THE
INTERNATIONAL LITIGATION QUARTERLY
Summer 2010 Vol. 26, Issue 3
A PUBLICATION OF THE INTERNATIONAL LITIGATION COMMITTEE OF THE SECTION OF LITIGATION, AMERICAN BAR ASSOCIATION

IN THIS ISSUE

AMERICAN BAR ASSOCIATION
Section of Litigation

A Civil Law Brief

By J. Eloy Anzola

Imagine yourself in arbitration where your counterpart is a civil law lawyer educated in a Latin American country. In addition, two of the arbitrators are also lawyers educated in other Latin American countries where civil law is the rule. You receive a brief that has been filed late in the evening by your adversary, and you have to answer it promptly. On your way home, while on a train to a nice New York or Connecticut suburb, or after a nice drive on one of those smoothly paved American highways, you start reading the brief filed by your counterpart.

The Surprise

What a surprise! It's a long brief, and instead of citing recent cases and court decisions and focusing on the facts of the controversy, you see that your adversary philosophizes about the legal institution with which he is working, cites many scholars but very few local court judgments, describes the facts succinctly, briefly reviews the evidence, and at the end, makes pompous conclusions.

What is more astonishing is that although the governing law of the disputed contract is one of a Latin American country, your adversary brings many citations from other Latin American countries and names several scholars from Spain, France, Belgium, and Italy—and he goes back to Roman times to explain the origins of a specific institution or legal provision.

For you, the brief looks more like a dissertation to obtain a doctoral degree than an advocate's submission attempting to convince the arbitrators of the law and the facts of the case being disputed.

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New Possibilities for and First Experiences with Class Actions in Denmark

By Dan Terkildsen and David Frølich

On February 22, 2007, the Danish parliament adopted new legislation that, for the first time, will make it possible to conduct class actions under the rules of the Danish Administration of Justice Act.[1] The rules, which took effect January 1, 2008, constitute the new chapter 23d in the act and are based on a report drafted by a permanent committee that the Danish government named to deal with matters related to the act.[2]

The primary reason for putting forward a proposal on class actions was addressing the number of cases that were never brought to trial because the amount involved for each individual was too low to make it worthwhile to initiate legal proceedings.

The main organizations of industry and trade opposed the legislation, fearing that it would lead to an exorbitant number of proceedings, and in general, that it could lead to what was labelled an "American situation." Considering the content of the legislation and the conditions for being able to invoke a class action, the fear seems to have been unfounded.

According to the act, class action is

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THE INTERNATIONAL LITIGATION QUARTERLY

The International Litigation Quarterly (ISSN 1937-061X) is published quarterly by the International Litigation Committee, Section of Litigation, American Bar Association, 321 N. Clark Street, Chicago, IL 60654-7598, www.abanet.org/litigation. The views expressed within do not necessarily reflect the views or policies of the American Bar Association, the Section of Litigation, or the International Committee.

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Message from the Chairs

By Genevieve A. Cox and Edward M. Mullins

One of the great privileges of our jobs as chairs of the International Litigation Committee is participation in the Section's search for and selection of an International Human Rights Award recipient each year. Year after year, we are humbled to learn about each of the nominees and their tireless, inspired work championing human rights around the world.

This year was no exception. We were pleased to receive eight extremely impressive applications—one of our largest fields of nominees to date—representing some of the best and most dedicated in the field of international human rights. It was a difficult decision, but from this remarkable group, the Section was honored to nominate Beatrice Mtetwa, an international human rights lawyer practicing in the jurisdiction of Zimbabwe, for the 2010 International Human Rights Award.

We thought we would dedicate this note to bringing Mtetwa's important and lifelong work to the attention of our readers. For the past 20 years, Mtetwa, a leading female lawyer in Zimbabwe, has represented human rights defenders, journalists, and political leaders subjected to governmental persecution. She has dedicated her legal career to protecting the freedom of Zimbabwe's press from severe and continual governmental restrictions, which have threatened the very existence of any independent media or opposition speech. In addition to her tireless defense of freedom of expression, Mtetwa has represented numerous other individuals, including political leaders, human rights defenders, women, and children, against unfair charges brought and threats made by Zimbabwe's governing regime.

Mtetwa has carried out all of her work at great personal risk and sacrifice. As a direct result of her advocacy and her work as a lawyer, she has been repeatedly targeted by the police, and she has been arrested and severely beaten on several occasions. Mtetwa has suffered relentless attacks on her reputation and work as a lawyer from government supporters and the government-controlled newspapers.

Notwithstanding these grave consequences, Mtetwa remains undeterred in her advocacy on behalf of victims. As Dewa Mavhinga, who nominated Mtetwa for this award, praised, Mtetwa "continues to fearless[ly] defend victims of human rights abuses and to speak out on human rights issues in a volatile human rights environment, where so far only a handful of lawyers dare speak out."

Mtetwa's career exemplifies the highest principles of integrity, honor, courage, and commitment that define what it means to be a lawyer. Sadly though, Mtetwa's many achievements become all the more impressive when the tragic costs are taken into account. We hope that Mtetwa's receiving the Section's International Human Rights Award will call global attention to her important work in Zimbabwe and that this attention will assist Mtetwa in her efforts to further advance human rights and defend victims in that country and prevent Mtetwa from continuing to undergo such severe personal consequences.

We extend our congratulations to Mtetwa on receiving the Section's 2010 International Human Rights Award.

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Your first impression is that your counterpart is completely out of line. You think that he has a weak case and that all this erudition shows that he has no good arguments upon which to rely. In any case, you conclude that all the name-dropping and history is an unnecessary exercise of arrogance that will certainly bore the arbitrators.

A New Member of the Team

The next morning, however, you have second thoughts, and you decide to call a civil law lawyer in the country of your counterpart—someone you met in one of many arbitration seminars and who has expertise in contract law and comparative law—and ask him to explain why this brief is written in this manner and what he thinks of the brief and its contents.

Over the phone, your colleague tells you that your adversary is a much respected lawyer with an extended and successful practice and a distinguished academic career, and your colleague says he needs to read the brief before giving you an opinion. You send him a copy and he becomes a new member of your team (after due consultation with your client over his name, credentials, and fees). A few hours later, your newly drafted player calls you back.

A Different View

He has reviewed the brief, and he cautions you that the brief is a respectable piece of work. However, he disagrees with some points of law and how some facts are presented, and he objects to some of the conclusions.

He explains that the research was well done, and that the legal and factual arguments are orderly and clearly presented. It certainly admits rebuttal, but it's not a piece that should be discarded lightly. In the back of your mind, however, you have the feeling that for some reason—friendship, camaraderie, etc.—he doesn't want to criticize the brief openly. You aren't convinced with the overall picture, and you ask him to pursue his analysis.

Your Latin American colleague explains that your counterpart works with *syllogisms*. While you are on the phone with him, you quickly go to Wikipedia and see that a syllogism is "a kind of logical argument in which one proposition (the conclusion) is inferred from two others (the premises)."

