TRENDS®

YOUR BUSINESS AND THE LAW

MAY 2007

FAEGRE & BENSON LLP

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Corporate Counsel Profile: James M. Hansen, Musco Sports Lighting

James M. Hansen is Secretary and General Counsel of Musco Sports Lighting, LLC, a company with approximately 1,000 employees worldwide that is based in Oskaloosa, Iowa. Musco manufactures and distributes permanent and mobile lighting assemblies for sporting events. The company's products are used in schools and community sports centers around the world as well as at major sporting events including the 1996, 2000, and 2004 Summer Olympic Games in Atlanta, Sydney, and Athens, five Super Bowls, Major League Baseball and NFL football stadiums, NBA and NCAA arenas, and NASCAR super-speedways. The company's products have also been used by NASA to light the space shuttle, to relight the Washington Monument, and to aid first responders on search, rescue, and recovery operations following the terror attacks in Oklahoma City on April 19, 1995, and in New York City on September 11, 2001.

In this interview for TRENDS, Hansen discusses the challenges and the opportunities of doing legal work for a company which is both a global leader in its industry and headquartered in a small Midwestern town.

TRENDS: Musco Lighting is not a household name, but it's clearly a global leader in the lighting industry. How did it all get started?

HANSEN: We first came on the national scene when we developed a process of mobile lighting, where light arrays are affixed to a crane on trucks. The trucks are then parked near college stadiums and light games for television. We won an Emmy for that, and the system was also introduced into the motion picture industry, for which we won an Academy Award. After that, people started recognizing our name and our business for permanent lighting has grown ever since.

TRENDS: How did Musco get involved in lighting the search and recovery operations at Ground Zero after the attacks on September 11, 2001?

HANSEN: If you recall, the attacks on the World Trade Center were happening at nine o'clock our time and people started huddling around televisions in our office here. Everybody had the same thought: What can we do to help? A couple of our mobile-lighting trucks happened to be on the East Coast. We sent one to New York, and the other one eventually ended up at the Pentagon for several months during that recovery operation. The security at Ground Zero took a little bit of doing to get us in, but some federal agents recognized the trucks from Oklahoma City, and facilitated our entry. They began work that night and stayed there for several months.

TRENDS: Musco's primary business, of course, has always been sports lighting—for schools and community facilities as well as Olympic competitions and professional sports stadiums. NASCAR became a night sport largely because of Musco.

HANSEN: Well, obviously, at fairgrounds and other smaller tracks around the country everybody's been putting up lights for years. But there hadn't been, prior to the development of our MIRTRAN product, a way to light super-speedways that could provide enough light with no glare for the drivers, provide enough light for television, and keep the light out of the eyes of the spectators in the stands. When you've got cars going 200 miles an hour, you don't want light flickering in the drivers' eyes.

Musco products light TEDA stadium in Tianjin, China.

TRENDS: Musco has manufacturing facilities in Muscatine, Iowa, and in Shanghai. How does China fit into the company's international strategy?

HANSEN: China has proven to be a pretty important part of that. Our product is big, and therefore shipping it is an issue. We chose to have it manufactured in Shanghai for our clients in Asia and the Middle East because we could not serve them cost-effectively from Iowa. We serve all our European clients from here, though. We've not displaced any employees, and we won't displace employees for manufacturing in China.

TRENDS: To what degree does Musco partner with foreign companies? Or are you operating on your own in non-U.S. markets?

HANSEN: Over the years we have done both. In India, for example, we formed a joint venture that had limited success. We've had joint ventures other places, but we found that they haven't been very successful, only because we're a privately-owned company and like to do things the way we like to do them. And we've been very effective and successful in doing them that way. Our foreign business grew substantially last year, and we expect substantial international growth in the years to come. The Middle East and China will prove to be substantial markets, and we expect Europe to grow as well. In all of these areas, we have wholly-owned subsidiaries.

TRENDS: Tell us about your legal model.

HANSEN: The legal department at Musco is a service-oriented, fast-paced place to work. On any given day there can be a number of contracts, intellectual property development, personnel issues, business development, real estate development, and other things coming through. In order to handle all this effectively, we have two in-house attorneys (including myself) in Oskaloosa and one in Shanghai. Last year, we had a third attorney here who left. The question then became what the best method was to get the work done. So, because Faegre had known us and how we run our business for so many years, we thought it might be a good idea to bring in a Faegre lawyer on a part-time basis. We gave it a go, and it's been working out very well.

TRENDS: What about other relationships? You're obviously the legal center of your company, but you're interacting with managers in other parts of the company. How do you establish, build, and manage those relationships with business people? As a lawyer, what have you found to be particularly helpful in bridging the gap?

HANSEN: I've been here 12 years. When I started, the general counsel at the time was also a co-owner. He wore several different hats, as I guess we all have over the years. But he was acting essentially as a CFO as well as the general counsel. The company was in the process of going through its first significant growth spurt. So, because he particularly liked the financial side of things, he gravitated toward that area.

As a result, when I came in I had an opportunity to have a direct impact on the service provided to the other departments and to become someone that they came to for advice on a variety of issues. I think the legal department has done a pretty good job of that over the years. It's important to remember that the department spends money—and in some cases, a lot of money—and has to create value from that. I think the value we create results from our understanding of what Musco is trying to accomplish and from our ability to provide timely, concise, and clear legal advice to the company's various business units around the world.

I've been involved in other areas as well. For example, for several years prior to this year, I oversaw the HR department. I got to know people, to know what their jobs and their needs are. I saw how business people integrate legal considerations into their decision-making and how they come to rely on the legal department for advice. I've told new lawyers as they come in: that's our key. The managers in Musco's business units are our customers and we need to make them happy, or they'll find somebody else.

TRENDS: What's the range of legal issues that you're currently facing?

HANSEN: We are in a significant growth mode right now as a result of the product we introduced in January of 2005. In the last several years we've grown in terms of employees, 15 percent or more per year. Our business has once again taken off. There's all sorts of issues related to the sales world: contracts, business development, other commercial matters. We have ongoing intellectual property issues we're dealing with, both internationally and domestically. As anybody who works for a privately held company knows, the owners have their own interests. They can walk in and say, "I need you to do this." And you do that. Most of it these days seems to be dealing with international matters because that is the focus of our growth. But in our company, the administrative group reports through me, and the environmental health and safety group report through me. So I have enough to keep me busy.

TRENDS: How do you balance business goals and legal risk?

