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New York International Chapter News

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Message from the Past Chair

Moving Through 2010 and Into 2011

Michael W. Galligan

Our goals of deepening the presence and service of the NYSBA International Section to the international bar of New York, while expanding its outreach around the globe, continued to motivate and energize new programs and projects through the end of 2009 and now well into 2010.

I. Service to the International Bar in New York. Here in New York, the Section was, I submit, by far the most active co-sponsor and cooperating

(continued on page 52)

Message from the Chair

Carl-Olof Bouveng

It is a great honor to have been appointed Chair of the NYSBA International Section. The Section has successfully evolved over more than 20 years. During the leadership of my predecessor, Michael Galligan, we have seen a tremendous amount of activity and energy. Michael has instituted new and successful programs such as the "Fundamentals of International Practice" and energized our Committees and Chapters. Michael has also given new life to the overall long-term missions of the Section, namely (i) "Custodian" of New York Law

(continued on page 54)

Inside

In Memoriam: Steven C. Krane 2
Note from the Editor 4

Of International Interest
Enforcing Judgments in the U.S.: New Opportunities in New York 5
What You Don't Know *Can* Hurt You: FCPA Risks in Cross-Border M&A Deals 7
ACLI Statement Seeks to Ban Securitization of Life Settlements: But Should "Ban the Bomb" Be "Save the Whales" Instead? 9
The Offshore Reach of the U.S. Taxman: Phase Three 12
The Newly Revised U.S. "Trade Adjustment Assistance" (TAA) Program Under the 2009 Amendments 17

Legal and Investment Updates from Various Member Countries
The New Tax Shield Aimed at Repatriating Assets Held Abroad 19
"Class Action" in Italy 21
Little Brother Is Watching You… 24
Anyone Looking for Reasons to Move to Israel? 27
Maturation of Chinese Anti-Monopoly Law 29
Arbitration Law in India 30
Pre-Salt: A New Legal Framework for the Oil Industry in Brazil 31
Brazil Is Ready to Retaliate Against the U.S. and May Implement the First Cross-Retaliation Effectively Adopted in International Trade Recent History 33
New Disclosure Rules for Brazilian Issuers of Securities 34
Labor Claims and Liens on Real Estate in Brazil 36
The Constitutional Implications of International Treaties 37

Section News
Words of Fernando Peláez-Pier, President of the International Bar Association, Upon Receipt of the Section's 2010 Award of Distinction in International Law and Affairs at the Annual General Meeting 39

Chapter News
Opening Remarks of James P. Duffy, III at India Conference 42
Address of Michael W. Galligan at Mumbai Conference 43
Opening of the Indian Legal Market 46
Report of Inter-American Committee Regarding NYSBA Participation in the XII Congreso Nacional de Abogados of the Barra Mexicana, Colegio de Abogados 46
NYSBA International Section Held Successful London Meeting 47
The Germany Chapter of the International Section, in Cooperation with the American Chamber of Commerce in Germany, Presents Expert Briefing 48
Swedish Chapter Holds Mini-Seminar on the FCPA 48
Understanding CEDAW's Role in Advancing Women's Rights Globally 48

Member News
NGO Participation in the Universal Periodic Review and the UN Human Rights Council 50
Book Review 51

NYSBA

Once the information necessary for the repatriation or regularization transactions has been gathered, the intermediaries must guarantee to the persons participating in the amnesty program that they will remain anonymous, and in fact, under the above provisions not only is the data related to the emersion transactions carried out by the taxpayer not reported to the Tax Administration at the time of the transaction, but it is not even provided subsequently in the event of an audit. Indeed (as an exemption from art. 1 paragraph 3 of law decree 167/1990) intermediaries "***must not report to the tax administration, for purposes of tax checks/audits, data and information concerning the confidential declarations.***"

In order to further reinforce anonymity and therefore to encourage the taxpayer to perform the repatriation transaction, paragraph 3 of art. 13-*bis* (introduced by law 102/2009, of conversion of legislative decree 78/2009) provides that the repatriation or regularization may not in any case constitute an element that is usable against the taxpayer, in any administrative or court proceedings, whether on an autonomous or tangential basis. However, the "indulgent" nature of the provision is tempered by the amendment made by decree 103/2009 correcting paragraph 3 of the above-mentioned article, which has excluded from the application of such provision and therefore from the use of the shield, proceedings that are pending on the date of entry into force of the law converting this decree.