He explains: "Your counterpart works with a *major premise* (the law), a *minor premise* (the facts), and the conclusions. Your counterpart presents a thorough analysis of the legal provisions governing the different aspects of the contractual dispute, and thereafter he highlights the evidence to prove the facts that favor his case." In summary, your Latin American colleague explains, your counterpart has applied the legal provisions to the facts, and he has come to his conclusions.

What Is Law?

This first comment seems abstract and vague, so you continue with your questions and ask your Latin American friend why your counterpart engages in such a lengthy historical analysis and cites foreign scholars, the laws of other countries, and the courts of different places, and does not limit himself to citing and explaining the legal provisions of the governing law country and the cases of that specific country.

Your friend explains that civil law lawyers, particularly those with academic backgrounds, consider themselves members of a certain legal culture and a community that has roots in ancient Rome and medieval times and continues to grow with the cross-fertilization of legal minds from a diversity of countries. In many cases, particularly in contract law, several countries share similar legal provisions, and in any case, share the same legal principles and concepts that are valid everywhere that civil law culture has been established.

He adds, "In the civil law world, law is not only the written legal provisions approved by a legislative body or constitutional assembly, such as in hierarchical order, the constitution, the international treaties, the organic laws, and the regular laws, but also a major body of court decisions and academic treatises and opinions. Any Latin American law student would tell you that the sources of the law (*derecho*) are the written statutes or laws (*las leyes*), above all others; the judgments of the courts (*la jurisprudencia*); treatises, books, articles, and comments written by legal scholars (*la doctrina*); and the general principles of law (*los principios generales del derecho*)—a core of principles such as justice, fairness, and equity that are the basis of and taint the whole system of law."

You confront him, saying, "But in civil law countries, there is no *stare decisis*—court decisions are not precedents. Isn't that right?"

He concurs, and adds, "But in certain countries, the code of civil procedure 'invites' judges (including arbitrators) to follow the rulings of the court of cassation—normally the court of last resort for contractual disputes in a civil law country. Although we won't go into that now, you will find that in certain matters, the rulings of certain courts become mandatory and have to be followed by all courts and all citizens. That is the case of constitutional courts that are entitled to set aside written statutes because they are declared unconstitutional. But let's get back to the functions of the court of cassation."

He explains that the purpose of *cassation* (France) or *casación* (Spain and Latin America), developed by the French and

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followed in many civil law countries, is to procure a uniform and consistent application of the law as read and interpreted by the court of cassation.

He adds that the court of cassation "exclusively reviews matters of law and does not analyze—with some true exceptions—the findings of facts made by the courts of appeals or the courts of first instance. The purpose of the court of cassation is to police the correct application of the written law. The rulings issued by the court of cassation create a body of law (*droit* or *derecho*) complementary to statutory law, and because of its authority, it permeates to the whole system." But he tells you that you are right, the judges or the arbitrators aren't bound or obligated to strictly abide by such rulings. However, "the persuasive effect of the judgments of the court of cassation is major, and they have to come into play."

Your Latin American friend explains that the decisions of *la casación* of the governing law country are the most important, and that all decisions—not many—that have dealt with similar cases have been cited and analyzed in the brief.

You find these explanations quite reasonable, but you inquire why French, Italian, and Spanish cases, and also cases of other Latin American countries, are brought into the brief. He explains, "Depending on the importance and prestige of the court that has issued a ruling in foreign countries, it will be followed, or at least read or analyzed, by a judge or an arbitrator (or a panel of arbitrators). The French *Cour de Cassation* and the Spanish *Tribunal Supremo* enjoy great appreciation and respect. It's therefore not unusual to include a discussion of their relevant decisions, especially if the rulings have been consistent through a long period of years. If you can show that the French *Cour de Cassation* has repeatedly held the same position on a specific point of contract law and the local written law is similar to the French Civil Code, you have a good chance that such opinion will be followed, or at least taken into account, by a local court or arbitrator.

"Although the brief is long and maybe tedious, he's showing the arbitrators that he has thoroughly researched and analyzed the matter and that no stone has been left unturned." He explains that the historical part of the brief fills this purpose, and also shows that the legal rule he's advocating has been in the civil law system for ages, and there are no good reasons to deviate from that well-accepted rule.

A Law Made by Scholars

The next question that you have for him is "Why is the brief full of citations of local scholars and, above all, foreign scholars?" He responds that this is a very interesting question, and he says, "This is where, maybe, common law and civil law really differ." He categorically asserts that civil law is a system of law made by scholars.

You question him, "But it was my understanding that in the civil law system, statutory law is king, isn't it?"

"Yes, of course," he says. "But the written law must be completed and explained by someone. You, in the United States, have given that task to the courts. We, in Latin American countries, have chosen the scholars. In the United States, you've given the courts the power to *make law* in the absence of statutory law. In Latin countries, we need a *statute*—in the case of contract law, primarily the civil code—but we also need *someone* to explain the contents of the written laws and their insertion in the legal system. That task has been given to our scholars."

He then tells you that the rules on the law of contracts of the civil codes in Latin America find their main genesis in the French Civil Code of 1804. This code in turn inspired the Chilean Civil Code of 1855, drafted by a distinguished legal scholar and poet, Andrés Bello, whose influence was felt in many other countries in the region. The French code is also the basis of the Italian Civil Code of 1865 that, together with the Spanish Civil Code promulgated in 1888–89, would also serve as sounding boards for many codes in Latin America. "The codes," he adds, "are not identical, but in many cases, similar. I can recommend a very good book if you want to pursue these matters. It's called *Latin American Law*, written by Professor Mathew C. Myrow.

"If you review the provisions of contract law in the civil codes of civil law countries, you'll see that, as in many written laws, they are quite laconic. They need to be explained by researchers and scholars who have to refer to the ancient principles, explain them, and expand them with the language of the codes and put them together with what is new, or was new, in the written laws.

"All these codes, especially the French code, surely the first of its kind, are intended to simplify the language of the law, making it accessible to all and easily understood. To that end, the codes use a succinct language. It must be understood that the idea of the codes was to summarize in a single book all the principles and rules of law applicable to individuals, legal entities, families, property, estates, torts, contracts, and specific contracts such as sale, exchange, and lease, along with guarantees such as bonds and mortgages, and even evidence—a wide array of matters. You may see the code as a summary of the rules applicable to all those matters. And law would not be law if that short book was not followed by masses of comments, theses, antitheses, discussions, hypotheses, and all forms of intellectual interchange among members of a club of human beings called lawyers (*abogadas* and *abogados*) and legal scholars (*juristas*)."

He cautions: "When it comes to procedural matters, don't think that the Code of Civil Procedure in Latin American countries is necessarily based on the French *Code de Procédure Civile*. Rather, these codes find their inspiration in the Spanish rules that were put together in the *Novísima Recopilación de las Leyes de España*, published in

1805 and 1806, under the rule of King Charles IV (before he was imprisoned by Napoleon), together with his son, who would later become King Ferdinand VII. There is a major exception, however: the rules of evidence, which are in the French Civil Code, and also in many civil codes in Latin America. But that's a discussion for another day."