HANSEN: One of the things I think Faegre understands fairly well, having worked with us for years, is how we handle different types of matters: in what areas do we respond strongly to limit any perceived risk and in what areas are we more comfortable? On the one hand, we're going to protect intellectual property as closely as we can. It's a pretty competitive industry we do business in, in that regard. On the other hand, if I have a contract that reaches my desk that's an inch thick, and we've worked with this customer before, and it's a big project for the company, we're probably not going to be concerned so much about the risk of liability there or the risk of not getting paid. So we simply need to balance the growth needs of the company with real legal risks, as opposed to dotting every "i" and crossing every "t." Fortunately, I work for a company that does what it promises it will do. That's why we're successful. That also makes it easier to take risks, because you know that if something goes wrong and it's our fault, we'll fix it.

TRENDS: Tell us how working as a general counsel has affected your development as a lawyer.

HANSEN: I was in private practice for 10 years or so before coming in here. You know, I'm living and working in small-town Iowa. But at the same time, I am working around the world. It's a truly unique experience. It's unique for a lawyer in small-town Iowa to have the opportunity to do the types of things I'm doing. From helping local little leagues to establishing foreign branches and working on Olympic contracts. So to me it's been a huge growth opportunity. All those things, combined with the lifestyle a small town has to offer, make me feel quite fortunate. FB

Focus: International Arbitration

International arbitration is the most widely accepted method for resolving international commercial disputes between parties based in different nations. More than 130 countries have signed the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (commonly known as the New York Convention), and under this convention, an arbitral award, in almost all circumstances, will be treated as if it had been sought and received in a domestic arbitration in the country in which a party seeks to enforce such an award. International arbitration thereby provides the means to enforce a judgment, and this is perhaps the most compelling reason to include international arbitration in cross-border contracts.

There is no similar convention relating to international recognition and enforcement of judgments rendered by courts, so the recognition of judgments depends upon a patchwork of bilateral treaties (or, in the case of European Union member countries, on EU directives). The United States, notably, has entered into no bilateral treaties. This fact should prompt those U.S. and foreign companies involved in cross-border commerce to consider international arbitration as a tool for setting contractual disputes between contracting co-parties.

In the two articles that follow, Walt Duffy examines how international arbitration allowed one company to recover damages from a supplier while preserving a positive business relationship, and Ben Horn shows that although there are many options for international arbitration available in London, choosing the right arbitral body is crucial to achieving a favorable outcome. – *Ed.*

Have Your Cake and Eat It, Too: Underappreciated Benefits of International Arbitration

By Walter J. Duffy, Jr.

Walt Duffy (wduffy@faegre.com) is a partner in the firm's Minneapolis office and practices in the area of international commercial dispute resolution. He is co-chair of Faegre & Benson's international arbitration practice.

International arbitration offers the parties involved many obvious benefits, including the ability to select the law of the contract, to choose the number of arbitrators, to select ad hoc or administered arbitrations, to choose the language of the proceeding and to agree on the site for the arbitration.

There are, however, other less obvious and underappreciated benefits associated with international arbitration. One of these can be illustrated by reviewing the details of an arbitration in Johannesburg, South Africa, in which the author and John Mandler, chair of Faegre & Benson's agribusiness

practice, were privileged to represent a U.S. subsidiary of a German multinational corporation in an international arbitration. This hidden advantage was available to the company thanks to the thoughtful, long-range business perspective it brought to its dealings with customers and commercial suppliers.

The Onion and the Seed

In June 2003, the company, a seed-supply firm based in the western United States, received a shipment of onion seeds from one of its suppliers in South Africa. These seeds had been produced in that country after a two-year process of growth and cross-pollination, and were designed to produce a uniform, productive batch of seeds for a highly popular variety of onion known as the sweet onion hybrid. Consistent with its practices, the company kept a few batches of these seeds and shipped the balance to its international dealers and distributors, who in turn sold them worldwide to the ultimate end users, onion farmers.

Some time into the onion-growing season, the company started receiving complaints about the onions that sprang from these South African seeds. It appeared that instead of producing the hybrids—which are large, sweet and bulbous—the seeds were producing small, yellow, flat onions that would yield less and receive a lower price in the marketplace. Shortly after these discoveries, the onion farmers complained to the company about having been sold the wrong species of onions.

The Company Does the Right Thing

At this point, the company had to decide what to do about the wrong species of onions and what course of action it should take to resolve the difficult situation in which the onion farmers found themselves. The company's first step was to contact its dealers and distributors and instruct them to stop selling the problem seeds.

Its next decision was ultimately what made possible the successful resolution of its supplier dispute: The company decided to face the seed crisis head on, to acknowledge its responsibilities to the onion farmers and to pay those who were harmed as a result of the company's sale of the wrong seeds. At significant expense to the company, it settled all claims received from onion farmers worldwide, who had, through no fault of their own, planted the "bad" seeds.

Besides being fair and responsible, these actions proved to be wise from a business standpoint as well. The company was able to eliminate quickly its downside-liability risk and to maintain its excellent relationships with its worldwide dealer, distribution and customer networks. At that same time, the company laid the foundation for the eventual successful resolution of its future dispute with the seed supplier.

"Bad" Seed Investigation

When the complaints about the seeds first surfaced, the company concluded that the cause of the problem was most likely that the seeds had been mislabeled by its South African supplier. The company immediately began an in-depth investigation to confirm the cause of the problem. The company conducted sophisticated DNA testing of the seeds and grew test plots to confirm the problem. These tests revealed that, as suspected, the seeds received were not those of the sweet onion hybrid, nor were the bad seeds related to the seeds provided by the company to its South African supplier for cross pollination. In short, the evidence

resulting from the company's investigation provided proof that the supplier had mislabeled the seeds.

International Arbitration in South Africa

The company decided to move forward to recover its losses from the South African supplier. But in doing so, it also wanted to maintain its business relationship with the seed supplier, notwithstanding the supplier's negligent mislabeling of the bad seeds. Additionally, since the South African company was modestly capitalized, the company realized that the seed supplier may not have had the financial wherewithal to survive protracted litigation of the issues. Because the company had a long and mutually beneficial relationship with this particular seed supplier, it wished to preserve the business relationship. The company asked Faegre & Benson's agribusiness practice team for advice on how to achieve these goals.

The company, with assistance from Faegre & Benson's experienced arbitration and agribusiness lawyers, made a claim in arbitration against the South African seed supplier. Under the seed-supply contract, the arbitration was held in South Africa under the rules of the International Seed Federation.

A successful result in international arbitration does not just happen. It requires an effective team of lawyers and clients—business people who know their industry, who are experts in their field, and who are intimately familiar with the facts of the case and experienced attorneys who can assist them.

The arbitration team worked to develop the evidence and provided the technical and legal expertise necessary to document and prove the claims for damages. The company's prior decisions to treat its customers fairly and to apply its technological expertise to confirm the source of the mistake were key in this regard. By promptly settling the end users' claims arising from the supplier's negligence, the company limited both its exposure and the cost of litigation with the end users. It had already developed persuasive evidence that the South African supplier had made a significant mistake. The team was able to present the company's case effectively to the arbitral panel in a week-long proceeding in South Africa. The company was successful in its arbitration effort and the arbitral tribunal issued an award to the company for damages, which were ultimately paid by the supplier's insurer, a major London–based insurance underwriter.

