommunications or energy supply. In the field of water and sanitation, the flaws of the legislation have so far deprived Brazil from offering good services to a great percentage of its population. The current reform should attract investors, who can benefit from the potential of a wide market access, supported by a well-designed set of rules to protect them, and thus, hopefully, eradicate earlier problems.



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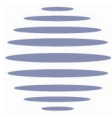
The reform of the law for German limited liability companies

With the declared aim to increase the attractiveness of German liability companies to foreign investors, the Federal Ministry has submitted a draft bill to the Federal Parliament for limited company law reform and for the prevention of abuse - *Entwurf eines Gesetzes zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbräuchen* – or in short MOMiG), dated May 2006.

The previous bill was drafted in June 2005, which was mainly restricted to the lowering of the required minimum capital stock to €10,000. This bill expired at the end of the legislative period. The new draft envisages a far reaching reform of the law for limited companies, which has hardly changed since the 1980's. The proposals for reform are based on the intention to prevent abuse of the corporate veil in crisis situations and takes into account judgements of the European Court, where the formal requirements for the German GmbH are compared to those of similar bodies in the other member countries.

The new draft bill reconfirms the intention to lower the minimum capital to €10.000. Furthermore, the regulations with regard to raising of capital and determination of individual shares are made less stringent. It will be possible for German companies to choose a seat of administration which is not the same as stated in the Articles and Memorandum of the company and to carry out all company activities in a foreign subsidiary.





This conforms to judgments of the European Court, which allows such separation, provided it is in compliance with the law of the state in which the company was founded. According to existing law, such separation is not permissible and this will be changed when the reform bill has become law. In future, both the German GmbH and AG type company will be able to have the main administration of the company abroad, i.e. in a locality which is different from the registered address of the company. The only requirement is to have a registered address in Germany and to maintain this address.

Where the foundation of the company requires official approval, it will be possible to submit the approval after registration in the Commercial Court Register and to make the required investments at an earlier stage. The list of shareholders will gain a greater significance than it has at the moment, with the result that participation in the company will become more transparent. The list of shareholders may also become a point of reference for the acquisition of shares in good faith. It will then no longer be necessary to follow the tedious procedure of documenting every single share purchase back to the time of foundation of the company.

The abuse carried out by so called "company killers" who try to circumvent the regular insolvency or liquidation proceedings by dismissing managing directors or closing business premises, is prevented by extending the duty to apply for insolvency to the participating shareholders. Furthermore, the managing director is obliged to reimburse any sums if payment to a shareholder cause the insolvency of the company. The law with regard to loans by shareholders will also be changed. In insolvency proceedings the loans by shareholders will count as ordinary loans and rank with non-preferred creditors.

It remains to be seen whether the proposed changes as briefly described above will become law and if this will improve the attractiveness of the German GmbH to investors.



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Software licenses: How to manage them – an Indian legal perspective

Do software companies need to have a closer look before executing license agreements with third parties?

Creation of new software is in itself creation of an intellectual property right. So, like other intellectual property, it also needs to be protected. Software, in simple terms comprises a set of instructions, which causes the hardware to accomplish a particular function and it is from that angle, that the software appears to be an intangible property. It has attributes of both authorship and invention. Thus, under Indian law, it can be protected under the Copyright Act, 1957.

Businesses that grow swiftly or that frequently acquire new hardware, sometimes find it hard to stay on top of their software licenses. Unlike most things you buy, software doesn't necessarily belong to you. When you pay for a program, you become a licensed user - not an owner. The ramifications are profound.

Traditionally, the definition of computer software and programmes are substantially described under various copyright laws from WIPO's draft model legislation for Copyright 1977 to the Indian Copyright Act, 1957 under Section 2 (ffb) & (ffc).

Why licensing?

Apart from legalising the use of the software by a customer, a license is an effective way by which a software owner can impose restriction on its use. Customers buying software from a retailer or distributor are not entering into any direct contract with the software owner.

The delivery of software could be broadly classified in two categories. In the first category, there is a distribution of the software via a chain of dealers or retailers, whereby all physical media is supplied when you purchase the software, such as CD-ROMs, floppy disks, etc., which is accompanied by paper documents, including the **End User License Agreement (EULA)**.





