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A Word from the Past Chair

Glenn Fox

It has been a privilege to serve as Chair of the International Section for the past year. Needless to say, the year passed by very quickly. I am very proud of all of our accomplishments as a Section over the past twelve months and thank my fellow senior officers, Thomas Pieper, Neil Quartaro, Diane O'Connell and Nancy Thevenin, as well as the entire Executive Committee for their tremendous support. I would like to briefly summarize this past year's events.

The inaugural meeting of the International Section's Latin American Council (the "Council") was held in Antigua, Guatemala in May of 2013. Since then, the Council has had two other meetings, one during the Annual Meeting in New York and another in Uruguay in March. The

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A Word from the Chair

Thomas N. Pieper

On June 1, I assumed the position of Chair of the New York State Bar Association's International Section—or short "NYSBA International." I thank my predecessor, Glenn Fox, for the true leadership he has displayed over the past 12 months. My gratitude also goes to those who have preceded both Glenn and me, and who have made the Section what it is today. On a personal note, I would like to mention Joel B. Harris and Oliver J. Armas, who have also been my mentors.

This is a critical time for our Section. Due to our growth over the years, we need to adjust our structures to facilitate continued success. This includes, first and foremost, the many Committees and Chapters we have, which distinguish our Section from other organizations.

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questions may well have little relevance in strict *legal* terms—much to the consternation or even the irritation of the lawyers in the case.

Although not paramount, the law IS relevant as a backdrop. The legal issues in the case are issues, albeit not the ONLY issues that will be explored.

In the international context, the gap created by differing legal systems has to be bridged. A claimant from a Civil Law jurisdiction will have the same emotional make-up as a claimant from a common law jurisdiction. If there is a knowledge gap in terms of law, so far as the mediator is concerned, it will be made up by the parties' Position Statements lodged in advance of the mediation.

The mediator does not have to decide anything and so the legal background is just that—a background. An English psychotherapeutic mediator should be able to mediate a French, or German, or Russian, or American dispute. What is far *more* significant than the legal principles that govern the dispute is how to get the parties to move from dispute mode to solution mode.

So before costs are incurred in taking a dispute through the process of arbitration, and especially if that process may strain to accommodate the differences in the civil and common law traditions, all lawyers should fully consider with their clients a day of mediation.

Arbitration may bridge national differences in international disputes, but mediation can do the same thing before the high costs of arbitration are incurred.

This subject matter was part of a program delivered at the NYSBA's Spring meeting in Paris, France, on March 7th 2014.

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Better Late Than Never: The Start Up in Italy

For many years Italy was not considered to be at the forefront of innovation and inducement of new business opportunities; therefore, many young Italians with brilliant ideas were forced to leave the Country to pursue their dreams. Fortunately, since the former Prime Minister Mario Monti began to enact laws to stimulate the development of the Country's economy, this negative trend has changed. Just a few months after his nomination, on January 24th 2012, Mr. Monti issued a Decree Law named "Provisions for the Development of Infrastructures and the Competitiveness" ("Disposizioni urgenti per la concorrenza, lo sviluppo delle infrastrutture e la competitività"), which contained a set of urgent measures to promote the economic growth and competitiveness of Italian enterprises. Article 3 of this Decree introduced a new corporate form into the Italian legal system, called "Società a responsabilità limitata semplificata" (*Simplified limited liability company*) under new article 2463-bis of the Italian Civil Code. This provision, titled "Accesso dei giovani alla costituzione di societa' a responsabilita' limitata" (*Access of young people to the establishment of simplified limited liability company*), allows people under 35 to incorporate a company with a share capital of not less than 1 euro (the minimum share capital for common Limited Liability Companies is 10.000,00 Euros). These companies are incorporated under standard articles of incorporation issued by the Ministry of Justice and are exempted from the notary fees and duties for the inscription at the Chamber of Commerce. According to the new provision, when the members reach their thirty-fifth birthday, the company is transformed into a Limited Liability Company.

Subsequently, Mr. Monti's government, on June 22nd 2012, enacted a new decree n. 83 called "Decreto Sviluppo" (*i.e., Development Decree-Law*), introducing another corporate form that allows persons over 35 to incorporate a company more easily. The new corporate form, called "Società a responsabilità limitata a capitale ridotto" (*Limited liability company with reduced capital*), was governed along the lines of the aforesaid simplified limited liability company with few significant differences: the power of management could be conferred to non-members, the articles of incorporation could not adhere to the government standards and the company could not benefit from any fees waiver or tax exemption connected with its incorporation. Both company forms mentioned above had a further constraint; members' contributions had to be made in cash.