The final measure, as approved on the basis of the amendments introduced by the above-mentioned corrective decree, does not grant any "exoneration" to taxpayers who have already been reached by the courts, financial police (*guardia di finanza*), or tax inspections. However, through the approval of the Fleres amendment to the corrective decree, the scope of action of the shield has been extended to cover tax crimes covered by the amnesty program.

The initial version of the measure ensured coverage of only those cases of disloyal declaration or failure to submit a declaration, governed by arts. 4 and 5 of legislative decree no. 74/2000. The extra-large version of the shield, however, ensures that certain crimes will not be punished, such as the following:

a. fraudulent declaration using invoices or other documents or inexistent transactions (art. 2 of legislative decree no. 74/2000);

b. declaration altered fraudulently using other accounting maneuvers (art. 3 of legislative decree no. 74/2000);

c. concealment or destruction of accounting books (art. 10 of legislative decree no. 74/2000).

The umbrella also covers corporate crimes such as misrepresentation on financial statements, pursuant to arts. 2621 and 2622 of the Italian Civil Code, where such crimes have been committed in order to conceal fiscal crimes.

Finally, in connection with the twofold tax- anti-money-laundering shield, since art. 13-*bis* of the anti-crisis maneuver provides for, in connection with repatriation and regularization transactions, the applicability of art. 17 of legislative decree 350/2001, which, in turn, imposes applicability to the transactions indicated, of the anti-money-laundering provisions set out under legislative decree 143/1991, the technical staff of the Ministry of the Economy has been called upon to provide clarifications on the relationship between anti-money-laundering obligations and the tax shield, considering the taciturn nature of the provision. The same, in concert with the *Unità di Informazione Finanziaria* (UIF), confirmed the exemption, for professionals and intermediaries, only for crimes covered by the shield, from the obligation to report a suspect transaction to the Unità di Informazione Finanziaria, leaving in place the obligations to identify, register and report cases of tax crimes that are not eligible for the shield (such as, for example, false invoices or tax fraud) for which action must be taken pursuant to the provisions introduced by legislative decree 231/2007, implementing directive 2005/60/CE (concerning the prevention of the use of the financial system for purposes of laundering proceeds of criminal activities and the financing of terrorism), as well as directive 2006/70/CE (which sets out the implementing provisions).

At this point, regardless of whether the measure is referred to as a san "amnesty" or "exoneration," rather than legitimate amnesty program, the focus should be placed on the commencement of the procedures allowing for the "return to the country of capital abroad."

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"Class Action" in Italy

1. The Subjective Positions, the Parties, and Cases Covered by the New Discipline

On 1 January 2010, after a troubled legislative process, the so-called class action procedure came into force in Italy. This procedure, however, is very different from the one in the USA.

For the very first time in Italy a procedural instrument enables the enforcement of a plurality of individual rights through a single action. This represents a turning point from the previous rules that governed so-called collective actions in Italy, which, found in the Consumer Code, have as their focus the protection of consumers' rights, among which the most important to be mentioned

are the right to health, safety and quality of products and services, as well as the right to correctness, transparency and fairness in contractual relations.

The previous regulation envisaged a central role for consumers' associations in the field of protection of "*collective interests of consumers and users.*" The terms under which the recent reform amends the previous text are therefore twofold: first, it modifies the subject matter of the action, and second, it changes the subject empowered to act.

The innovation in the Italian legal system must therefore be defined very broadly.