Secondly, the internet has led the way for the growth of software distribution, whereby the customer can pay online and download software from the software developer company's website.

In the first mode there is no possibility of the customer and the software owner to enter into any direct contract. So, the policy of **Shrink-Wrap Licenses** is followed where it is indicated on the box containing the software that by opening the box the customer accepts the terms and conditions relating to software usage. These are standard form contracts and are a large deviation from normal contracts, and in the past a few questions have been raised with regard to their validity and enforceability, as there must be a slight modification to the normal requirements of 'offer and acceptance' required for a valid contract. The doubts are cleared mainly by amendments in contract laws in the USA and the UK and ambiguity has been resolved, to a large extent, as these contracts/ licenses are the only feasible way to achieve large-scale software distribution. The technique of 'Shrink-Wrap' licensing is generally used to try to establish direct contractual relationship regarding standard software.

Bespoke or custom made software contracts require a more formal form according to the particular specifications and development stages. So, even if directly no contract regarding the use of software is entered into, there is a restriction upon the user by way of a shrink-wrap license. There is also one more remarkable difference between the two. While in standard software, the intellectual property ownership is essentially with the software creator, in bespoke software there could be a clause giving intellectual property ownership to the user. This is still a controversial issue open for interpretation in the absence of a specific clause, but an express clause would normally make the user the owner of the copyright.

For distribution over the internet, the policy of '**Click Wrap Licenses**' is followed, where the user sees a page containing the license agreement with full 'terms and conditions' and by 'clicking' an 'I agree' box, the user is bound by the license terms. This is often normal for 'standard' software.



Regarding 'bespoke' or 'custom-made software' certain terms may vary relating to the fact that when a contract is entered into the software is not ready for delivery. Such software is function-specific and so the related terms become important. There could also be a term relating to the trial of the software, where the contract is conditional on a successful trial.

Most license agreements are perpetual if no time specification is given. If specified for a fixed time period, on expiry, the license has to be renewed with payment of additional fees, otherwise the software itself stops functioning or limits itself.

Therefore the basic formulation of software license agreements either grant a licensee a personal, non-exclusive, non-transferable right to use software on one machine, or gives the licensee the right to use the software on any number of networked or clustered computers. These terms, 'non-transferable' and 'non-exclusive' bar any third party from benefiting from the terms of the license agreement or being granted rights of the licensed agreement. The term 'non-exclusive' also allows the licensor to retain the right to grant licenses in favour of other persons.

Software Piracy

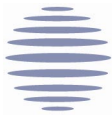
Businesses of all sizes face legal risks because of software piracy. Under the law, a company can be held liable for its employees' actions. For example, if an employee installs unauthorised software on a company's computers or downloads illegal software via the Internet, the company can be sued for copyright infringement - even if the company's management was unaware of the employee's actions.

Software piracy is growing at a similar pace as the software industry. In simple words, it could be defined as illegal/ impermissible use of software in violation of its copyright and license agreement without permission of the software creator/owner. All legal software is sold as per the terms of an accompanying license agreement. According to the nature of the software, the license allows for a one-time installation on a single computer or for multiple installation upon a network.

Software piracy means duplicating and selling software illegally. Software piracy comes in many forms, with the following being the most common:

End-user piracy: This occurs when an employee reproduces copies of software without appropriate licensing for each copy. It ranges from using one licensed copy to install a program on multiple computers (also known as "soft lifting"), to taking advantage of upgrade offers without having a legal copy of the version to be upgraded.





Internet piracy: Intellectual property theft via the Internet has grown by leaps and bounds in recent years, to the extent that virtually every software product can be found on a pirate web site. These include web sites that make software available as a free download; internet auction sites that offer counterfeit software; and peer-to-peer networks that enable the unauthorised transfer of copyrighted programs. According to the Software and Information Industry Association, over 90 percent of software sold through on-line auctions is pirated.

Hard-disk loading: This takes place when unauthorised copies of software is installed on a computer's hard drive before sale in order to make the machine more attractive.

