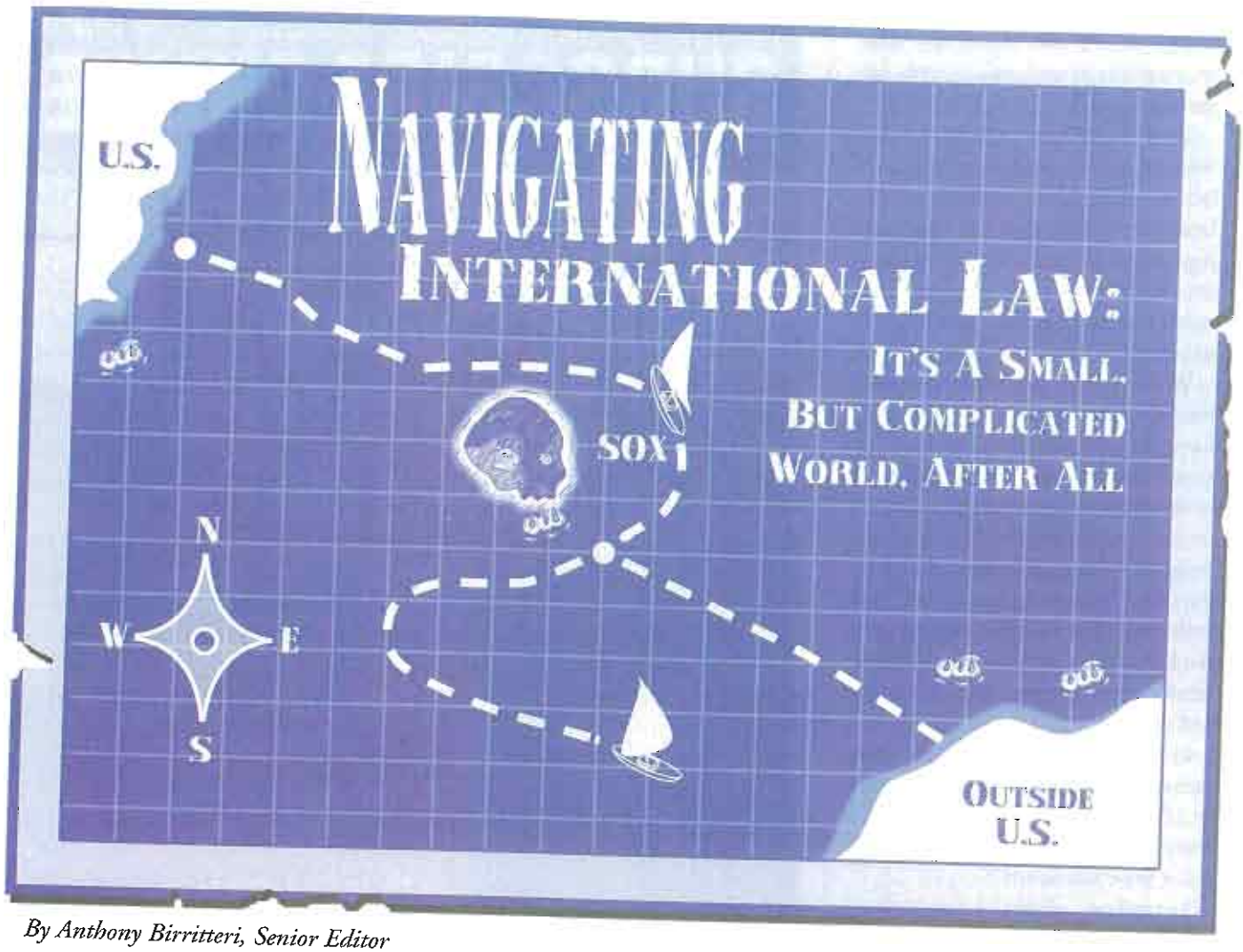


NAVIGATING INTERNATIONAL LAW:

IT'S A SMALL, BUT COMPLICATED WORLD, AFTER ALL

By Anthony Birritteri, Senior Editor

September 11, the threat of global terrorism and the war in Iraq have not placed a damper on business transactions between U.S and foreign companies, as has the Sarbanes-Oxley Act of 2002. Business executives at overseas firms are nervous about becoming board members of U.S. public companies, because the Sarbanes-Oxley, better known as SOX (sparked by executive malfeasance at Enron, Worldcom, Tyco, Adelphia Communications and other companies), now makes directors and top corporate officers personally responsible for the accuracy of financial statements and corporate disclosures.