Books in Spanish

He stresses that there is another point that may sound anecdotal but is nevertheless important. Many Latin American lawyers are familiar with many European legal scholars from France, Germany, Italy, and Spain. In the case of Spain, it's easy to understand; Spanish lawyers and scholars share the same language with their Latin American colleagues.

"Many treatises and books written by French, Italian, and German legal scholars were translated into Spanish," he adds. "In addition to those who were able to read the originals, most law students, especially those who went to Latin American law schools in the 1970s and 1980s, are very familiar with names such as the French Aubry, Rau, Planiol, and Ripert, who authored lengthy treatises, or the Mazeaud brothers; the Italian Francesco Messineo; and the German Ennecerus, Kipp, and Wolf, to name a few. You will find Spanish translations of their works in many, if not all, law libraries in Latin America. In those years, students would not easily find books written by local scholars, so in certain fields, such as contract law, it was almost a necessity to go to those sources to better follow the law professors or do any kind of research."

He explains that judgments rendered by the courts in your own country and other countries around the world weren't so easily found before the Internet. Therefore, the books of these legal scholars were the most important reference you had to construe a legal concept or provision. And many of them would quote judgments of the courts of their respective countries.

He adds that Jacques Ghestin of France and Luis Díez-Picasso of Spain are the preferred living European scholars for contractual law, although Ghestin's works haven't been translated into Spanish. He adds other names of Latin American scholars, such as Atilio Alterini in Argentina, José Melich Orsini in Venezuela, and others.

He continues, "Times have changed, of course. First, local legal scholars are publishing more and more, so as you have seen in the brief, your adversary takes into account these new publications. Second, courts' judgments are placed on the web and are easily accessible, and your counterpart has included all the relevant cases on the debated contractual matter, especially those issued by the local court of cassation, although these are not numerous. But, as with many things, lawyers are used to traditional methods. Therefore, quoting foreign judgments, especially reputed foreign scholars, continues to be of use, especially in these traditional fields.

"The ideal situation you can have in a contractual matter is to be able to quote in your favor a decision of the French Court of Cassation or another prestigious European court, followed by approving comments from foreign and local scholars, tied with a favorable local decision issued by your own Supreme Court that receives the approval from reputable local scholars.

"The influence of U.S. law is also felt in the region. Many students and young lawyers have gone and continue to go to your country to study law, do research, or obtain masters and doctorate degrees in U.S. law schools, and also work in U.S. law firms. Although their influence is felt more in nontraditional fields, you may find that in contract law, as an example, they may want to add and share their knowledge of common law."

The Quebec Civil Code and the Spanish

Your friend adds, "If you want to read a really good English translation of a civil code and expand your knowledge of civil law, I recommend that you take a look at the Louisiana Civil Code, and especially the official English version of the Quebec Civil Code." He explains that the Quebec Civil Code was amended in the 1990s with the participation of the best Canadian legal minds that in turn consulted with their French counterparts, such as Jacques Ghestin, among others. "It's very helpful if you have to write in English about civil law. The *Québécois* have provided us with the best tool available—an impeccable English translation of the provisions of a civil code. I recommend that you use it to polish any Spanish-English translation of any Latin American civil code."

Finally, you invite your friend to work with you to prepare a response, and you thank him for his help. He parts, saying "I hope that you now have a better view." And you answer with a muffled and not very convincing voice, "Certainly."

Class Actions in Denmark

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defined as "a claim which is attributable to a number of persons and where it is a representative of these persons (not the individual persons) who has the capability of acting as a party during the process."

Basic Criteria for Applying the Rules

The claims in question must be attributable to a number of individuals, and they must be of a similar nature, which means that they must concern the same facts and have the same legal foundation.

In the comments made on this particular issue in the governmental proposition that is the foundation of the act, types of claims that would meet this criterion are mentioned.[3] Such claims could, for instance, include a claim from investors submitting that the content of a prospectus was misleading, that standard terms and agreements had been applied against their true legal meaning or in violation

of mandatory legislation on consumer protection, or that groups of companies had engaged in violation of the Danish Rules on Competition by forming a price-fixing cartel. Further examples could include cases regarding damages caused by pollution or product liability.

If such issues are the subject of a class action, it could be necessary to refer the decision regarding the size of each individual's compensation to individual cases because the calculation of the damages could very well differ and thereby be excluded as an integrated part of the class action.

Another main condition for the acceptance of a class action is that the class action procedure must in fact be the best way to handle the litigation compared with other methods of handling a claim.[4]

In addition, it must be possible to identify the members of the group involved in the class action and inform them of the action. Depending on the specific circumstances, it can be decided that information should be provided by way of specific information to each individual member or, for instance, by newspaper advertisements. A formal group representative must also be appointed.

Unsurprisingly, another condition for class action is that the Danish court must be competent with respect to at least one of the individual claims forming a part of the class action.

It's for the court to decide if the basic criteria for conducting the procedure as a class action have been fulfilled.

The Group Representative

According to Section 254c of the act, the group representative can be:

1. a member of the group,
2. a private association or institution, if the class action is within the object of the association, etc., according to the definition in the articles of association, or
3. a public agency authorized by law to act as a group representative.

There are no additional conditions, such as financial power or a minimum number of members, for an association or similar organization to be able to act as a group representative. It is necessary for private associations to have adopted written articles of association and for the members to be identified.

At present, the only public agency that falls under No. 3 is the Danish Consumers' Ombudsman (*Forbrugerombudsmanden*). Even prior to the act, this agency was authorized to initiate proceedings against companies violating the Danish Marketing Practices Act.

As mentioned earlier, it's the group representative who will act during the proceedings, appoint counsel, and decide on all procedural matters.

The Group Covered by the Class Action

To avoid having class actions utilized in Denmark the same way that they are in the United States—which would have been unacceptable for Danish legislators—the general rule is that class actions only comprise individuals who have chosen to enlist as participants (i.e., the act follows the "opt-in" model).

The act does not specifically state whether consent to be part of the group can be withdrawn later. However, from the comments made in the governmental proposition, it seems that once enlisted, a class member may not cancel that enlistment and thus cause the class action to lose its legally binding effect.

In order for a class action to comprise all members of a relevant group without each individual consenting to the class action (i.e., the "opt-out" model), the conditions in Section 254e, subsection 8, must be fulfilled.

First of all, each individual claim must be of such a limited amount that it cannot be expected to be made a part of an individual action.

Secondly, the court must decide that it isn't appropriate for each member of the group to have to give specific consent. For instance, this could be the situation if the group comprises a very large number of individuals, thus making it very burdensome to administer a case based on an opt-in procedure.

If the relevant conditions are met, the court will set a deadline for any member of the group to opt out of the class action.

Significantly—especially when compared to class actions in some other countries—only a public agency (and, at present, only the Danish Consumers' Ombudsman) may act as group representative in a class action based on an opt-out procedure.

Appeal and Settlement

If the class action is being dismissed by the court or withdrawn by the group representative, each member of the group can, within a four-week deadline, continue the case insofar as the claim of that individual is concerned.