This result achieved the company's goals of recovering its damages while maintaining an ongoing relationship with a valued supplier. Not surprisingly, after the arbitral award was rendered, the representatives of the company and the seed supplier went off together on a weekend photo safari that marked a new beginning for their business relationship.

The company was able to minimize the harm from events that could have resulted in long-term damage to its business relationships with both customers and its suppliers. Instead, it protected its customer base and built a more effective supply chain.

The company effectively used international arbitration to resolve a dispute and make itself financially whole while at the same time continuing to maintain a mutually beneficial business relationship with the adverse party in the arbitration. As this experience suggests, the ability to preserve business relationships while resolving disputes with a contract party is one benefit of international arbitration that deserves a bit more recognition than it is normally given. FB

Choosing the Right Form of International Arbitration in London

By Ben J. Horn

Ben Horn (bhorn@faegre.com) is special counsel in the firm's London office and specializes in international arbitration and commercial dispute resolution. He is an experienced London Maritime Arbitrators Association arbitrator and a fellow of the Chartered Institute of Arbitrators.

Arbitration is usually the dispute-resolution method of choice in international contracts. London, like other dispute resolution centers worldwide, offers a broad range of arbitral bodies and available rules. Some are industry-based, while others are institutional.

Choosing the right form of arbitration is crucial, however, because it will ultimately tie the parties to a particular procedure—in some cases, a procedure with which they may have little experience and which, had they considered it at all when signing the relevant contract, they may have wished to avoid. The following overview examines the pros and cons of several of these options.

Arbitration under the 1996 Act

The statutory framework for arbitration in London is set out in the United Kingdom's Arbitration Act 1996. The act obliges the arbitrators "to adopt procedures suitable to the circumstances, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined."

The Arbitration Act does not provide for any specific procedure. Its approach is that whatever procedure is adopted must comply with the above guideline or be one that has been agreed to by the parties. For this reason, arbitration under the act benefits from a mutual willingness to exercise flexibility.

Typically, the first step for the tribunal conducting this form of arbitration is to hold a preliminary meeting at which the parties can explain their cases and debate with the tribunal the most appropriate procedure to adopt. This of course involves the parties in the arbitral process at the earliest time, gives them an opportunity to influence both the type of procedure to be chosen and the timetable and has the greatest chance of resulting in the adoption of a cost-effective procedure.

This form of arbitration is unique in London in that it gives the parties the greatest influence in framing the arbitration. All other common forms of arbitration have their own rules, none of which are identical.

LCIA Arbitration

The London Court of International Arbitration (LCIA), in its various forms, dates back to 1883. At its inauguration, it was stated that the court was "to have all the virtues which the law lacks. It is to be expeditious where the law is slow, cheap where the law is costly, simple where the law is technical, a peacemaker instead of a stirrer-up of strife."

The LCIA has its own set of rules. As in International Chamber of Commerce

arbitration, discussed below, the process begins when one party makes a request for arbitration to the LCIA. The opponent must respond to this within 30 days, after which the LCIA appoints arbitrators to deal with the case. Importantly, in urgent cases, there is a provision for expedited constitution of the tribunal.

Once the arbitrators have been named, the parties are free to agree upon their own procedure. There are, of course, provisions for the submission of written statements of case, which operate in default of the agreement of the parties, but the freedom of the parties enables procedures to be selected that are most suitable for the determination of the particular dispute. These may or may not be the same as the default provisions.

An important factor distinguishing LCIA arbitration from all other forms of arbitration is that, in addition to the power to order security for the anticipated costs of the process (granted to arbitrators in London under Section 38 of the Arbitration Act 1996), the LCIA has the right to order the provision of security for the claim or counterclaim. This can be a very valuable tool indeed; along with the flexibility offered by the procedure, it provides a strong incentive to use LCIA arbitration.

ICC Arbitration

Arbitration before the International Chamber of Commerce (ICC) is widespread not only in London but also in various dispute-resolution centers around the world. Two critical features of ICC arbitration include the existence of the ICC court, which supervises the conduct of the arbitration and the arbitrators, and the role of the ICC secretariat to act as a liaison between the court and the parties involved. Parties should also note that ICC rules require that they pay a percentage of the sums in dispute as administrative expenses and that there is a scale of remuneration for the arbitrators themselves, similarly based on a percentage of the amount in dispute. These sums have no real connection to the complexity of the matter, the amount of time spent or other qualitative yardsticks.

Thus, ICC rules provide some certainty concerning the costs of an arbitration. Also, by subjecting the arbitrators to control by a private body (the ICC court) as opposed to the courts of the nation in which the arbitration takes place, the parties are able to maintain a higher level of privacy. These features are often regarded as quite attractive.

Also unique to ICC arbitration are the terms of reference, which comprise a central document in any ICC arbitration that sets out the rival positions of the parties and their disputes. It is prepared by the tribunal and signed by the parties. It is only at this stage that the arbitration commences and that the tribual begins seeking to establish the facts of the case "by all appropriate means."

The finalized terms of reference define the tribunal's jurisdiction. Article 19 of the ICC rules provides that no party shall make new claims or counterclaims that fall outside the terms of reference without authorization by the tribunal. Therefore, in order for the arbitration to

London has long been home to many trade organizations, a number of which operate arbitration services and promulgate their own rules suitable for the particular trade.

proceed smoothly, the disputing parties need to do considerable work at an early stage to ensure that the terms of reference fully reflect their disparate positions. The process of early analysis of claims and definition of issues, although having obvious cost consequences, severely restricts the possibility of last-minute amendments to the case. However, while working out an agreement on the terms of reference, parties often engage in discussions that lead to an early settlement and protect the award from future challenge.

LMAA Arbitration

One of the most common forms of commercial arbitration that takes place in London is that conducted under the auspices of the London Maritime Arbitrators Association (LMAA). An estimated 2,000 maritime arbitrations are initiated in London each year.

This type of arbitration is conducted in accordance with LMAA terms, the latest edition of which was published in 2006 and contains a full set of procedural rules. The LMAA has never restricted use of lawyers by the parties to an arbitration. The rules provide for exchange of submissions by the parties with pleadings allowed only with consent of the tribunal. Submissions are to append documents relied upon, and the parties complete a procedural questionaire after submissions are closed. It is on the basis of these questionnaires that the procedure leading to a hearing —and indeed whether a hearing is required —will be determined. The parties are encouraged to reach agreement on all matters and are discouraged from seeking interlocutory orders from the tribunal. In

contradistinction to ICC and other forms of arbitration, the LMAA's rules are designed to minimize the need for early involvement of the tribunal. This means that if early settlement is achieved, there will more often than not be no significant costs for the parties, as arbitrators have not spent any significant time working on the case.