For the foreign businesses that want to invest in U.S. companies, SOX is just another stone weighing down commerce in the U.S., which is viewed as a very "litigious" place to do business. Already, regulations and an exorbitant amount of legal documentation required in most deals have been irking many foreign investors, yet they have no choice but to adhere to the rules if they want to participate in the "strongest economy in the world."

Enter the U.S. law firm, helping foreign-owned companies and investors, as well as U.S. companies here that want to conduct business overseas, navigate the waters of international law.

U.S. attorneys more often help foreign companies do business domestically, rather than help American companies or investors conduct business overseas. In the latter case, a law firm in the foreign country would best serve the U.S. business, since it would – as hopefully expected – better know business law and regulations of its native soil.

The greatest assistance that lawyers provide foreign companies and investors in conducting business here is minimizing risk. That means choosing the right corporate structure in an effort to avoid double taxation (here and overseas) and simply limit the chances of litigation going upstream and impacting the foreign parent company, rather than just the U.S. affiliate.

Alyce Halchak, a director at Gibbons, Del Deo, Dolan, Griffinger & Vecchione.

SOX now has foreign firms conscious of its possible impacts. "The act has had a watch-dog effect overseas," says Alyce Halchak, a lawyer at the Newark-based law firm of Gibbons, Del Deo, Dolan, Griffinger & Vecchione. "I find that it is having a depressing effect on the market because foreign companies are not quite sure what they are going to get into when they come into the U.S. to do business . . . they want to know what the ramifications will be on the international side."

Halchak is chair of Gibbons Del Deo's Corporate Department and the Corporate & Finance Practice Group. She is also a director at the 130-attorney firm. She says that many of the firm's international business clients are becoming more interested in what their U.S. affiliates are doing and how the changes in U.S. law can affect how these affiliates operate. "Many of our foreign clients are interested in finding out how we think SOX will be governing them, even though it may not be directly applicable," she says.

As expected, foreign companies (not to mention U.S. corporations) are going through a learning curve with SOX. With governance issues and securities laws, plus the ongoing litigation and indictments, "there is a definite fear of the unknown," says Halchak.

"Foreign businesses want guidance. They want to know that when they enter a joint venture or merger and acquisition (M&A) with an American company, that their risks are limited to what they see on paper. They don't want lack of clarity in the law that may not just put their U.S. investment at risk, but the entire foreign holding company, for example," explains Halchak. "This is why you are seeing many different business structures being tested and many of the foreign holding companies, with many tiers, doing some restructuring."

John Aiello, chair of the corporate securities department at Giordano, Halleran & Ciesla, Middletown, says that there is a real cultural difference in the way board of directors operate here and in foreign countries. Directors in the U.S. have more management authority in how a business is run, creating the highest level of oversight in operations, whereas a managing director at a foreign company may have more responsibility in running the business overall. But with the greater power of U.S. board members comes the increased exposure to litigation and, therefore, the reluctance on the part of the foreign investor to participate on boards here.

Aiello helps U.S. companies in which foreign concerns want to invest. "In that context, we deal with the international company. We need to know their concerns relative to their ownership interests, perceive their expectations and their involvement in the corporate governance scheme," he says. The investment would ultimately lead to a board of directors position, growth through a public offering, or perhaps the purchase of the entire company. "It is similar to what you would do for an U.S. investor, but you have to work extra hard to make these folks (foreign investors) comfortable that the company has adequate officer and liability coverage because of their sensitivity to our litigious economy," he says.

John Aiello, chair of the corporate securities department at Giordano, Halleran & Ciesla, Middletown.

Commenting on SOX, Aiello says it has made companies publicly traded overseas reluctant in getting their securities listed through American Depository Receipts (a negotiable certificate issued by a U.S. bank representing a specific number of shares of a foreign stock traded on a U.S. stock exchange). "Once those securities are listed in the U.S. for trading, U.S. securities laws and SOX must be complied with," he says.

For the U.S. company looking to do business with an overseas firm, Aiello advises that the U.S. business conduct proper due diligence on the foreign operation. "If you are selling your product overseas through the foreign firm, for example, you need to know that the company is financially stable and has sensitivity to compliance in its own country and elsewhere. You want to make sure that there is no negative situation that can adversely effect your company," he says.

While there is a cultural difference in the role that boards of directors play in various countries as opposed to the U.S., there is also a difference in the authority and role that a lawyer plays on behalf of a client company. According to Steven E. Gross, co-chair and managing partner of Sills, Cummis, Radin, Tischman, Epstein & Gross, the Newark-based law firm with 150 attorneys in the state, "Overseas business executives, whether in Europe or in the Pacific Rim, have a different understanding of what they expect from lawyers and law firms than in the U.S.