Client/server overuse: This occurs when too many employees on a company network are using a central copy of a program at the same time. If you have installed programs on your local area network for several employees to use, you must be sure that your licenses entitle you to do so.

Counterfeiting: This is the illegal duplication and sale of copyrighted material with the intention of directly imitating the copyrighted product. Counterfeit registration cards with unauthorised serial numbers are often included in these packages.

In the light of the above, companies should ensure that the agreements are carefully worded. For example, a clause of great importance is the 'limited warranty clause' wherein there is no or a limited warranty in relation to the functioning of the software. These may be further expanded to include a warranty only upon media containing software. In such cases the licensor makes sure that software can be successfully installed from suitable media, but the quality of functioning is not warranted as this also depends upon hardware configuration.

In addition, companies need to consider an indemnity clause, which assures and secures the buyer against any 3rd party claim of patent on copyright infringement. This is a type of certification that the software has no intellectual property violation and if any claim is raised the licensor would indemnify the licensee.

Other important terms could be a clause against copying and infringing modifications. Such a clause is necessary because a slight alteration in the source code, or by way of reverse-engineering, could result in the production of new software in a sufficiently different format, while performing similar functions.

Conclusion

It would not be possible for the law enforcing agencies to prosecute people indulging in piracy and copyright violation, until and unless there is an effective license agreement, which is very clear about what amounts to software piracy and similar actions which violate the copyright of the software owner.

The general misconception in the mind of most of software users is that by buying a copy of some software they become owners of it and they can use it in any way they like. Here, it becomes important to make the software users aware that by purchasing a copy of software they just get usage rights, but not ownership. The users must be bound to use the software in the manner prescribed by the software-owner in the license agreement, and any other act would be a violation of that agreement between the licensee and the licensor, which could invoke serious civil and/or criminal penalties.

Recently, in a landmark judgment, the Delhi High Court awarded damages worth Rs.1600,000 to Microsoft Corp. in a case for software piracy of its 'Windows' software. Leading by this example, the law enforcement agencies in India need to become stricter with the violators of software license agreements.

As the solution to the problems of piracy and copyright violation ultimately lie in the effective licensing of software, there is a serious need for developing mechanism for strictly enforcing license agreements.

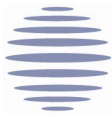
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New German company tax law amendments

The German legislature passed two major bills in December 2006, which amend extensive portions of the German tax law, just in time for enactment as of January 1, 2007. These include new legislation regarding reorganization measures within the European Union – *Gesetz über steuerliche Begleitmaßnahmen zur Einführung der Europäischen Gesellschaft und zur Änderung weiterer steuerlicher Vorschriften* (SEStEG) – as well as the Tax Law 2007.

SEStEG creates new standardized regulations regarding the amortization of undisclosed reserves in the following cases: the termination of a legal entity through legal succession (single and universal); the transfer of property from business assets into private assets; the termination of the German duty of taxation; and the withdrawal of an economic asset from the area of German taxation.

In such cases, upon taxpayer request, the tax on undisclosed reserves will be calculated at the moment of the withdrawal from the German scope of taxation but the tax payment will be postponed if the assets are transferred to a subsidiary situated in an EU Member State.

The application of the German Reorganization Tax Act (*Umwandlungssteuer-gesetz*, hereinafter "UmwStG") will be extended to businesses located throughout the European Union or the States of the European Economic Area (EEA). In the future, in the case of merger, a corporation is obliged to show not the book values (as required for the commercial balance sheet) but rather the fractional values of its business assets in the closing tax balance sheet. The same applies to a corporation that is intended to be merged into another corporation.

By requiring the transferring entity to reveal fractional values in the closing balance sheet, the German state seeks to ensure that undisclosed reserves are realized and taxed in Germany. Therefore, upon request of the taxpayer, book values or interim values can be used if the taxation of the undisclosed reserves is assured in another manner.

In the case of a merger of two corporations, under Section 12(2) of UmwStG, the transferee corporation will no longer be allowed to carry forward the losses of the transferring corporation, but rather the transferring corporation will only be allowed to charge the losses against its own profits in its closing financial statement.