Trade Arbitration

London has long been home to many trade organizations, a number of which operate arbitration services and promulgate their own rules suitable for the particular trade. These include: GAFTA (Grain and Feed Trade Association), RSA (Refined Sugar Association), LME (London Metal Exchange) and FOSFA (Federation of Oils, Seeds and Fats Associations). Typically, their trade rules do not allow for third-party representation, although lawyers are often involved in preparation of the cases that will ultimately be presented by the parties themselves. Sometimes, the rules also provide that only members of the relevant trade association may serve as arbitrators. Underpinning these groups' rules is the belief that disputes in the given trade should be determined by those engaged in that trade. FB

Productivity and Innovation in the Construction Industry: Paving the Way for Building Information Modeling

By Patrick J. O'Connor, Jr.

Pat O'Connor (poconnor@faegre.com) is a partner in the firm's Minneapolis office and practices in the area of construction law. He is the co-author (with Philip L. Bruner, also a Faegre & Benson partner) of Bruner & O'Connor on Construction Law, *a seven-volume treatise addressing all major areas of construction law.*

Many agree that building information modeling (BIM) holds the promise of sparking technological innovation and generating real and lasting productivity gains in the construction industry—an industry that has, for several decades, suffered from sagging productivity as a result of a profound lack of investment in research and development.

But as with the implementation of any new technology, there are a number of challenges that must be overcome before BIM achieves widespread adoption in the construction sector. Among the most pressing of these is the fact that there currently exists no legal or contractual framework within which to encourage the full implementation of BIM. This article will examine the current state of technology and productivity in the construction industry, how BIM works and what changes need to occur in the legal landscape in order for BIM to flourish.

Time for a Revolutionary Approach

On the surface, technology is everywhere in the industry. Cell phones are ubiquitous, use of global positioning system technology continues to rise and advancements in power tools and other types of construction equipment have made discrete construction tasks more efficient.

But fundamentally, technology has had only a limited impact on construction to date. While technological innovation has been a major driver of productivity growth in the U.S. economy over the past decade—and the use of computers and other information technologies has revolutionized the financial, health care, service and manufacturing industries, to name just a few—construction has not seen such progress or systemic improvement. Consequently, by most measures, productivity in the construction industry has lagged far behind gains experienced in sectors such as manufacturing. By some measures, it has actually declined in the industry since 1964.

However, BIM has seen success in some major, complex projects—including prominent stadiums, entertainment venues, and industrial facilities—and could help propel the industry to a new level of productivity and technological advancement.

What Is Building Information Modeling?

The word *model* in building information modeling can be a bit misleading. BIM is not a single unitary model, and this technology is not a computer-aided

design system—or even "CAD on steroids." BIM is more in the nature of a single consistent project database into which construction participants place information. BIM permits data manipulation from databases formulated to provide consistent, coordinated information, and the databases act as a centralized storage vehicle for project information. While a 3-D graphic representation may be one of the "views" of the model, other views can include spreadsheets, tables, schedules, narrative text and other information necessary to design and construct the project. It might well be that only a portion of the project, such as the structural steel work or particularly tricky mechanical parts in a building, is actually "modeled" in the traditional sense.

Contrary to some of the myths surrounding BIM, this technology is not only for large projects with complex geometries. The benefits of using BIM on all projects, regardless of size and shape, are being proven by contractors using BIM today. And it is not only for large contractors who can afford the investment—the benefits of using BIM are being seen by contractors of all sizes, and the level of investment and commitment is scalable.

BIM adds value to the development process in many ways. It is a tool for more effective marketing and planning through better visualization, for achieving improved means and methods through enhanced operational capabilities and for facilities maintenance and management once a project is completed.

Just as important, however, this technology is an agent for process change through closer collaboration between industry participants—in fact, it places a premium on collaborative effort. The architectural team can develop a number of design models, and the construction team (e.g., the structural steel fabricator and the mechanical, electrical and plumbing subcontractors) can create models as well. Although self-interest is well entrenched in the industry, an innovation that ties significant financial benefits to collaborative behavior might well cause a widespread re-examination of whether a "business as usual" mentality really works any longer.

Legal Challenges

Because building information modeling relies so heavily upon electronic data from multiple sources, one of the most pressing legal issues is that contractual arrangements regarding electronic media should reflect the reality in the field. For example, if the involved parties are using the model to build the project, then the contract should state that the model is the design (or at least that portion of the model supplied by the design team).

The current state of affairs, however, runs contrary to that. Most BIM projects are performed under traditional non-BIM contracting arrangements in which the design documents are identified as the 2-D drawings. This creates confusion. If something goes wrong and the error arguably rests with the design professional, is the contractor absolved from responsibility even though it technically failed to follow the plans (the 2-D drawings) because it built from the model?

Existing standard contract language (of which there is very little) typically pertains to the delivery of electronic drawings and other data under a contractual relationship in which the contract documents are 2-D drawings. In this environment, providing electronic data is seen almost as a gratuitous act, and the party transmitting the data (usually a design professional) often does so with a disclaimer as to its completeness or accuracy.

This approach is antithetical to the deployment of a BIM-driven collaborative process. In the BIM environment, there are either no paper drawings, or, when provided, they are simply one tranche of the model's many databases. Industry participants utilize the electronic files to design and construct the project and must be able to rely on the accuracy of those files.

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International Arbitration Practice Expands with New Special Counsel

Faegre & Benson expands its international arbitration practice with the addition of **Ben J. Horn**, who will handle arbitration and commercial dispute resolution matters from the firm's London office. Prior to joining Faegre, Ben was a partner at a leading London-based international law firm for nearly 10 years, where he was head of asset recovery and commercial litigation. Ben has handled ICC and LCIA arbitration cases, and he is a Chartered Arbitrator and a Fellow of the Chartered Institute of Arbitrators. In addition, Ben has represented clients in the Commercial Court, the Court of Appeal, House of Lords and European Court of Justice in Luxembourg. He has also represented clients under LMAA, GAFTA and RSA rules for handling disputes in the shipping industry. FB

Ben J. Horn

Faegre & Benson Attorneys Named to Colorado's *Corporate Counsel Black Book*

Seven attorneys from the firm's Denver and Boulder offices were included in the inaugural Colorado edition of the *Corporate Counsel Black Book*. They are **Charles D. Calvin**, **Darrell M. Daley**, **Natalie Hanlon-Leh**, **Peter J. Kinsella**, **Renée O'Rourke**, **James G. Sawtelle** and **Douglas R. Wright**.