"The way we - and most other U.S. law firms - handle international law and clients is proactively," he says. "We are much more proactive in representing our clients both on a business and legal basis. In Europe and the Pacific Rim, lawyers have had a much more limited and defined role . . . as in just documenting certain things. We are much more involved in the business decisions, the coordination of business and law . . . we are sitting at the business table and making decisions."

He says the foreign executives are at first taken aback by this "proactiveness." They are also amazed at the amount of "heavy" documentation

required in a transaction. "Overseas companies are much more accustomed to a short-form statement of intent on how a deal will occur, as distinguished from the American style which attempts to cover every possibility (in a deal), such as laying out the alternatives, what would happen if a breach occurs, what are the rights and remedies, what are the time periods of the deal, etc.," explains Gross. "There is no right way or wrong way of doing this," he continues. "It's just a difference in cultural style."

Commenting on SOX, he says that foreign businesses do not yet understand the changes that are occurring in the U.S. As it becomes more prevalent, setting the tonal standard for fairness and corporate transparency, foreign companies involved in public entities in the U.S. will have to start conforming to the law. "European and Pacific Rim businesses have never had that concept," says Gross. "They are going to be behind us (U.S. businesses) on the issue, but American capitalism is strong and the cultural changes occurring here on fairness, transparency and disclosure will be adopted by foreign countries. We are now talking to European clients about it. They want to understand it."

Steven E. Gross, co-chair and managing partner of Sills, Cummis, Radin, Tischman, Epstein & Gross.

Most of Sills Cummis' international work is for overseas firms wanting to conduct business in the U.S. This past March, for example, Gross was named U.S. council for Fiat, the Italian auto-

mobile manufacturer. His role is to advise the Turin-based company on U.S. law and supervise all of its legal work domestically.

For SNIA SpA, a Milan, Italy-based medical technology manufacturer of cardiovascular devices, Sills Cummis advises the company on acquisition strategies in the U.S.

Asked how these European contacts are made, Gross says it is all based on relationships and word-of-mouth referrals. "I have spent a lot of time in Europe – not going to seminars or bar association meetings, but talking to clients, getting introduced to their business clients and competitors. It's really word of mouth. That's the best way of doing it," he says, adding that he or other Sills Cummis lawyers have, in the past year, traveled to Italy, Spain, England, the Netherlands, Japan and China.

He adds that Sills Cummis can offer international businesses the firepower of large New York firms, and the "Old World way" of doing business, which is forging relationships.

At Klett Rooney Lieber & Schorling, the Pennsylvania-based law firm with offices in Trenton and Newark, Joseph G. Manta, a shareholder in the litigation department, helps international firms wanting to conduct, or who are already doing, business in the U.S., minimize risk. "We advise companies on the appropriate corporate structure here in the U.S., whether they want to form a corporation, S Corporation or Limited Liability Company (LLC). We explain to them the pros and cons of each, both legally and on a practical matter."

He says foreign companies must worry about branch taxes, explaining that if an U.S. affiliate is viewed as a branch rather than a subsidiary, then the income information for the entire corporation may be susceptible for tax allocation purposes.

Regulatory issues, including employment and immigration law, follow corporate structure concerns. On the immigration side, Klett Rooney attorneys advise companies

on non-immigrant visas, permanent resident visas and how to comply with the Immigration Control Act. Employment law is very different in the U.S. than in European countries where employees abroad are usually treated as employees for life and are difficult to terminate. In the U.S., workers are "at-will" employees and are more opened to being fired.

Joseph G. Manta, a shareholder in the litigation department at Klett Rooney Lieber & Schorling.

Concerning U.S. companies wanting do business overseas, the "employee for life" issue is minor compared to knowing the political and economic climate of a country. According to Stuart A. Hoberman, a shareholder and director at the Woodbridge-based law firm of Wilentz, Goldman & Spitzer, "International law fluctuates and depends on the economic climate worldwide and the political climate of the country with which you are dealing."

As an example, Hoberman says that in the 1970s and 1980s, Liberia was a prime country to set up a new business for purchasing vessels. However, because of the civil, political and economic turmoil of the country today, it's a country from which to stay away.

He also warns U.S. companies to not be tempted by lower wages they can pay employees in certain countries because it's normally in those countries where political turmoil exists – mainly because workers are not being paid much. He also warns about nationalization movements in third-world countries in which an

American business may set up operations and then, somewhere down the road, have it taken over by the country. The bottom line is that businesspeople, as well as lawyers, have to keep an eye on what is happening in particular countries and jurisdictions.