If the group representative enters into a settlement, this settlement must be approved by the court.[5] However, the court can only deny approval of a settlement if the settlement inappropriately treats individual members differently or if it's manifestly unreasonable.

If opposing counsel files an appeal, the class action will continue as a class action under appeal.

If the group representative decides to appeal, he or she will once again have to go through the class-action procedures, including getting renewed confirmation from individual class members through an opt-in procedure, confirming that they will also be a part of the class action on appeal.

Should the group representative decide not to appeal, another individual or entity that fulfils the requirements for being appointed group representative can initiate an appeal and conduct the case as a class action on appeal.

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It's also possible for each member of the group, within four weeks of the normal expiration deadline for initiating an appeal, to file an appeal with respect to an individual claim.

Costs

Under Danish law, there is an overriding principle that the losing party shall reimburse the prevailing party's costs related to the proceedings.[6] However, it should be noted that the reimbursement of costs is fixed based on a fee scale and that the amount offered as reimbursement, at least in cases involving smaller amounts, is not equivalent to the actual legal fees paid to counsel.

In a class action, the court can decide that the individual group members must pay costs to the opposing counsel or to the group representative. The group representative's claim for costs is secondary to the opposing counsel's claim.[7]

The court can decide that the group representative shall provide security for the costs that the group representative could be ordered to pay in compensation to the opposing counsel. This rule is specifically related to class actions, and it does not apply in individual cases unless the claimant is domiciled in a country outside the European Union.[8]

Individual members are normally asked to provide a limited amount as security for costs at the outset of the proceedings. If the costs aren't covered by insurance or the rules on legal aid, they will normally be limited to the amount provided as security by the individual at the outset of the class action.

The First Years of the Act

The fears of misuse of the new rules providing for class actions have yet to materialize. The facts remain that so far, only two major class actions have found their way to court. Many more cases have been rumoured in the media.

The only case to date in which an association of individual investors has filed a class action is the so-called *Bank Trelleborg* case. In that case, a group of investors filed the first class action under the new rules based on a failed investment in the Danish Bank Trelleborg. The substance matter of the case is that the investors are of the opinion that Bank Trelleborg, in connection with a liquidity crisis in the bank, was taken over by another bank at a share price below its actual market value.

The *Bank Trelleborg* case has yet to be tried before the High Court Eastern Division. However, all information on the case is available on the Internet at www.btaktier.dk, thus providing full publicity on the matter in a modern way. As this class action is based on the opt-in principle, there is a strong interest in encouraging the widest possible public awareness.

Another case where preliminary steps have been taken to initiate a class action is a case where a number of investors seek recovery from Jyske Bank, one of the major Danish banks, for losses of approximately DKK 800,000,000 (the equivalent of about USD $130 million) in a hedge fund set up by the bank. This case will probably be conducted based on an opt-in procedure; the preliminary steps have been taken by the Danish Consumer Ombudsman.

A third potential case involves compensation for damages with respect to delays in registering title to land in connection with the malfunctioning of a newly adopted national electronic registration system.

The foregoing cases are very well suited to be tried under the act, and it's no surprise that the two cases in which proceedings have already begun are related to the financial crisis. The press is showing great interest in the use of class actions, and every financial collapse of some magnitude in recent times has been discussed in connection with a possible class action.

So far, the new rules have proved more of a negotiating tool and means of pressure than an actual legal remedy. Before the act, there were certainly a number of legitimate smaller claims not being pursued in court. Larger corporations can be seen to more often adhere to public (and sometimes political) pressure at an earlier stage when potentially facing a class action.

Conclusion

There are no uniform rules of class actions within the European Union, although various policy initiatives have been undertaken, as consumer protection is one of the main goals of the European Union. Approximately half of the member states have various forms of class-action procedures, but they differ to a large extent. It's also a common feature of these rules that they are used in relatively few cases.

Under Danish law, there is an overriding principle that the losing party shall reimburse the prevailing party's costs related to the proceedings. However, the reimbursement of costs is fixed based on a fee scale and the amount offered.

The Danish rules show that it's possible to pass legislation on class actions that enables individuals to initiate litigation as a group for claims that each individual would have refrained from submitting without resulting in the perceived abuses resulting from the U.S. approach to class actions. However, it's also our opinion that the rules will have a limited effect, especially due to the overriding principle of a class action being based on an opt-in

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Part II: The Assessment of Damages under German Law

By Annemarie Grosshans

Part I of this article, which appeared in the Spring 2010 issue of The International Litigation Quarterly, *provided an overview of damages principles under German law and a closer look at how damages are defined under the* Bürgerliches Gesetzbuch *(BGB)—the German civil code.*

The rationale behind the assessment of damages under German law includes the compensation of disadvantages suffered, providing satisfaction to victims, prevention in regard to social behavior, and solidarity with regard to social security systems.

The basic statutory provisions on damages are set out in the BGB. Statutes regarding claims for damages are also to be found in other laws, for example, in the Copyright Act (*Urheberhebergesetz*), Product Liability Act (*Produkthaftungsgesetz*) and others.

Damages for Particular Types of Claims

Product Liability

Regarding product liability, both the *Produkthaftungsgesetz* and section 823 of the BGB provide for damages, although the *Produkthaftungsgesetz* does not affect the liability in tort (section 15(2) of the *Produkthaftungsgesetz*).

The *Produkthaftungsgesetz* is based on a directive of the European Union providing for strict liability (*Gefährdungshaftung*). A "product" within the meaning of that act is any movable item or a part of another movable or immovable item, as well as electricity (section 2 of the *Produkthaftungsgesetz*). Under section 3 of the *Produkthaftungsgesetz*, a product is defective if it is not as safe as could reasonably be expected under the applicable circumstances, including how the product is presented, whether the product is used in an expected manner, and how the product is supplied to the market.

A "producer" in the meaning of the *Produkthaftungsgesetz* is the person or entity who has produced the end product, a basic material, or a partial product. A producer also includes a person or an entity who markets as a producer by fixing his or her or its name, his or her or its brand, or any other distinguishing sign on the product. Further, a producer is one who imports a product into the European Union for sale, letting, leasing, or any other form of distribution. If the producer cannot be traced, every supplier is deemed a producer, unless the supplier identifies the producer who delivered the product within one month of the injured party asking the supplier to do so. Contrary to liability in tort, in case of personal injuries by one or more products with the same defect, the liability to pay damages is limited to €85 million (section 10 of the *Produkthaftungsgesetz*). If property has been damaged, the producer is liable for damages above €500 (section 11 of the *Produkthaftungsgesetz*).

Other than the *Produkthaftungsgesetz*, tort liability provides for liability on the part of the producer. A producer will be liable, for example, if it negligently disregarded its duties of care by distributing a defective product. Regarding construction, production, and instruction of a product, the producer is to be guided by the current state of the art as concerns the product. The producer must organize the construction and production in such a manner that defects will be completely avoided or, if any exist, discovered by controls.