In fact, collective and individual interests mentioned in Article 139 of the Consumer Code (Legislative Decree no. 206/2005) are not relevant anymore, but rather "*consumers' and users' individual homogeneous rights.*" The main feature of the right object of protection appears to be homogeneity, namely, the identity between a number of rights, which rise to a collective relevance starting from an individual relevance. However, the new protection does not extend to any person or citizen in Italy. It is restricted to a particular category of people, that of consumers. Consumer is, by definition of letter a, paragraph 1, Article 3 of the Consumer Code, "*a natural person acting for purposes not related to the entrepreneurial, commercial, handcraft or professional activity carried out,*" which is opposed to a "professional."

Precisely, the harmed (or damaged subject) is legitimated to act (individually or collectively) in Court, thus making a significant turn from the old rules, which entitled both consumers' and users' associations to the protection of their interests. The solution adopted by the legislature, however, is fully acceptable because it gives back to the right holder the role of sole legitimate claimant, in line with the general principles of law, and leaves a subordinate role to the associations representing consumers.

The legitimated defendants, therefore, include only private entrepreneurs (natural or juridical persons), independently from other professional requirements. However, what must be highlighted is that the new provisions keep the chance for associations and committees to take legal action to protect the collective interests of consumers and users (including direct actions to inhibit the professionals' prejudicial conduct), thus strongly limiting the practical innovative importance of the actions under Article 140-*bis* of the Consumer Code.

Other types of rights that the new provisions protect are those "*concerning the final consumers of a certain product against its producer, even regardless of a direct contractual relationship*" (letter b) and "*identical rights to from the damage resulting to the same consumers and users from unfair trade practices or anticompetitive conducts*" (letter c).

Despite the wording, which is not completely transparent, a reference may be found from the legislature, in the cases mentioned in letter b, to the damages caused by a defective product (in Articles 114 to 127 of the Consumer Code) to final consumers, even if that product is still in the test period or on approval with the consumer himself ("*regardless of a direct contractual relationship*"); this is the first moment from which, under Article 119 of the Consumer Code, the product is to be considered put into circulation, and thus "eligible" to infringe the rights of the final consumer. Clearly evident is the restriction implemented by the legislature in these particular cases, because the previous wording of Article 140-*bis* encompassed all cases of non-contractual tort.

The term referred to in letter c, however, faithfully recalls the text of the old Article 140-*bis* ("*illegitimate contractual acts, unfair trade practices or anti-competitive conducts*"), while those already indicated in letter b (i.e., defective products) must be excluded from the field of extra-contractual torts disciplined here.

The Consumer Code, under Article 20, defines an unfair trade practice "*if it is contrary to professional diligence and materially distorts or is likely to distort significantly the economic behaviour, with respect to the product, of the average consumer whom it reaches or to whom it is addressed, or the average member of a group when a commercial practice is directed to a particular group of consumers*": deceptive advertising is a clear example of unfair trade practice under Article 20 above.

The anticompetitive conduct is regulated and governed by the Law 287/1990 (so-called "*antitrust law*") and must be understood as any conduct performed by professional suppliers of goods and services likely to affect the functioning of the free market system. These acts may affect consumer rights in a more indirect way, since the rule is designed simply to regulate the behavior of professionals.

2. The Action's Features and Procedural Matters Regarding the Admissibility of the Claim

A class action is proposed before the Ordinary Court, which judges in joint composition, pursuant to paragraph 4 of the new Article 140-*bis* of the Consumer Code. The Ordinary Court also governs the territorial jurisdiction, according to the place where the legitimated defendant company has its head office.

The action is proposed through a writ of summons which must be served on the legitimate defendant and to the competent prosecutor's office (paragraph 5). The competent prosecutor's office has power to participate in the case, but only with reference to the judgment of admissibility. This stage is, actually, the first of the trial and the judge is primarily responsible for determining whether there is a character of identity of the rights that the claimants consider violated pursuant to paragraph 2.

This stage is very significant since it involves the awarding to the Court of an effective power to set the object of the case (so-called "*petitum*") and the legitimate claimant. Not by chance, in fact, the last provision of paragraph 6 grants the judge the power to issue a declaration of inadmissibility of the action if he deems the proponent's inability to "*adequately protect the class's interests,*" with all the problems that a discretional evaluation of this nature involves.