The conversion law of the Development Decree (Law n. 134/2012) introduced a further benefit for young people who wanted to incorporate a limited liability company with reduced capital: the Minister of Economy, in order to facilitate access to credit for young entrepreneurs, promoted an agreement with the Italian Banking Association to provide credit at favourable conditions.

The coexistence of the two forms of company mentioned above did not last for a long time. Decree Law n. 72/2013 removed the limited liability company with reduced capital from the Italian company law, consequently entitling young people over 35 to incorporate a simplified limited liability company.

In April 2012, while the aforementioned reforms of the corporate law were being introduced, Mr. Passera, Minister of Economic Development in Mr. Monti's Cabinet, entrusted a group of experts in innovation to issue a report on the current state of start-ups and possible future developments (the "Task Force"). The Task Force began its work under the slogan: *Restart, Italia!*. The Task Force defined the concept of innovative start up as a company that

i. is not listed on the stock exchange;

ii. is owned or controlled (51% at least) by individuals;

iii. has been running for no longer than 48 months;

iv. is having a turnover not exceeding 5 million Euros;

v. does not distribute dividends;

vi. does not use cash; and

vii. has as a corporate purpose aimed at the development of goods and services having a high technological value.

According to the Task Force, the most important issues that needed to be addressed were taxation, employment, access to credit and bureaucratic streamlining.

A few months after the publication of the *Restart, Italia!* report, the Italian Government, prompted by the excellent work done by the Task Force, issued additional provisions to promote the establishment of start-ups in Italy, namely Law Decree n. 179/2012 "Ulteriori misure urgenti per la crescita del Paese" (*Further urgent measures for Italy's economic growth*), also known as "Decreto Crescita 2.0" (*Development Decree 2.0*), converted, with amendments, into law n. 221/2012 and subsequently amended by Labour Law Decree (Decree Law n 76/2013). Articles 25 to 32 of the Decree contain specific provisions for start-ups. The first article of the Decree clearly defines the scope of application of the provisions, underlining that they refer to a business linked to innovation and technology fulfilling the following requirements:

a. established for no longer than 48 months;

b. principal place of activity and interests in Italy;

c. no turnover or a turnover not exceeding 5 million €;

d. does not distribute dividends;

e. scope of activity must consist of innovative goods and services of high technological value; and

f. does not originate from a merger, demerger or disinvestment process.

Moreover, a new business may be defined as an innovative start-up if:

i. 15% of its costs are related to Research & Development;

ii. at least one third of the team is made up of people who either hold a PhD or are PhD candidates at an Italian or foreign University or have conducted research work for at least three years;

iii. at least two-thirds of the team is made up of people holding a Master's degree; or

iv. it is the owner or the licensee of a patent or registered software.

The start-ups having the aforementioned requirements must also register in the special register of the Chamber of Commerce and, moreover, they are exempted from the payment of registration fees.

The actual advantage that the start-ups can benefit from are related to employment terms, taxation and access to credit. The start-ups, in fact, can hire personnel through fix-time contracts, which last for at least 6 months and no longer than 36 months. During this period, contracts can be renewed more than once. After three years the contract can be further renewed for an additional year; although the total duration of the contract must not exceed 48 months. After this period, the employee must be employed under a permanent contract. The new entrepreneurs may remunerate their employees through stock options and the providers of external services under a "work for equity" scheme.

Regarding taxation, the Italian Government introduced different benefits for corporate and personal investments in start-ups for the period between 2013 and 2016. Art. 29 of the Decree Law n.179/2012 allows individuals and companies, investing directly or indirectly in start-ups, to deduct from their taxable income respectively 19% and 20% of the amount invested in start-ups, provided that the investment is lower than € 500.000 for individuals and € 1.800.000 for companies and that the investment will be maintained for at least two years.

One of the most important novelties introduced by Law 221/2012 is the possibility for start-ups to raise venture capital via an online portal operated by professional managers registered in a special register maintained by CONSOB (Italian Securities and stock exchange commission) or by bankers. On June 2013 CONSOB published the "Regolamento sulla raccolta di capitali di rischio da parte di start-up innovative tramite portali on-line" (*Regulations on the collection of risk capital by innovative start-ups through online portals*) in order to provide guidelines for equity crowd funding. Italy is therefore the only European nation to have a uniform set of rules on this matter. A few months after the CONSOB Regulation was issued, several platforms became available for this type of fund raising.