Designed exclusively as a resource for in-house legal departments, the *Corporate Counsel Black Book* connects corporate counsel to the best private-practice lawyers in a credible way by identifying practitioners deemed the best in the areas of law most used by corporate counsel. Top practitioners were identified through a comprehensive survey of more than 1,000 Colorado corporate counsel and managing partners at 50 law firms in the state. FB

Van Oort and Kramer Win Top Honors

Aaron D. Van Oort

Aaron D. Van Oort, a partner in Faegre & Benson's litigation practice, was recently named an "Up & Coming Attorney" by the editors of *Minnesota Lawyer* magazine. The annual listing honors lawyers who have distinguished themselves within 10 years of admittance to the bar through professional accomplishment, leadership, and service to the community and the legal profession.

Leslie P. Kramer, special counsel in Faegre & Benson's intellectual property practice was named to the NameProtect Trademark Insider® "Top 50 Trademark Attorneys" list for 2006. Leslie was the only Colorado attorney named to the list, which recognizes leading trademark attorneys and law firms on a national basis. FB

Leslie P. Kramer

Fortune 500 Companies Name Faegre & Benson a "Go-To Law Firm"

Four Fortune 500 companies named Faegre & Benson as a "Go-To Law Firm" in a recent survey conducted by *Corporate Counsel* magazine. The legal teams for Ashland, C. H. Robinson Worldwide, General Mills and Principal Financial Group indicated Faegre & Benson as a top choice for outside legal counsel.

Each year since 2003, the firm has been recognized in this annual survey, which asks general counsel at Fortune 500 companies which law firms they rely on in various practice areas. Faegre & Benson is listed this year in four out of five possible practice areas: corporate transactions, intellectual property, labor and employment, and litigation. FB

Four Associates Named Special Counsel

Sarah F. Armstrong

The following attorneys have been promoted from associate to special counsel:

Sarah F. Armstrong is a member of the trusts and estates practice in the firm's Minneapolis office. She represents individuals, corporate trustees, and guardians and conservators in a wide range of matters related to wills, trust agreements, guardianship proceedings and more.

Jolene M. Cutshall

Jolene M. Cutshall also practices in the area of trusts and estates in the Minneapolis office. Her work includes the design and implementation of estate-planning techniques and complex tax-planning strategies, administration of trusts and estates, and representation of clients in litigation and on appeal in estate- and trust-related matters.

Lynn M. Kornfeld

Lynn M. Kornfeld practices in the area of regulatory litigation in the firm's Denver office. She concentrates on environmental law and policy and has represented major multinational corporations in the resolution of a broad range of issues arising from federal and state regulations.

Lesley L. Zaun

Lesley L. Zaun practices in the area of corporate law in the Minneapolis office and is a member of the firm's emerging companies practice group. She has experience in many areas of corporate representation, including venture-capital representation, general corporate counseling and mergers and acquisitions. FB

Faegre & Benson is Lead Outside Counsel on Multibillion–Dollar Biotech Deal

Celia F. Rankin

Faegre & Benson served as lead outside counsel for BASF in securing a research and development and commercialization agreement with Monsanto. The multibillion-dollar deal commits the companies to a long-term collaboration in the area of plant biotechnology—specifically in the development of high-yielding crops and crops that are more tolerant to adverse environmental conditions.

The Faegre and Benson team was led by Boulder partner **Celia F. Rankin**. FB

38 Law Students Join 2007 Summer Program

Each year, Faegre & Benson welcomes a group of law students to join the firm as summer associates. The Summer Program gives them hands-on experience working on challenging projects with the firm's lawyers and clients. We strive to recruit a diverse group of students with the potential to become both great lawyers and great additions to our team. That means recruits who not only have proven outstanding academic performance, but who also demonstrate qualities such as collegiality, innovation, strategic thinking, communication skills and maturity.

On average, 90 percent of students accepted to the Summer Program receive offers to join the firm as associates after completing law school. About 90 percent of those receiving offers decide to join the firm.

Faegre & Benson is pleased to introduce its 2007 summer associates:

MINNESOTA SUMMER ASSOCIATES

Amber Bowman – Hamline University

Katy Burno – University of Iowa

Jiabei Chen – Harvard University

Chris Diedrich – University of Minnesota

Breia Euteneuer – University of St. Thomas

Maggie Fang – Georgetown University

Alison Guernsey – University of Iowa

Jacob Johnson – University of Virginia

Justin Krypel – University of Michigan

*Kyle Landis-Marinello** – University of Michigan

Meghan Lind – Northwestern University

Michael Molepske – University of Wisconsin

Jason Monfort – Boston College

Amanda Newman – University of Iowa

Jeff Recher – Cornell University

Jennifer Seifert – University of Iowa

Nick Smith – University of Minnesota

Angie Snavely – William Mitchell College of Law

Kate Sorensen – University of Wisconsin

Matt Steilen – Stanford University

Shaun Thompson – University of Michigan

Julie Wahlstrand – Stanford University

Michelle Weinberg – University of Minnesota

Julia Zhang – Georgetown University

Anne Zorn – University of Minnesota

IOWA SUMMER ASSOCIATES

Ryan Howell – University of Iowa

COLORADO SUMMER ASSOCIATES

Robert Bailey – University of Denver

Jon Gillam – University of Chicago

Adrienne Hernandez – New York University

Jeannine Holmes – University of Denver

Alex Hornaday – Washington and Lee

Jeff Hurd – University of Denver

Pawan Nelson – Columbia University

Kirk Neste – University of Oregon

Sam Piñero – Wake Forest University

Ned Prusse – Baylor University

William ("Zaki") Robbins – University of Michigan

Mike Wautlet – University of Colorado

*denotes environmental intern FB

Faegre & Benson Announces New Staff Attorneys and Associates

Minneapolis


Cathleen F. Baraloto

Cathleen F. Baraloto is a staff attorney in the firm's intellectual property practice. She focuses on trademark matters, including trademark clearance and prosecution. Cathy has more than a decade of experience as a senior paralegal at two Washington, D.C., law firms and the American Red Cross. She received her J.D. from George Washington University.


Jonathan L.H. Nygren

Jonathan L.H. Nygren is an associate in the firm's corporate practice, and he advises clients on public and private mergers and acquisitions, joint ventures, and general corporate issues. He recently practiced law in the Washington, D.C., office of Cleary, Gottlieb, Steen & Hamilton LLP. Jon received his J.D. from Yale Law School.


David J. Penna

David J. Penna is an associate in the firm's corporate practice. He concentrates on international transactional law, with emphasis on cross-border finance, mergers and acquisitions, joint ventures and restructurings. David was previously an associate with Latham & Watkins LLP in Washington, D.C. He received his J.D. from Yale Law School.


SallyJean Tews

SallyJean Tews is an associate in the firm's corporate practice. She represents public and private companies and private equity firms in a wide range of corporate and transactional matters. SallyJean recently practiced law in the Washington, D.C., office of Latham & Watkins LLP. She received her J.D. from the University of Michigan Law School.


