

New York International Chapter News

A publication of the International Section of the New York State Bar Association

Message from the Chair

2009 has been a year of "firsts" for our International Section: the inauguration of our Announce List-Serve in early March; the organization of our first day-long CLE event, "Fundamentals of International Practice" on April 30; the organization of our first major Chapter Meeting in India, in June; our first meeting with the CLE Directors of New York's major international law firms in August to discuss future CLE projects; a breakthrough CLE program in September on Latin American private equity in which we were able to offer free CLE credit to our Section's attendees while offering a paid-for web conference option through NYSBA's CLE office, and much, much more.



Michael W. Galligan

At the September 15 meeting of the Executive Committee, we approved three "Long-Term Missions" for the Section: Custodian of New York Law as an International Standard, Guardian of the New York Convention on the Recognition and Enforcement of Arbitral Awards and the Arbitral process, and Monitor of International Law Developments at the United Nations. You can read more about these Missions in the Chapter News section of this Newsletter. In addition, we approved Guidelines for Committee Chairs and Chapter Chairs, which synthesize debate and discussion going back to our 2006 EC Retreat (Chapter Chairs) and 2007 EC Retreat (Committee Chairs). We also approved the establishment of a new Section Committee on International Contract and Commercial Law, which we hope will play a very significant role in implementing the first of the "Three Missions." At our October 26 Executive Committee Meeting, we adopted a proposal by First Vice

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The Italian Anti-Crisis Decree and Its Ramifications for Companies

Law decree no. 185 dated 29 November 2008 setting out "*Urgent measures in support of families, employment and business and aimed at redefining national strategies from an anti-crisis standpoint,*" approved on a definitive basis by the Italian Senate on 27 January, entered into force upon its publication in the *Gazzetta Ufficiale*, no. 22, on 28 January 2009.

In the current economic downturn, the anti-crisis measures implemented by the Council of Ministers, comprising a package worth almost Euro 5 billion, is aimed at providing support to families, protecting human capital and, from a broader perspective, promoting the Italian economy and the country's overall competitiveness.

The following constitute a few of the more noteworthy measures comprising the anti-crisis decree:

- a) Art. 15, which envisages the possibility of allowing companies to reappraise real estate assets registered in their corporate books for the financial year ended 31 December 2007. In particular, paragraphs 16 and 23 of the above-mentioned article, which sets out tax provisions on the optional reappraisal

of real estate assets, provide that "The parties indicated in art. 73, paragraph 1, letters a) and b) of the uniform income tax code, as well as general partnership, both limited and general partnerships, which do not adopt international accounting standards with regard to financial statement preparation, may, also as an exemption from art. 2426 of the Italian Civil Code and any other provision of law in force on such matter, reappraise real estate assets, excluding buildable areas and real estate assets the construction or exchange of which constitutes the company's corporate purpose, set out on the financial statement for the financial year ended 31 December 2007."

It should be noted that the reappraisal of assets is not permitted under the Italian Civil Code, which provides under art. 2426 that long-term financial assets must be registered in the financial statement at cost of purchase or production.

As an exemption from the above provisions, an adjustment in actual accounting values of real estate assets would be allowed, also allowing for recognition for tax purposes of higher values assigned to assets, through a reduced tax cost as compared with the taxes normally applicable.

The rationale underlying the above rule is that of "improving" civil law financial statements of companies without, however, neglecting tax repercussions.

Following the amendments introduced on the occasion of the conversion of decree 185/2008, the higher amount attributed to assets upon reappraisal may also be recognized for tax purposes (with regard to both income taxes and IRAP) starting from the fifth financial year following that in which the reappraisal was carried out, through the payment of a substitutive tax in lieu of IRPEF, IRES and IRAP.

The parties that may benefit from the reappraisal adjustments, as provided under paragraph 16 of art. 15, include joint stock companies (*società per azioni*), partnerships limited by shares (*società in accomandita per azioni*), limited liability companies (*società a responsabilità limitata*), cooperative companies (*società cooperative*), mutual insurance companies, public and private entities other than companies, trusts, collective name companies, and partnerships limited by shares.

The reappraisal concerns all of the instrumental and non-instrumental real estate assets, with the sole exclusion of buildable areas, which are set out on the company's financial statement for the financial year ended 31 December 2007. The reappraisal obligation concerns all of the real estate as-

sets belonging to the same homogeneous category: in such regard, the decree breaks down real estate assets into two categories: amortizable and non-amortizable.

- b) On the matter of tax controls over large companies, art. 27, paragraphs 9-15 of the anti-crisis decree provides for the activation by the Italian Revenue Agency (*l'Agenzia delle Entrate*) of substantial checks on the income declaration, on an early basis with respect to the deadline for the exercise of auditing actions: these checks will be carried out by the end of the year following that in which the income and VAT declarations are filed.

For income tax declarations and VAT declarations of large companies, the Italian Revenues Agency activates substantial checks by the end of the year following the year of submission of the declarations (art. 27 paragraph 9).