And indeed, within the meaning of letter a, paragraph 9, the Court "*defines the characters of the individual rights object of trial, specifying the criteria according to which the subjects seeking to join are included in the class or must be deemed excluded from the action,*" awarding the judge a task of delimitation of the object and subject of the procedure.

The rule provides, therefore, a curious hybrid assessment field for the judge, which settles halfway between evaluations of procedure and matter of the case. This is an anomaly in respect of what the Italian legal system provides regarding inadmissibility, traditionally limited to procedural issues (and in this case, the examples could be numerous: i.e., if the defendant is not a company, if the homogeneous rights do not concern consumer relations, etc.).

The inadmissibility must also be declared for manifest groundlessness (see those cases in which the damage actually caused by the company's conduct is not recognizable, setting up what could be called a "punitive judgment") or when there is a conflict of interest, for example, when the judicial decision might have beneficial effects for some of those taking part in the class and prejudicial ones for others.

The judgment is given through order, appealable to the Court of Appeal within the final term of thirty days from its communication or notification. On the complaint, the Court of Appeal decides by order in council chamber, no more than forty days after the filing of the appeal. It must be noted that the proposition of the complaint on the admissibility/inadmissibility judgment does not suspend the proceeding before the Court.

The reasons, which permeate the rule referred to regarding the declaration of inadmissibility, have, however, the open purpose of limiting the number of cases, since through the order, "*the judge rules on the costs of litigation, even according to article 96 of the Civil Procedure Code, and on the most appropriate publicity to be made by the losing party at its own expenses.*" This obviously aims to discourage consumers or users from starting a clearly unfounded action, since the economic consequences would be extremely heavy for them, especially in the case of recklessness of the dispute, in which case the claimants would incur the aggravated liability under Article 96 of the Civil Procedure Code, resulting in damages and also in the possible request of payment of a sum determined "*aequo et bono*" by the Court.

It appears as though the legislators took into consideration the damage that companies, defendants in the class action, would encounter due to the negative publicity and damage of image that an unfounded action (for bad faith or gross negligence of the claimant) would inevitably entail.

An important content of the order with which the Court admits the action is the setting of terms and conditions for the "*most appropriate publicity, finalized to a timely participation of the class members.*" Even more important, as the performance of such publicity in the form and manner specified by the Court is also an admissibility condition for the claim.

Paragraph 11 provides that the same order declaring the admissibility of the action also fixes the course of the procedure. The law attempts to ensure the greatest possible speed and simplicity by allowing a very wide area of discretion of the decisions of the Court regarding a "*fair, efficient and prompt procedure management.*" The aim of the exercise of this discretion is to "*avoid undue repetitions or complications in presenting evidences or arguments*" and to enhance the management of the evidential part of the trial.

We cannot, therefore, fail to point out that the discipline of the procedure, such as that relating to the identification of the legitimate claimants, presents full of blanks and uncertain aspects, which certainly will lead to conflicting decisions on admissibility of actions between different courts in Italy. Only the creation of a substantial body of case law will help to better define the conditions and modalities for the carrying out of this type of action.

It does not seem, however, according to the author, that the proposed solution will have significant and decisive impact in the reduction of trial time in general, for which, it is believed, an effective enforcement of final terms would be needed and not an unlimited increase of discretion in setting conduct rules attributed to the body hearing the single cases.

3. Contents and Effects of the Judgment

Paragraph 12 of Article 140-*bis* of the Consumer Code provides that, if the claim is accepted, "*the court pronounces a judgment with which it liquidates, under Article 1226 of the Civil Code, the final amount owed to those who have joined the action or it sets the homogeneous criterion for the liquidation of such sums.*" Even in this case, the lawmakers have provided for vague rules, this time with respect to the amount determined in the judgment.

The judgment of the Court does not grant the claimants any right, but is limited to the ascertainment of the company's liability (thus constituting a mere declaratory judgment) and then later liquidates the sums or determines the liquidation criterion. It is therefore likely that, at the time of delivery, in the case of a sole liability judgment, each claimant does not know the amount due, but

also a further individual process will be needed for the liquidation of the individual and specific due sum.