Allen Wheeler

Allen Wheeler is an associate in the firm's real estate practice. He has represented clients ranging from international developers and landlords to emerging local companies and banks in national real estate-related activities. He recently practiced law in the Minneapolis firm of Maslon Edelman Borman & Brand, LLP. Allen received his J.D., cum laude, from William Mitchell College of Law.


Jill E. Cooper

Denver

Jill E. Cooper is an associate in the Denver office. Her practice spans the areas of environmental law, climate change, sustainability and renewable energy. She served five years as senior advisor to the executive director of the Colorado Department of Public Health and Environment. Jill received her J.D. from the University of Colorado School of Law.

Des Moines

Ronald D. Fadness is a staff attorney in the firm's real estate practice. He has substantial experience representing and advising developers, brokers, lenders and commercial and residential buyers and sellers. Ron received his J.D., with high distinction, from the University of Iowa College of Law. FB


Ronald D. Fadness

Building Information Modeling

(continued from page 11)

Another risk-allocation approach utilized primarily by the design community when receiving or transmitting electronic data is to create an indemnification obligation in connection with this transfer. The American Institute of Architects (AIA) has published a "best practices" guide containing a sample indemnification clause for consideration in connection with the architect's receipt of electronic data from others. The AIA has also suggested that the architect and owner be indemnified for the adverse consequences of the use of electronic data transmitted to the contractor.

Infusing the creation, transfer and receipt of electronic data with one or more indemnity obligations creates the potential for great mischief. Because these obligations may inhibit collaboration between the parties, they should be utlizied with much caution. Although broad indemnities (to the extent they are enforceable) can be efficient risk-allocation mechanisms, more tailored indemnities fixed to the generation or transfer of electronic data might well create tension and invite disagreement. Tailored indemnities do not provide the same efficiencies as broad indemnities, as parties have the ability to dicker over whether indemnification is owed and all the more reason to dispute the issue as the stakes are higher.

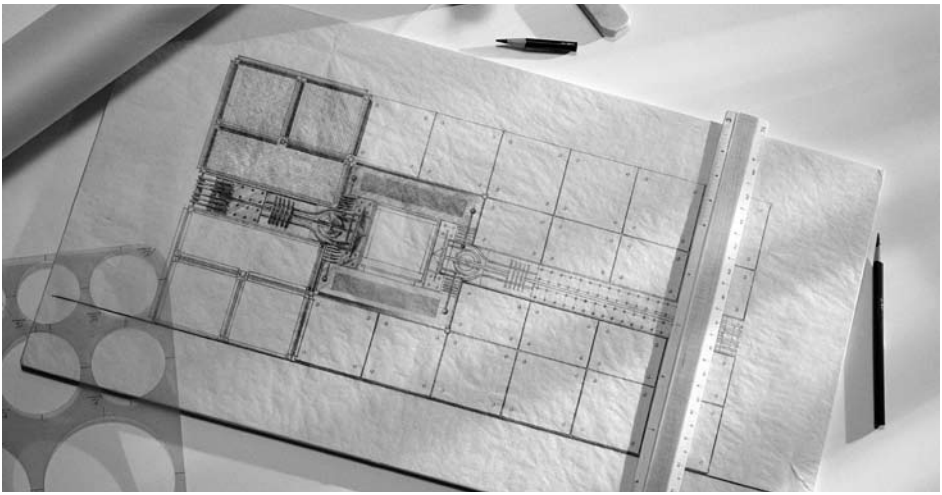
On the other hand, saddling one party, such as the entity responsible for devising and implementing the model protocols (i.e., the model master) with the responsibility to defend and indemnify all others in connection with any loss arising from the creation, transfer, receipt or use of electronic data, may be unrealistic, unless the risk is fully insurable and agreement can be reached on who bears the cost of coverage.

In the end, the guiding principle when developing contractual arrangements between the parties in a BIM environment must be to develop arrangements that foster the collaborative working relationships that are so crucial for achieving the full benefits of BIM.

The steel-fabrication industry is perhaps the construction-industry player most well-versed in BIM. The American Institute of Steel Construction (AISC) promoted the development of software that uses an industry-standard 3-D-neutral file format for modeling steel construction. The AISC's Code of Standard Practice holds that if the contract documents indicate a 3-D model is to be used as the primary means of designing, representing and exchanging structural-steel data for the project, then "all references to the Design Drawings in this Code shall instead apply to the Design Model, and all references to the Shop and Erection Drawings in the Code shall instead apply to the Manufacturing Model." The AISC code's approach avoids a number of problems encountered when employing BIM under traditional contracting models.

Perhaps the best-known and most important legal decision pertaining to the construction industry is the U.S. Supreme Court opinion in *United States v. Spearin*, which imposed on an owner supplying a contractor with plans and specifications an implied warranty that the design is adequate for the work intended. If a contractor establishes that it followed the plans and specifications, it usually is not found responsible for a result that does not meet the owner's goals.

How does the *Spearin* doctrine apply in a BIM environment, in which the contract documents are designated as the 2-D drawings and the contractor does not use the 2-D drawings but instead builds from the model? If the information supplied by the owner or the owner's design team and incorporated into the model is flawed, may the contractor utilize the *Spearin* doctrine as a shield against liability? What if the flawed data are contained in a database that is not within the "view" comprising the 2-D drawings? In this hybrid set of circumstances, there is a disconnect



between the contractual arrangements and the reality out in the field. The AISC code avoids this confusion, since under a BIM approach the model is included in the contract documents.

Working through the risk-allocation issues, whether by way of disclaimer, indemnification, waiver, release or other means, is just one of many contractual steps that the parties must take. There are many other significant issues to consider, including scope of work, interoperability (e.g., hardware and software requirements, file-transfer protocols), change management, insurance, information technology (e.g., procedures and protocols governing the project databases, access to the databases, rights and responsibilities of the model master, Web site provider and sponsor arrangements), regulatory requirements (e.g., building-permit issuance, building-code compliance), surety concerns, ownership of electronic data, use of the model upon project completion, professional-licensing concerns, security and encryption requirements, confidentiality protocols, archiving and data storage, handling of proprietary material, electronic signatures and the legal significance of the receipt or transfer of electronic data. This list is by no means exhaustive.

It will require concerted effort to create a legal framework that complements and fosters the use of BIM. While BIM holds the promise of closer collaboration between the design and construction communities, industry professionals must first collaborate to develop a commercial and legal environment that will encourage and hasten the evolution of this new technology.

Conclusion

Building information modeling holds great promise for improving the way projects are designed and constructed. The technology has already delivered demonstrable benefits. Through the widespread application of BIM, it is possible that the industry can reverse its decades-long pattern of anemic production. While most innovations have been utilized in the construction industry for discrete tasks (with finite benefits), BIM contains the potential for the industry to achieve systemic improvement.