The large companies subject to such tax checks are those with declared revenues or turnover of at least three hundred million Euro.

The criteria followed for the selection of companies to be audited are based upon the so-called "selection criteria," which include a specific risk analysis of the individual company, related to the industrial sector of the same. On the basis of the data in the possession of the tax database, the selection criteria may be based upon the degree of risk attributed to the individual company, its shareholders, its subsidiaries or transactions realized by the same, all of which is viewed in light of the tax history of the same with regard to checks or audits already notified.

- c) The conversion of the anti-crisis decree will give rise to different changes for companies, also with regard to the reduction of administrative costs. Article 16 (paragraphs 12-bis and 12-undecies) acknowledges the possibility of keeping accounting books using electronic means. Paragraph 12-bis, in broadening the contents of art. 2215-bis of the Italian Civil Code, provides that "books, repertoires, writings and documentation required by law or regulation to be kept or required on the basis of the type or size of the company may be prepared and kept using electronic means." The obligations to keep, authenticate and number books, as well as the other duties imposed by law upon the company, are fulfilled through the time marking (every three months) and the digital business owner's signature (or that of another authorized person). The accounting documentation prepared and kept electronically will have the same evidentiary force as ordinary accounting books referred to under arts. 2709 and 2710 of the Italian Civil Code.

Companies will be obliged to have their own certified electronic mail address (PEC), which must be indicated in the application for registration in the companies' register.

Businesses established in corporate form are required to indicate their certified electronic mail address in the application for registration in the companies register or similar electronic mail address based upon technologies that certify data and transmission and reception times and the completeness of the contents of the same. Within three years from the date of entry into force of this law, all companies, already established in corporate form as of the date of entry into force, must notify the companies register of their certified electronic mail address. The registration of the certified electronic mail address and any changes to the same in the companies register are exempt from stamp duties and filing fees (art. 16 paragraph 6).

One further step toward simplification achieved by the cancellation from the list of corporate books of the obligation to keep a shareholders' ledger. One of the more noteworthy changes introduced by the anti-crisis decree is the abrogation of shareholders' ledgers for limited liability companies starting from 30 March 2009.

Article 16, paragraph 12-septies abrogated number 1 of the first paragraph of art. 2478 of the Italian Civil Code, which lists the shareholders' ledger among the mandatory corporate ledgers, which must set out the shareholders' names, the respective shareholding of each, the contributions made in respect of such shareholdings, as well as any changes in the shareholders.

The importance of such a ledger concerns the transfer of shareholdings since, under art. 2470 of the Italian Civil Code, *the transfer becomes valid and enforceable against the company upon registration in the shareholders' ledger.*

Upon registration in the shareholder's ledger, the transfer becomes valid and enforceable against the company and the purchase acquires corporate rights, including both administrative rights (participation and voting at shareholders' meetings, challenge of shareholders' decisions, and so forth) and economic rights (dividends, liquidation of his respective shareholding upon the company's dissolution).

Under the new provision, the moment in which the transfer of the corporate shareholdings becomes valid and enforceable is now the filing with the company's register of the deed of transfer of the share in the limited liability company and, therefore, its filing rather than its actual registra-

tion. In addition, the protocol registration will not allow persons retrieving a good-standing certificate to view the transfer of the shareholding, since such transaction will become visible only after registration and, therefore, following the completion of the related matter.

Moving on to art. 16, the obligation to submit the list of shareholdings and the other holders of rights over shareholdings on the occasion of balance sheets approval has been cancelled.

Finally, in consideration of the need to adapt to the new obligations, paragraph 12-undecies of the above-mentioned article sets out transitional provisions which state that *"The provisions of paragraphs 12-quater through 12-decies shall enter into force on the sixtieth day after the date of entry into force of the law converting this decree. By such deadline, the directors of limited liability companies must file a special declaration to supplement the data set out in the companies register with the data set out in the shareholders' ledger, which filing is exempt from all taxes and duties.*

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Three Strikes and You're...Disconnected: How France Is Trying to Prevent Illegal Downloading

This year, the French government tried to solve the problem of illegal downloading on the Internet, a problem that stands at the crossroads of both intellectual property and privacy laws. Although the debate took place in France, the tension it raised between two positive interests—protecting intellectual property rights while protecting the privacy of Internet users—is at the core of the worldwide debate.

In order to prevent illegal downloading of copyrighted materials, the French government presented in June 2008 the Internet and Creation bill, which then became known as the HADOPI bill, from the *Haute Autorité pour la Diffusion des Oeuvres et la Protection des droits sur Internet*,¹ an administrative authority created by the bill. The HADOPI would have had the power to shut down a user's Internet access if, after two warnings, the first being an e-mail and the second a registered letter, the user persisted in illegally downloading protected works. American journalists nicknamed the bill the three-strikes law, even though baseball is, unfortunately, an unknown sport in France. The United Kingdom seems to be taking a similar route: its currently discussed Digital Economy