Section 22 of UmwStG creates a rather new amortization position. Substituting the old Section 21 of UmwStG regarding the treatment of shares obtained in return for the contribution of assets into another corporation, this provision requires that undisclosed reserves of assets which have been contributed to another corporation and valued at fractional value will be realized only if the shares of the transferee are sold within seven years after the contribution and 1/7 of the tax amount will be forgiven in each year in which the shares remain unsold following the contribution.

In order to meet the demands of the European Commission, which declared the German taxation of companies in the case of a relocation of the major shareholder as inconsistent with EU-Law, the German legislature has amended Section 6 of the International Tax Relations Law (*Außensteuergesetz*, hereinafter "AStG"). Section 6 of AStG still provides for the amortization of undisclosed reserves existing in a major shareholding at the moment of relocation. But the new provision allows the deferment of taxation until the shares are sold and the reserves are actually realized. The tax amount calculated at the moment of relocation is thus postponed until the time of actual sale.

The Tax Law 2007 will institute a subject-to-tax clause in order to ensure that international income does not remain completely tax-free on the basis of a tax treaty. Furthermore, it will make more difficult the complete exemption from or the granting of a reduced withholding tax on dividends paid to foreign shareholders. If the recipient is a corporation, in order to be eligible for tax relief, the corporation must achieve at least 10% of its gross earnings through economic activities be a listed corporation or a corporation falling within the scope of the Investment Tax Law. So called "manufactured dividends" will be subject to withholding tax. In certain cases, hidden profit distributions will no longer be deductible from the taxable income of a corporation. This will be the case, for example, in the situation where a shareholder does not pay taxes on income received from the corporation due to the provision of a double taxation treaty. Investment models for achieving tax deferrals will also be restricted.

Finally, taxpayers requesting an Advanced Pricing Agreement (APA) will be subject to a minimum charge of €10.000 and other types of binding information will also be made more costly.



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VAT Carousel Fraud – is France any different?

What is 'Carousel Fraud'?

VAT Carousel is a tax fraud involving several companies from at least two European countries. Actually, it generally implies the movement of goods with important added value (e.g. mobile phones, software, electronic components) between two or more member states. The main fraudsters are short-lived companies (called "sociétés taxi" in French) existing for the unique purpose to issue invoices which allow their customer(s) to get the VAT back - charged but not paid by the "taxi" - either through direct deduction, or through VAT refund.

The basic scheme is the following: "A" (say a UK company) delivers goods to "B" (say a French company) for Euro 100,000 VAT free. Before disappearing "B" resells to "C" (say another French company) for Euro 119,600 VAT included (VAT rate at 19,6 %). "B" has charged VAT but will not pay it. "C" delivers these goods to "D" (say a German company) exempted from VAT. Finally "C" can ask for VAT refund.

The French authorities take action against Carousel Fraud

As other European countries France decided to fight against this very costly fraud. A new act (in December 2006) has been introduced into French tax law. Basically, three ideas have to be underlined:

- The VAT exemption from the delivery is not applicable to the supplier who knew or could not ignore that the presumed addressee of the goods had no real activity.
- VAT cannot be deducted when the company knew or could not ignore that its transaction participated in a fraud consisting in not paying VAT.
- The addressee of the goods is severally liable with the taxpayer if it knew or could not ignore that VAT would not be paid although owed on the said delivery.

The European Court of Justice in its "Optigen" decision (January 12, 2006) has decided that the fraud committed by an enterprise is not enough, by itself, to sanction the other enterprises in the same chain of delivery. The French judge will thus have to apply the new French act as well as to take into account this European Court of Justice decision.

In conclusion, it becomes more and more imperative to have good knowledge about a customer in France before entering into commercial transaction. In particular, be very careful with very newly incorporated (or dormant) companies. If you do not know your customer, due diligence can prevent some later problems. This issue is not isolated to France and can occur anywhere in the EU. For example there was a very recent decision by the English Courts which sentenced seven men to more than 16 years in prison between them after being found guilty of VAT Carousel fraud.



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