The benefits of BIM will not be fully realized, however, unless owners, designers and builders work together to create a setting conducive to the widespread adoption and growth of this technology. FB

Houses Divided: Does TILA Prohibit Classwide Rescission Claims by Subprime Borrowers?

By Michael M. Krauss

Michael Krauss (mkrauss@faegre.com) is a senior associate in the firm's business litigation practice in Minneapolis. He is also a member of the firm's financial services litigation team.

Both Wall Street and Washington have been moving quickly in response to the tumult in subprime mortgage lending. Courts are also having their say, as borrowers facing foreclosure bring lawsuits that place the blame on lenders for allegedly failing to disclose the true loan terms. The potential exposure of subprime lenders turns on the outcome of ongoing litigation under the Truth-in-Lending Act (TILA), as judges decide whether disgruntled borrowers have the right to rescind their loans en masse, with no cap on lender liability. This question has split the courts, and an upcoming decision expected from the 7th U.S. Circuit Court of Appeals in Chicago could determine whether the issue eventually reaches the U.S. Supreme Court.

Subprime Mortgage Lending

During the housing boom earlier in this decade, adjustable-rate, interest-only and no-documentation loans enabled nontraditional borrowers to become first-time homeowners or to tap into the equity of their existing homes. In 2004, for example, nearly half of all mortgages issued had adjustable rates. Today, foreclosures and defaults—including early payment defaults in the first six months of a loan—are surging among subprime borrowers as interest rates rise and home values fall.

In response, investors are backing away from the subprime market, while the government prepares to intervene. Freddie Mac announced that it would no longer buy bonds backed by subprime mortgages unless the borrowers can make payments at the loan's maximum rates, not just the low initial rates. Federal banking regulators have proposed requiring lenders to consider subprime applicants' ability to pay back the entire loan (including higher interest payments as rates adjust upward), and to verify applicants' incomes. Congressional lawmakers, meanwhile, plan to introduce legislation that would tighten restrictions on lenders and open new avenues of recovery for borrowers. For example, one contemplated bill would bar loans worth more than the value of the collateral—and would impose liability not just on the original lender, but also on the investors who buy and sell the loans as mortgage-based bonds on the secondary markets.

Relief for Subprime Borrowers under TILA

Many subprime borrowers have already pursued relief under TILA, claiming that they were not fully informed of all material loan terms, particularly those related

to adjustable interest rates. TILA was enacted in 1968 to "assure the meaningful disclosure of credit terms" and "avoid the uninformed use of credit." TILA requires lenders to make preliminary disclosures to prospective borrowers about the terms of the loan, and it governs both the substance and form of those disclosures. For example, and of particular importance to subprime borrowers, lenders must disclose certain information about adjustable-rate loans—including the existence of the variable rate, when the rate change is to take effect and an estimated composite annual percentage rate that accounts for future increases. All required disclosures must be "clear and conspicuous," which includes being properly grouped and segregated.

A lawsuit brought under TILA typically alleges that required information about the loan was not properly disclosed because mandated content was missing, misleading or confusing. In the subprime context, borrowers allege that they were not adequately informed about when and how much interest rates would rise with their adjustable-rate mortgage. Such borrowers claim that they understood that the low introductory rate would stay fixed for a longer period and would not rise so high or so quickly.

Money Damages and Rescission under TILA

Two types of relief are available to borrowers under TILA: money damages and rescission. The statute's money damages provision caps the amount of recovery in both individual and class actions. The plaintiffs' total recovery in a class action may not exceed the lesser of $500,000, or 1 percent of the lender's net worth.

Borrowers also may rescind their loan for any reason within three days of closing, and certain TILA violations extend the right to rescind to within three years of closing. Rescission unwinds the loan entirely and requires the lender to surrender all loan fees, including interest payments. Violations that extend the rescission period include a lender's failure to disclose properly the right to rescind or to make certain "material disclosures," such as those regarding the annual percentage rate, any variable rate and the payment schedule. Rescission has been described as a "private" and "personal" remedy to be addressed between lender and borrower. A borrower who wishes to rescind must formally notify the lender of her preference, and the lender has 20 days to respond. A suit can commence only if the parties cannot agree on rescission.

Unlike the TILA provision governing money damages, the statutory section providing for rescission does not impose a cap and does not address class actions. Borrowers' counsel interpret this silence as authority to seek classwide declarations of rescission rights following TILA violations, placing any given lender at risk of being forced to return unlimited loan fees and interest payments. Lenders' counsel, in contrast, understand this absence of direction to mean that Congress never intended rescission to be a classwide remedy, much less one with no limit on liability. That question split two federal courts earlier this year.

Judicial Split on Classwide Rescission under TILA

In *McKenna v. First Horizon Home Loan Corporation*, the 1st U.S. Circuit Court of Appeals in Boston held that classwide rescission claims are not available under TILA. There, the plaintiff borrowers had engaged in home refinancings and claimed they had not been properly informed of their rescission rights, thus extending the rescission period to three years post-closing. The plaintiffs sought a judicial declaration that every class member had the right to rescind his or her loan during this extended period. The 1st Circuit rejected these claims, holding that it was "nose-on-the-face-plain" that allowing classwide rescission claims "would open the door for vast recoveries" that Congress had never intended.

The 1st Circuit gave four reasons for its ruling. First, the court explained that the absence of any mention of class actions in the TILA provision governing rescission—in direct contrast to the provision addressing money damages—"strongly suggests that Congress did not include a class action mechanism." Second, the court rejected the notion that Congress would impose a cap on money damages in class actions but would allow for unchecked classwide rescission claims. In the case at hand, the lender claimed that its potential liability with unrestricted classwide rescission could reach $200 million, while the court estimated the potential exposure at $4.45 million—either way, far above the $500,000 cap on classwide money damages. Third, the 1st Circuit cited the TILA amendments of 1995, in which Congress reacted to another court's decision by imposing a moratorium on class actions for minor or technical TILA violations. The 1st Circuit noted that while debating this amendment, members of Congress had made clear their desire to avoid "wholesale rescissions" that could bring "financial disaster in the mortgage industry." Finally, the 1st Circuit stressed the private and personal nature of rescission, in which borrower and lender were to attempt to resolve before resorting to filing suit. The court deemed this process "incompatible" with class actions and noted that borrowers had an array of remedies to obtain redress and bring about TILA compliance.