Here lies, in our view, the insufficiency of the scope of the new discipline. A ruling of this kind is obviously not suitable for enforcement against the company, nor is it an assessment judgment, which, in itself, would be sufficient to constitute a title for registration of mortgage claims.

The second possible content of the judgment is the sentence to pay damages and repayments, according to paragraph 1. Also, according to the combined provisions of paragraphs 1 and 12, the sentence may consist solely in the payment of a sum of money, excluding all other types of obligations. Explicitly, however, it is, unlike the previous one, enforceable under Article 474 of the Civil Procedure Code, since it becomes (see paragraph 12) enforceable after 180 days from its deposit.

The additional element that the Court may need to consider in the assessment of the liquidation is indicated in the actions proposed against companies which manage public services or public utilities: in the liquidation, "*the court takes into account what is granted in favor of harmed users and consumers in the relevant codes of services that may be issued.*"

The most important anomaly, however, concerns the discipline of the effectiveness of the judgment, which is achieved only after 180 days from its issue, mentioned in paragraph 12, in striking contrast with the general principle under Article 282 of the Civil Procedure Code providing for the immediate enforceability of any judgment since the date of issue. Moreover, paragraph 12 continues by stating that "*the payments of the due sums during that period are exempt from all rights and increases, including the legal accessories accrued after the publication of the sentence.*" The purpose of the rule is quite easy to spot: to protect the company from possible substantial economic losses as a result of any negative judgment and grant it a period of time to gather resources for the payment of the due sums. Another goal that has been pointed out is the setting-up of a system to encourage businesses to comply with the judgment of first instance, without appeal.

The favor for the losing company is also clearly seen from the provisions of paragraph 13, relating to provisional enforcement in appeal of the ruling of first instance, firmly integrating Article 283 of the Civil Procedure Code; the Court of Appeal, in fact, is likewise obliged to "*take into account the entity of the overall sum burdening the debtor, the number of creditors, and the related difficulty of reimbursement in case of acceptance of the claim*" to suspend all or part of the enforceability or execution of the judgment contested, with or without bail.

At the conclusion of this brief analysis, there are still many doubts regarding the real effectiveness of the protection granted by the Italian class action, as well as the complete constitutional legitimacy of the discipline, in reference to Article 24 of the Constitution, which states that all persons are entitled to bring cases before a court of law to protect their rights. If, from this latter point of view, the participation in this type of action is optional, without prejudice, pursuant to paragraph 14, to individual action of non-participants to the collective action, the possibility that the class action has a real diffusion remains very limited. Greater importance should be given, instead, to a legislative solution for the development of the effectiveness of individual actions in the direction of an effective achievement and protection of consumer rights.

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Little Brother Is Watching You…

Privacy experts have used George Orwell's Big Brother to warn us about surveillance: but isn't Little Brother, that is, our friend, our colleague, even a person who just observed us yesterday on the street, as dangerous to our privacy? Some Internet sites, both public and private, are dedicated to "tattling," whether it is denunciation of crimes, deviant behaviors, critiques, or whistleblowing. This article will examine how French law has addressed this threat to privacy.

Little Brother Is Tattling to the Government

In 2007, the police of Var county, in the Provence area of France, put in place a system allowing individuals to report illegal behavior by email. The site was later closed due to pressure from several police and judges' unions.

However, since 2008, individuals may still report illegal behavior online on a reporting site (*Internet Signalement*) managed by the French Minister of the Interior.[1] Certain activities, such as mere immoral behaviors and illegal acts perpetrated by a person we know, even if this person is using the Internet to harm us, may not be reported. Such complaints must still be made directly to the local police authorities. When making a permissible online report, the individual does not have to give his name; however, the site records the IP address of the computer from which the report is filed. In certain cases, the government has the right to obtain a warrant to learn the identity of the person using the identified IP address. IP addresses are then kept on file for two years.