"Attorneys constantly need to be monitoring economic climates all over the world – reading newspapers and other publications - and keep abreast of what's going on," he says.

The European Union (EU) has become "stronger and more active" in the area of international business, but for any outside company wanting to do business within the EU, it still has to keep up on the regulations and laws of each individual EU country. "You still have the laws of each jurisdiction," explains Hoberman. "If I were setting up a business in France, I would be looking into the laws of France.

Stuart A. Hoberman, a shareholder and director at Wilentz, Goldman & Spitzer, Woodbridge.

"On the same token, any country in Europe that wants to be a major player in international business will have to adopt similar laws to other countries, as well as the U.S. . . . you have to adopt laws that encourage other countries to come in," he says.

International tax treaties (ITTs) are one method in which two countries can enter favorable international trade agreements with one another, avoiding issues of double taxation at home and abroad. Advising businesses on these bi-lateral agreements is Robert S. Schwartz, a partner at Westfield-based Lindabury, McCormick & Estabrook.

"The U.S. has been entering international tax treaties since the early part of the last century. The treaties address how two partnered countries will tax individuals or legal entities such as businesses, in each respective country," he says. "The whole purpose behind the treaty is to stimulate trade and investment between two nations."

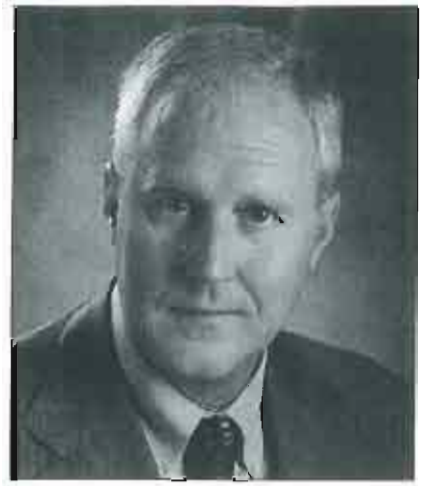
Schwartz says that there is a lot of "horse trading" going on when negotiating an ITT. In the U.S., the Treasury Department does the negotiating, while the Senate is responsible for confirming the treaty.

The U.S. has a model treaty that is a template, which the Treasury Department uses when entering negotiations with a foreign country. Similarly, Europe has a template treaty organized by the Organization for Economic Cooperation and Development (OECD), which is part of the European Union concept, according to Schwartz.

ITTs can cover all kinds of business transactions (depending on the agreement). A major problem they resolve is double taxation on the sales of products and services by granting tax credits. In the U.S./United Kingdom agreement (modified this past March 31), this would be a dollar for dollar reduction in U.S. taxes that were paid in the U.K. by an American business. Tax benefits on income derived from royalties, dividends, interest payments and other "fixed and determinable" income can also be agreed upon. Other items covered can include the taxation of international exchange students and the sharing or exchange of information between countries for the purpose of, for example, preventing fraud and trailing a tax cheat.

When asked if a New Jersey company should only do business with a country that has a U.S. tax treaty in place, Schwartz answers no. "A company should do business in a country in which they feel they need to do business in, in terms of markets and logistical considerations," he says.

He adds that the IRS and foreign authorities frown upon the practice of



Robert S. Schwartz, a partner at Lindabury, McCormick & Estabrook, Westfield.

"treaty shopping," in which a company doesn't necessarily want to do a great deal of business in a certain country, but wants to make use of the favorable tax advantages in place due to a treaty. "Some or all of the tax treaties that the U.S. has negotiated over the past 20 years contain an 'anti-treaty shopping' article," he says.

There are many issues that businesses, both foreign and domestic, face when it comes to transacting business worldwide. It is a "small world after all," as the song goes, but it is also a complicated world. Lawyers, fortunately, are available to help businesses navigate the many rules and regulations of international trade.

Economic Group Plans Conference

The Economic Development Association of New Jersey (EDANJ) will present a panel of speakers who will address the issue of "Homeland Security and our Ports" on Friday, October 3. The meeting, open to the public, will be held at the headquarters of the Delaware River Port Authority in Camden.

Panelists will include: John Mattheussen, CEO of the DRPA; Joseph A. Balzano, Executive director and CEO of the South Jersey Port Corporation; and a representative from the Port Authority of NY/NJ.

Registration is at 9:30 AM; program at 10; conclusion with lunch at noon. Cost: $45 per person. For reservations and further information, please call Margaret M. Smith, treasurer, at (856)-384-6934.