The last but not least incentive for start-ups to be reviewed is the fast-track, simplified and free of charge access to the "Fondo Centrale di Garanzia," the Government fund supporting access to credit thought guarantees on bank loans. The guarantee covers up to 80% of the loan provided by the bank to a start-up, with a maximum of 2,5 million Euros. Moreover, the Italian Trade Promotion Agency (ICE) supports start-ups looking to international markets by providing a 30% reduction on its assistance services, which include legal, fiscal, corporate and real estate issues.

As evident from all of the above, the Italian government is focused on inducing and supporting Italian start-ups and this positive trend is being supported by the new Italian Prime Minister, Mr. Matteo Renzi, as one of his first official visits was to one of Italy's most prominent incubators.

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Connecting the Dots: The Proposal for a New EC Insurance Mediation Directive

The development of the internal market in insurance services has notably been facilitated by European Parliament Directive 202/92/EC and by the Council of December 9, 2002 on insurance mediation (collectively the "Regulations"). This cornerstone has proven to be effective; however, several facts call for a renewal. Although quite complete, the Regulations appear to require certain amendments. Initially, The Directive was essentially made up of general principles as it was destined to be a tool of harmonization of the law. But, according to the Commission, it was, in fact, applied in extremely different manners in all 27 Member States. Secondly, the European Union's recent economic hardships has only deepened the importance of efficient protection for financial sectors, notably that of insurance. The combination of these elements fuelled a growing desire for its reform and in this context the Proposal for a Reformed Directive was communicated on the 3rd of July 2012 (the "Proposal"). To date, we are waiting for the European Union to finalize and promulgate the Proposal. The several improvements contained in the Proposal are detailed here below.

Extending the Scope of Mediation to All the Distribution Channels

Firstly, the concept of activity of insurance mediation is redefined in the Proposal as "*the activities of advising on, proposing or carrying out other work preparatory to the conclusion of contracts of insurance, concluding such contracts or assisting in the administration and performance of such contracts, in particular in the event of a claim, and the activity of professional management of claims and loss adjusting.*" In an effort to harmonize the different distribution channels, these activities are also considered to be insurance mediation if they are practiced by insurance companies without the interference of an insurance intermediary.

The Commission considered extending the scope of the Directive on the basis that different types of persons or institutions, such as traditional insurance intermediaries (agents, brokers), bank-insurance traders, travel agencies, car rental companies or even insurance companies that themselves distribute insurance products, and their clients must benefit from the same level of protection regardless of the distribution channel from which the insurance product is bought. This revised definition also brings numerous changes, notably on the question of the contours of regulated activity and the obligation to register insurance intermediaries.

Regarding the contours of the activity of insurance mediation, the analysis of the Proposal shows that the notion of "*introducing*" insurance operations is erased and replaced by the "*activity of professional management of claims and loss adjusting.*" Although this would not necessarily bring great change to the contours of the regulated activity that is distributing insurance products, it marks a turning point from the concept of "*the introduction of insurance operation,*" a notion found in the French Insurance Code since 1976.

Moreover, in the Proposal the activity of insurance mediation includes the sale of insurance contracts by insurance companies without the interference of an intermediary (art. 2). The contractual obligations of the intermediaries should thus lie directly with the insurer, allowing a similar level of protection for policyholders, whether they directly subscribed to the insurance or not. Another novelty is that claim managers' activity, defined as "*the activity of professional management of claims and loss adjusting*" (art. 2), is considered by the Proposal as insurance intermediation activity, hence subject to the directive's provisions. What is more, the Proposal considers insurance aggregators to be subject to insurance mediation's regulations.

Regarding registration conditions, the Directive required insurance intermediaries to be registered insofar as they practiced an activity for which they were remunerated. This obligation meant that all interested parties could easily check whether the intermediary was entitled to offer an insurance product. Although this obligation was meant to remain, the Proposal brings simplified modes of registration for some of the actors.

According to article 4 of the Proposal, there is no obligation of registration for claims by administrators or intermediary insurers who practice insurance mediation as an accessory, insofar as the practice meets certain requirements: (i) insurance mediation is not the main professional activity of the intermediary, (ii) the intermediary only acts as such for insurance products, when it is completing a product or service and (iii) the relevant insurance products do not cover life insurance or civil liability, except in cases of accessory coverage. Albeit not