Likewise, some other statutes provide for strict liability without affecting damages in tort. Examples include the Environmental Damages Act (*Umwelthaftungsgesetz*), Road Traffic Act (*Straßenverkehrsgesetz*), Civil Aviation Act (*Luftverkehrsgesetz*), Atomic Law (*Atomgesetz*), and Genetic Engineering Law (*Gentechnikgesetz*). The basis for strict liability in these statutes is the premise that one who creates and maintains to his advantage a dangerous plant or enterprise should be liable for the damages that typically may occur from that conduct and cannot be avoided.

Infringement of Copyrights and Other Exclusive Rights

Regarding the infringement of copyrights and other exclusive rights, basically the injured party may choose between a claim for surrender of profits and one for damages. The damages can be calculated concretely inclusive of lost profits, or based on the copyright fee the injurer would have had to pay.[1]

Section 97(2) of the *Urhebergesetz* provides that a person who negligently or intentionally infringes a copyright or any other protected right under the act is liable for damages. In assessing damages, the profit realized by the injurer by infringing the right may be taken into account. Likewise, the damages can be calculated based on the amount that the injurer would have had to pay if he had sought permission to use the right. Authors, writers on scientific research, photographers, and performing artists may seek further monetary compensation for noneconomic losses based on equitable principles.

The same calculation methods are available for the infringement of name and company rights,[2] in case of imitation contrary to fair competition,[3] and for comparable infringements of competition law.[4] A different calculation applies to the infringement of the right of personality by press publications[5] or the

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infringement of contractual copyrights, however. Additionally, if a patent is withheld, the injured party must present the likelihood of a profit.

The protection of regular and legal usage of copyrights and affiliated protective rights and the respective remunerations by performing rights societies—for example, the *Verwertungsgesellschaften* (GEMA)—is governed by the Performance of Copyrights and Affiliated Protective Rights Act (*Gesetz über die Wahrnehmung von Urheberrechten und verwandten Schutzrechten*, or UrhWG). This act provides that the performing rights society must distribute the profit to the authors based on an allotment plan fixed in its articles. Case law has established that GEMA is free to surcharge 100 percent on top of the ordinary tariff in case of illegal use of a protected music label.

Section 42 of the Registered Designs Act (*Geschmacksmustergesetz*) provides that a person who illegally makes use of a registered design may be sued by the owner of the right or any other entitled person for removal of the infringement, and, in case of recurrence, for discontinuance. The claim for discontinuance likewise exists if even a first-time infringement is imminent. In case the injurer acts intentionally or negligently, he or she is obliged to make restitution of the damages caused. As with the *Urhebergesetz*, the infringer's profits may be taken into consideration in assessing damages. The amount of damages also can be calculated on the basis of the fee the injurer would have had to pay had he applied for permission to make use of the registered design. Section 43 of the *Geschmacksmustergesetz* further provides that the injured party can seek possession of illegally created or distributed goods in the infringer's possession. The same applies to equipment used in the illegal creation or distribution of such goods. The injured party can also demand that the injurer recall the illegally created or distributed goods or for the injurer to stop the illegal creation or distribution. The injured party also has the option to seek a turnover by the injurer of the infringing items in question (provided the cost of production would not increase as a result), in lieu of seeking the destruction of the goods and damages thereof. These claims may be unavailable, however, if they would constitute an unreasonable action under special circumstances and in consideration of the interests of third parties.

In case the injurer did not act intentionally or negligently, he may provide restitution to the injured party with a lump-sum settlement to avoid claims based on sections 42 and 43 of the *Geschmacksmustergesetz* if the fulfillment of the claims would cause unreasonable damage to the injurer and the lump-sum settlement is acceptable to the injured party. The lump-sum settlement is based on the appropriate fee that the injurer would have had to pay in case of a contractual permission to make use of the registered design. If the payment is made, the injurer is deemed to have permission from the injured party to make use of the right to the usual extent (section 45 of the *Geschmacksmustergesetz*).

The injured party can also request access to banking, financing, and trading documents if the documents are necessary to establish its claim. Such disclosure is subject to the court issuing appropriate measures to protect secret information, however (section 46b of the *Geschmacksmustergesetz*).

The Patent Act (*Patentgesetz*) and the Utility Models Act (*Gebrauchsmustergesetz*) provide for the same remedies as the law on registered designs. Section 15(2) of the *Gebrauchsmustergesetz* additionally allows the injured party to seek the deletion of rights if the relevant registration entry is identical in terms of the description, patterns, models, equipment, etc., as the entry of a third party who has not been asked for its consent.

Burden of Allegation and Burden of Proof

Under the rules of the Code of Civil Procedure (*Zivilprozessordnung* or ZPO), particularly sections 284 et seq., the claimant is responsible for alleging the necessary facts to establish his or her claim and for producing the evidence supporting them.[6]

The claimant must state the facts needed to comply with the requirements of the legal provision on which the claim is based. He or she has the burden of alleging the material substance of the claim, the injurer's fault (intention or negligence), the damages suffered, and the causality between the injuring action and the claimant's damages.

Under the rules of the Code of Civil Procedure, the claimant is responsible for alleging the necessary facts to establish his or her claim and for producing the evidence supporting them.

The offer of evidence must clearly and in detail state the facts and the measure of evidence for proving the alleged facts. Fishing expeditions, which are not likely to prove any alleged facts but are rather intended to obtain new findings or bolster a party's case, are not permitted. The burden of allegation and the burden of proof are applied strictly. While these burdens are lightened in some circumstances, only rarely are the burdens shifted from the injured party to the injurer.

Where a claimant seeks damages instead of performance under section 281 of the BGB, the claimant has to comply with the relevant statutory requirements. The injurer has to prove

due performance of his contractual obligations. If the claimant has accepted the performance, the burden remains on him to prove that the performance was not due under the parties' contract (section 363 of the BGB).

Under certain circumstances, prima facie evidence (*Anscheinsbeweis*) is sufficient to prove the causality between the injuring action and the damages sought. This is the case if the violation of a protective law entitles the injured to damages in a typical scenario—for example, if individuals develop health problems due to the introduction of toxic substances into neighboring property. It's up to the injurer to invalidate the prima facie evidence by showing that the damages aren't a typical result of the violation.

As applied to copyright infringement by Internet users, prima facie evidence is taken as sufficient to prove such infringement. For instance, the visitor to an infringing website will be deemed to be the same person that owns the Internet account used to visit the website.

Under section 10 of the *Urhebergesetz*, there is a rebuttable presumption that the author is the person named on the works, either on the original or on copies. If no author is named on the work, it's assumed that the editor named on the work is entitled to claim the rights of an author. If no editor is named, it's assumed that the publisher is the author. This also applies to owners of exclusive rights of exploitation with regard to interim measures and suits for discontinuance. The assumption is not valid in relation to the author or to the original owner of the affiliated protective right, however.

If the injurer's conduct fails to comply with legal requirements, then generally the burden of proof will be shifted (*Beweislastumkehr*) with regard to the facts regarding fault (intention or negligence). In such a case, the injurer must prove that it had done everything to comply with the protective law. A shift of the burden of proof is also recognized by case law with regard to product liability. If a defective product causes damage, the producer of that product must prove that he or she complied with his or her duties and therefore cannot be held liable for the defect.[7] This shift of the burden of proof is valid in matters concerning industrial production as well as products of handicraft and small enterprises. If the defect has its origin in the sphere of organization and risk of the producer, the producer can only discharge itself if it can prove that it and its employees acted without fault, that the organization was not improper, and that due diligence was exercised in the selection of the employees in charge of the development and production of the defective product.

Under section 93(2) of the Corporation Act (*Aktiengesetz*), the members of the board of an injuring corporation may be held liable for damage caused by the company. The board members have the burden of proving that they performed their duties properly and to the best of their abilities.

Regarding medical professionals' liability, the burden of proof is shifted in cases of a gross treatment fault, which—with other causes—is capable

Calculation Methods

Depending upon the nature and circumstances of the harm suffered by the claimant, various principles may apply to the calculation of damages.

Concrete Calculation Method (Konkrete Schadensberechnung)

The claimant's loss has to be calculated objectively. Among the relevant information is the factual loss suffered and the compensation sought. The overall economic interest of the injured party has to be restored, but sentimental feelings or interests are not considered.

Abstract Calculation Method (Abstrakte Schadensberechnung)

In case of a loss of profit, an abstract calculation is admissible based on the usual course of things and typical average profit (section 252(2) of the BGB). Practically speaking, this has the effect of lightening the burden of proof. The defendant may show that the loss of the injured party was less than claimed or even nonexistent. It should be noted that courts have allowed an abstract calculation based on section 249(2) of the BGB. For example, in the case of a damaged car, the amount paid would be what it would cost to have the car repaired by a proper business competent to do such repairs (minus VAT). It's up to the injured party what it does with the money. For instance, it could keep the money and not have the car repaired, or it could have the car repaired for less than the amount awarded and keep the rest.

Abstract-Normative Calculation Method (Abstrakt-normative Schadensberechnung)

This calculation method applies to cases in which the law, independently of the concrete loss suffered, automatically fixes the amount of damage without the possibility of the defendant to furnish proof to the contrary. Examples of such laws are section 376(2) of the Commercial Code (*Handelsgesetzbuch*, or HGB), which provides for a fixed-date purchase, section 288 of the BGB providing for default interest, and section 849 of the BGB providing for the duty to pay interest in tort.

of causing the harm that actually occurred.[8] The doctor then must prove that there is no causality between his treatment and the primary damage.[9] A gross treatment fault exists, for example, if the doctor failed to properly educate a patient as to the patient's options, the risks of certain treatments, etc.[10] In such a case, the doctor would have to prove when, to what extent, and on which risks he informed the patient, or alternatively that such clarification was dispensable because the patient had already been sufficiently informed by another doctor.[11]

Judicial Valuation (*Richterliche Schätzung*)

If the parties disagree as to the cause of damages, or the amount of damages, or what interest applies, section 287 of the ZPO provides for the court to resolve such disputes after taking into consideration the circumstances of the case.

Subsection 1 applies to cases where the plaintiff cannot precisely prove the damage sought, whether because the calculation of the damages is a discretionary matter (for example, section 253(2) of the BGB), if it's complicated because it involves hypothetical calculations (for example, lost profits under section 252 of the BGB), or because the taking of evidence would cause unreasonable expenses. In such circumstances, the damages will be set at the court's discretion. In cases involving extremely complicated damages calculations, the court can, and even must, evaluate the minimum sum.[12] Section 287 of the ZPO does not shift the burden of proof, however.[13]

Section 287(1) of the ZPO also governs the accrual of damage. Consequently, the courts hold that the lightening of the burden of proof also applies to the causal relationship between the cause of liability and the consequences. This provision supplements the legal rules, for example, in the BGB, providing for the lightening of the burden of proof.

Judicial valuation is not permitted if the claimant does not submit any facts upon which the evaluation can be based. It cannot be made "out of the blue."[14] The judicial valuation also can't lead to the court determining the amount of compensation entirely. This means that section 287 of the ZPO applies in principle only if a quantified claim has been filed. In essence, it acts to lighten the claimant's burden of allegation. A gap with respect to the burden of allegation can thus be bridged by judicial evaluation if sufficient facts for such a step are stated. These requirements are strictly followed. For example, the market price of a comparable good must be stated, along with an explanation as to why that good is considered comparable. It's left to the discretion of the court to take into account the relevant differences in valuation.[15]

If the facts are disputed, evidence must be taken concerning them.[16] Whether and to what extent evidence will be taken is up to the discretion of the court. Section 287 specifically provides that party examination is not inferior to other means of proof, which is contrary to the general principle that party examination is permitted only when all other means have been exhausted and no result has been reached.

For the valuation, the court may choose between abstract and concrete calculation methods (see sidebar on page 10). The facts supporting the court's valuation must be set out in the judgment. If the claimant has offered evidence for a concrete calculation, however, abstract calculation to the disadvantage of the claimant might seem arbitrary.

Endnotes

1. Palandt, § 687, Rn. 7.
2. BGH NJW 1973, 622.
3. BGH NJW 1993, 1989.
4. Palandt, § 687, Rn. 7.
5. BGH NJW 1994, 1950/53.
6. *See* Annemarie Grosshans, *Taking Evidence Under German Law*, The International Litigation Quarterly, Winter 2009, Vol. 25, Issue 1, 10.
7. BGH NJW 1991, 1948/51, BGH NJW 1999, 1028.
8. BGH NJW 2007, 2767.
9. BGH NJW 2008, 1304.
10. BGH NJW 2005, 427.
11. BGH NJW 1984, 1807.
12. BGH NJW 2005, 3348 (the court's evaluation must at least include the minimum sum called for by section 287 of the ZPO; BGH NJW 1994, 663).
13. BGH NJW 1970,1971.
14. BGH NJW 1994,1950/53.
15. BGH NJW 1984, 2282.
16. BGH NJW 1988, 3016.

Class Actions in Denmark

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system. We're not necessarily opposed to implementing more features of U.S.-style class actions.

One of the main advantages seems to be that counsel acting for several individuals with similar claims can avoid the often delicate issue of some claims being time-barred if pursued individually.

Looking at the very limited number of cases actually brought before the courts, it can be concluded that fears that the act would invoke a tidal wave of class actions were highly exaggerated. The amount of work and the formal requirements needed to bring forth a class action have limited the number of actual lawsuits. However, the possibility of a class action has had a huge psychological impact on the business environment in Denmark.

Furthermore, lawyers and potential claimants are acquainting themselves with the legal framework, and it's our expectation that the framework will be expanded in the future as part of the focus on improved consumer protection in Denmark and in the European Union.

Endnotes

1. Act no. 181 of February 28, 2007 (Retsplejeloven).
2. Governmental Report 1486/2005 (Reform af den civile retspleje IV—Gruppesøgsmål mv).
3. *See id.*, p. 213 ff.
4. *Id.*, p. 218.
5. *Supra* note 1, Section 254h.
6. *Supra* note 1, Section 312.
7. *Supra* note 1, Section 254f.
8. *Supra* note 1, Section 321.

Becoming an International Practitioner: Impressions and Challenges

By Harout Jack Samra

Whether a seasoned litigation veteran or a recent law school graduate, entering the field of international litigation can be a daunting, though appealing, challenge. Falling into the latter category of practitioners, I've worked over the last year to settle into this attractive and demanding arena. In the short span of a single year, I've grown considerably less clueless, though this is surely still a colossal work in progress.

Articles about lessons learned are frequently written by seasoned practitioners who fondly remember the "early days." Seldom are such articles solicited from those who are in the midst of surviving the day-to-day "learning experiences" with which we are all confronted at the beginning. My purpose, however, is to provide just such an article. Over the next few pages, I will identify several of the top lessons I've learned and challenges I've identified over the last year. These range from the practical to the theoretical and—trust me—are not exhaustive.

What's in a Name?

The marketing guru that each of us met in the first few days after starting at the firm told us all to develop the dreaded "elevator speech." In terms of difficulty, I would rate this exercise somewhere between riding a bicycle and reading Aramaic backwards. You'll find that some people have it easy. They can say "I do tax," and everyone understands (though with a tinge of sympathy). One year into my practice, though, I'm convinced that my mother still doesn't completely understand what it is that I do. There are a number of likely reasons for this, and they're rooted in the fact that international law and the even narrower category of international litigation come in a variety of shapes and sizes. Simply saying that you are an international litigator doesn't capture it. I'm afraid that everyone has a preconceived notion of what international law means. They may ask if that means you actually try cases abroad. Well, not likely—unless you're in arbitration. Your international practice might involve cases litigated in the United States. Try explaining that one.

You see, an international law practice can mean many different things and can encompass subjects as diverse as human rights, criminal law, arbitration, and even conventional domestic litigation. I've found that the best way to face this challenge is to be direct and specific. Tell people what it is that you actually do. Do you generally represent foreign parties in U.S. courts? Well, that's pretty specific and clear. Do you represent nondomestic parties in international arbitrations—sometimes against other nondomestic parties? Pretty clear as well, though explaining what arbitration is to a layman can be a challenge. Another common misconception is that we actually specialize in the laws of other countries (this is as you realize that you've hardly figured out our own law!). Although this might seem trivial at first, just wait until you're enjoying Thanksgiving at Aunt Sue's house and the questions start to flow about little Johnny's big law job. Trust me, you'll thank me later.

Remember 1L

Handling authority and managing precedent are usually among the first things that we learn how to do in law school. To a large degree, 1L is almost entirely dedicated to that task. Just think about it: Why start the discussion of the commerce clause in Con Law I with *Gibbons v. Ogden* if not to illustrate the evolution of the doctrine? Handling precedent in international litigation, though, is often a uniquely difficult task. One quick lesson I learned early in my first year was that vast doctrinal changes occur with some frequency and in an instant. There are often large gaps in the case law, not to mention rampant circuit splits. While this might make for interesting law review articles, it doesn't make the task of constructing well-supported legal arguments any more pleasant. On the other hand, there's always the thrill of having a hand in the next big precedent-setting case. Well, even that depends, I suppose.

Often, I get the feeling that maybe no field of the law better confirms Hobbes's observation that "it is not wisdom, but authority, that makes law." Take, for example, the issue of the continued viability of manifest disregard and the sharp divisions that have arisen among the circuit courts. Following the Supreme Court's monumental decision in *Hall St. Assocs. v. Mattel*, 552 U.S. 576 (2008), no fewer than six circuit courts have staked out at least three distinct positions as to whether the doctrine of manifest disregard still exists. Confronted with this question in one of the remaining circuits, I'm afraid that the answer is really limited to the dreaded "it depends." But on what? Truthfully, until the Supreme Court speaks, there is no definitively "correct" answer (though I certainly have my bias). This problem illustrates the unique challenges endemic to international litigation and arbitration; it's not unique to the

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enforcement of arbitration awards. Hall Street Blues, indeed.

Though there are many reasons for this, the starting practitioner will likely find—as I did—that it's often not only a function of divided courts but also a consequence of the relative dearth of directly applicable precedent. Where issues haven't been analyzed thoroughly by the courts, there is more room for argument. The grim reality is that there isn't always "the case on point." Instead, we're often left to argue by analogy—distinguishing those cases we seek to avoid and highlighting those we wish the court would apply. Though this is inarguably true for every other field of advocacy, it's especially true in fields such as international litigation, where our facts very often simply fall in the gaps between cases.

The bottom line is clear: The newcomer to international litigation and arbitration must be intellectually aggressive and thorough. Sometimes there really are only one or two cases on a specific point. The challenge is to find it when the online search resulted in 400 hits. Where not even those few cases are available, the onus is on crafting the creative argument that more persuasively applies the most analogous precedent.

What You Didn't Learn

Though many of us spent every additional hour of law school focusing on international law as an area of academic interest, the reality is that most of us had limited exposure to the field. Many law schools, identifying the increased necessity of this experience, have sought to increase the amount of international law instruction available, even going so far as to introduce a mandatory first-year course in international law. For most, the first few months of practice in this relatively strange arena can be a flood of unfamiliar names and concepts.

Of course, it isn't long before one begins to understand the basics. If you are an arbitration practitioner, you'll get to know the New York Convention pretty quickly. How, though, does one apply it? What are the primary sources? This isn't as easy as picking "Federal Cases, All" and running a search. Whereas we are generally taught that secondary sources are just that—secondary—they can be critically important to an international litigation practice. Even the most cursory review of Supreme Court precedent is striking because our learned justices often rely quite extensively on scholarship to support their holdings. International law has benefited greatly from a tradition of active scholarship. An early challenge that all of us must confront is the identification of these names, both in the United States and abroad. Kelsen, Brownlie, Schreuer, Jackson, Van den Berg, and Born are a few names that come to mind immediately, and they are but a few. If you are the bookish sort, get ready. A whole new world is opening up to you. Though these materials can be very expensive, they're often crucial to helping understand challenging new issues. Always check the nearby law library, which will generally have them available.

Beyond the flood of scholarship available, the new practitioner will also be confronted with an array of international and transnational authority. Though the principle of *stare decisis*, where previous rulings are binding on later panels, doesn't always apply in international law—for example, in International Centre for Settlement of Investment Disputes (ICSID) and World Trade Organization (WTO) dispute resolution—citing to authority from previous panel decisions can often be quite persuasive. Consequently, if your practice involves these types of cases, becoming familiar with those vast bodies of precedent is absolutely critical. A key problem, however, is that they are often not as "searchable" as U.S. case law, and consequently require different, often more proactive, strategies. One key approach is to commit to staying up to date with new developments. To this end, there are countless blogs and other online news sources dedicated to international dispute resolution. For example, the International Litigation Committee actively posts recent international litigation developments from every U.S. circuit court. Visit the webpage at www.abanet.org/litigation/committees/international for more information. Similarly, as shall be discussed shortly, there are several other organizations dedicated to international litigation and arbitration that also work to spread awareness of recent developments. The challenge is being confronted by a new and unfamiliar set of resources. This is only compounded by taking a lackadaisical approach.

Secondary sources can be critically important to an international litigation practice. Even the most cursory review of Supreme Court precedent is striking because our learned justices often rely quite extensively on scholarship to support their holdings.

No Man Is an Island

Finally, the new practitioner will be quite surprised to discover the variety of organizations available that are dedicated to our practice; some even

cater to our regional concentrations or subspecialties. This wealth of resources, though, can also be extremely confusing. Though they all seem interesting, we face the unswerving economic law of scarcity of resources, the most important of which is our time (though membership fees will also add up surprisingly quickly). The challenge is matching the organizations that most effectively overlap our interests. Perhaps most interesting, many of the organizations specifically dedicated to the international litigation and arbitration practice have specific programs dedicated to young practitioners. The challenge of parsing through the vast array of international organizations is one that all of us are challenged with quite early in our careers. Taking a strategic and methodical approach to this is important and can reap many rewards.

This is not a process that is completed in the course of the first few months on the job. One year in, I work constantly to continue to develop the new opportunities that are available and confront the new challenges that develop.

The ABA's offerings in this area are remarkably diverse and accessible, including frequent training activities and programs tailored for young practitioners. Our own International Litigation Committee has recently created both LinkedIn and Facebook pages (just search for the ABA International Litigation Committee) for members to join and interact with one another through social networking. In addition, the Young Lawyers Division (YLD) more broadly seeks to cater to young practitioners, focusing on their concerns and needs across a range of disciplines. Within the YLD, however, there are several committees, including Dispute Resolution, which take a narrower approach while still focusing on young practicioners. These types of organizations offer young practitioners many opportunities to join and become active as leaders quite early. Through the ABA's activities and organizations, young practitioners can gain exposure to other international practitioners throughout the United States and abroad.

Beyond the ABA, there is a broad universe of organizations that crave young members. Many, like the ABA, have developed programs or organizations dedicated to new practitioners. Generally, these groups can be divided into several broad categories. Several are general organizations of international practitioners not geared toward any specialty or group. In addition, numerous organizations focus on a specific subspecialty, such as arbitration, while others are specifically oriented towards a particular region.

One primary example of the groups falling into the third category is the International Association of Young Lawyers (Association Internationale des Jeunes Avocats, AIJA), a bilingual—English and French—international organization "devoted to lawyers and in-house counsel" who are 45 and younger. AIJA's stated purpose is to "promote professional cooperation and friendship among young career-building legal professionals on an international stage." Though AIJA doesn't focus only on dispute resolution, it's nevertheless quite interesting because of its international membership. It can be particularly interesting for those who are bilingual or multilingual. Similarly, though more limited to arbitration, the ICC's Young Arbitrators Forum (www.iccwbo.org/yaf) is dedicated to young practitioners.

Finally, there are countless organizations dedicated to particular subspecialties in international dispute resolution, many of which are regionally oriented. One very important specialty is arbitration, which has countless organizations dedicated to young practitioners. The regional organizations include, naming a few, British (www.lcia-arbitration.com), Canadian (www.ycap.ca), Austrian (www.cm.arbitration-austria.at), Swedish (www.sccinstitute.com/yas), and Australasian (www.afia.net.au). If your international practice is geared toward any of these regions, membership in these organizations could be quite rewarding. Other organizations, such as the Spanish Arbitration Club (Club Español del Arbitraje, CEA, at www.clubarbitraje.com) have taken an active, regional approach to their growth and have spread through a broader region. In the case of CEA, the organization is active throughout the Americas and has developed young-practicioner-specific programs through its CEA-40 group.

Parting Thoughts

At times, it can seem like too much to absorb at once. The fact is, however, that this is not a process that is completed in the course of the first few months on the job. One year in, I work constantly to continue to develop the new opportunities that are available and confront the new challenges that develop. Taking a long view of development is important. Maybe the most important piece of advice, though, is to ask someone who has been through it all, or who is further along. Sometimes it helps to know that others are juggling or have dealt with similar challenges. Experience only comes with time, unless you take the wiser approach and ask.

Postscript: Familiarity with Applicable Legal Systems Is Essential

By James L. Loftis and C. Ryan Reetz

In our Postscript to the Fall 2009 issue of *ILQ*, we discussed the difficulties that international litigation practitioners face when they confront disputes in which the applicable law will be one in which they are not qualified. This problem is particularly acute when that applicable law is part of an unfamiliar legal tradition. (We'll return to that word—"unfamiliar"—in a moment, so, as Indian senior advocates often say in argument, please mark it well.) Two of the articles in this issue cause us to return to that topic.

The first is Eloy Anzola's entertaining, excellent, and short article (excellent in part *because* it is short) "A Civil Law Brief," which is one of the best overviews of the civil law approach to written advocacy for common lawyers that we have seen. In 3,000 words, Anzola provides us with a primer on the differences between civil-law and common-law approaches to legal reasoning and written advocacy.

A common lawyer might be tempted to ask himself or herself the question that follows logically from Eloy's discussion: Which system is preferable? While the two legal systems proceed from recognized but different bases—common law as identified and explicated by courts in the first instance vs. civil law as laid down in codifications and explained by scholars—the systems are both directed at producing "justice" or "public order" or whatever one terms the product of a system of law. From that common lawyer's perspective, however, a level of certainty and predictability is an inherent component of justice. In contrast, the civil law appears (to a common lawyer, anyway) to prefer leaving open flexibility in the application of rules—hence the lack of *stare decisis*—as a means of allowing a court to produce a just result. To the common lawyer, that apparent lack of predictability and certainty as to outcomes is daunting. As Anzola explains, though, the civil law does address this question, just through different means.

On the other hand, however, preference, at least for most commercial international dispute resolution (IDR) practitioners, is at best an indulgence. While interesting, it does not much matter, as nearly all active IDR lawyers will find themselves confronted with disputes to which a civil law is applicable. And what Anzola's article illustrates is that unfamiliarity with the law is an obstacle that can be overcome.

The second article, Dan Terkildsen and David Frølich's piece on the new class-action statute in Denmark, addresses an interesting development in an E.U. state, using a combination of direct exposition and comparative legal analysis. After reading the article, nearly every reader of this newsletter will at least be aware of the new law. None would presume to advise a client on it (we hope), but each would now be more familiar with the Danish law and at least know to ask questions of cooperating counsel.

Now, let's return to the point about familiarity. The common-law IDR practitioner is unlikely to become fully qualified in civil law (or Danish procedural law). However, IDR practice today requires familiarity with other legal systems and traditions, if only to enable the practitioner to ask intelligent and appropriate questions. This is one of the key IDR practice skills that's both crucial and difficult: becoming familiar with the vast array of law that may become relevant to a client's international legal dispute. Of course, an additional skill, honed through experience, is knowing enough about the commonalities to be able to ask the right questions. Knowing that both systems aim at justice, arrived at through different paths and institutions, allows us to translate those differences to our target decision maker.

The essential skills of the litigator are explanation and persuasion, but the foundation of both is familiarity. One more reason, we say, to read the *ILQ*.

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