The 1st Circuit's decision in *McKenna* came just two weeks after a federal district court in Wisconsin had reached the opposite conclusion. In *Andrews v. Chevy Chase Bank, FSB*, the court certified a class of borrowers seeking a declaration of their rescission rights. There, the plaintiffs were subprime borrowers who took out an adjustable-rate mortgage to refinance their home. They claimed that the lender had led them to believe that the interest rate was fixed for five years and would adjust upward only thereafter. Instead, although the minimum monthly payment was fixed for five years, the interest rate began to increase after the very first payment—such that only the first month was at the low, "teaser" rate of 1.95 percent. As the interest rate rose, the required minimum monthly payment covered less and less of the debt. Eventually, it would not cover even the accrued interest, so that the principal balance could actually increase over time. The plaintiffs claimed that none of these terms had been properly disclosed under TILA and sought to represent a class of borrowers with a declared right to rescind their loans.

The district court granted this request and so joined the ranks of courts that interpreted TILA's silence on classwide rescission as tacitly granting authority to proceed. Unlike the 1st Circuit, the district court did not find the difference between TILA's money damages and rescission provisions to be compelling, concluding that "it is just as likely that Congress did not intend to limit rescission claims in any way." The court also opined that the purpose of class actions—"providing compensation in cases involving public wrongs and widespread injuries"—applied equally in the TILA rescission context.

After the 1st Circuit issued its decision in *McKenna*, the district court in *Andrews* agreed to stay its order on class certification pending appeal to the 7th U.S. Circuit Court of Appeals in Chicago. Still, the district court held fast to its ruling that TILA does not prohibit classwide rescissions claims, asserting: "The language of TILA is plain. It does not bar courts from certifying classes whose members have a right to rescind. Nor is the absence of such a bar absurd." The court explained that "it is just as likely that Congress remained silent about class actions involving the right of rescission because it did not regard such actions as posing the same economic threat to the credit industry as class actions involving damages or because it never considered the issue." The court noted that even the 1995 TILA amendments "did not bar class actions involving the right of rescission." Instead, Congress had sought to limit lender liability "by means other than prohibiting courts from certifying classes whose members may seek rescission." Finally, the district court concluded that the "personal nature"

of rescission did not preclude a classwide order that merely declared the right to rescind, still allowing for the actual remedy to be privately addressed between borrower and lender. Nonetheless, recognizing the importance of the issue, the district court stayed its order pending appeal, and the 7th Circuit is expected to rule later this year.

Looking Ahead

If the 7th Circuit reverses the district court in *Andrews*, then every court of appeals to consider the issue will have held that TILA prohibits classwide rescission claims, thus shielding lenders from the prospect of being forced to surrender unlimited loan fees and interest payments en masse. But if the 7th Circuit affirms, lenders could face even greater risk as rising foreclosure rates lead more and more subprime borrowers to court. In that event, it is possible that the U.S. Supreme Court would step in to resolve the issue and, at the very least, establish a uniform set of conditions nationwide. FB

Global Employment Law Update

By Greg Campbell

Greg Campbell (gcampbell@faegre.com) is a partner in the firm's London office, practicing in the area of labor and employment law.

CHINA

Employment-Promotion Updates

Chinese authorities are looking to increase access to the labor market for disabled individuals, and to advance that goal, China has just introduced a quota system. Starting May 1, 2007, all enterprises—including foreign-invested enterprises—are required to pay fees to local labor-protection authorities if they cannot show that at least 1.5 percent of their workforce falls under the definition of disabled.

In addition, this February, China's legislature, the Standing Committee of the National People's Congress (NPC), began deliberating the draft Employment Promotion Law. According to reports, this draft seeks to introduce new regulations aimed at eliminating employment discrimination and at creating more employment opportunities for disadvantaged employees. It is likely that any new law would be enacted in early 2008.

Employment Filing Requirements

As of January 2007, all labor contracts, or agreements concluded by employers and employees in China, must be filed at the local labor bureau within 30 days of execution. If the contracts are terminated, employers and employees should notify the local labor-protection authority within seven days of the termination. In addition, if any information contained in the original contract changes, the employer and employee must inform the local authority within 30 days of the change.

Pending Law

The draft Labor Contract Law is still being deliberated by the Standing Committee of the NPC. A number of controversial matters remain unresolved in the draft, such as the term and scope of non-competition, the role and rights of a general meeting of employees, open-term contracts and employers' liabilities on termination of contracts. Since the NPC did not take up this draft at its general meeting in March, it will be reconsidered by the Standing Committee for a third round—and possibly even further rounds—of deliberations.

GERMANY

Germany Ensures Employee-Participation Rights in Cross-Border Mergers

On February 1, 2007, the German Parliament enacted the Act on Employee Participation in Cross-Border Mergers of Limited Liability Companies. It aims at ensuring employee-participation rights in mergers of limited-liability companies within the European Union. This brings Germany into compliance with Article 16 of the EU Directive 2005/56/EC on cross-border mergers. The directive also requires changes to German corporate law.

Germany's history of employee participation dates back to the early postwar years. It emerged in the coal-mining and steel-producing industries as a means of balancing the powers of the entrepreneurs.

The new act provides a legal framework for employee representation in German companies that are merging with ones based in other EU countries. It allows the parties to negotiate an agreement concerning employee representation in the newly formed company. If these negotiations fail, the act imposes a mandatory system of employee representation on the company. A subsequent domestic merger will not automatically discharge the newly formed company from its obligations. If the domestic law of the new owner does not provide for at least the same level of employee participation, the newly formed company remains bound by the employee-representation system for three years following registration of the merger.

Germans Have to Work Longer

Demographic change remains the major challenge facing the German social security system. Increasing life expectancy along with low birthrates brought the statutory old-age pension-insurance system to the verge of collapse. The German government's reaction to this dilemma was to raise the retirement age to 67. The respective bill was passed by the German Parliament on March 9, 2007. Before it can enter into force, the bill also has to be approved by the Bundesrat, or federal council. A coalition of Conservatives and Social-Democrats holds the majority of seats in both legislative bodies.

The bill provides for successively increasing the general retirement age from 65 to 67 starting in 2012. Insured people born prior to January 1, 1947, are not affected. The same applies to employees participating in an old-age part-time program, provided that they were born before January 1, 1955, and agreed to work part time before January 1, 2007.

For younger employees there is a sliding scale, such that insured people born after 1963 can generally retire only when they reach the age of 67.

At the same time, the bill raises the retirement age for those who can retire even before reaching the general retirement age. This mainly affects disabled persons and long-term beneficiaries of the statutory pension insurance system.

UNITED KINGDOM

TUPE Changes

The Transfer of Undertakings (Protection of Employment) Regulations (TUPE) are the United Kingdom version of the EU-wide Acquired Rights Directive. These regulations transfer the contracts of employment of all employees engaged in a business that is sold by means of an asset sale (or subject to an outsourcing) to the new owner of that business.

One hotly debated aspect of these regulations is the ability they give new employers to make changes to the employment contracts. European courts have consistently voided any change to terms and conditions of employment made for a reason connected with the transfer—even if the change was made with the employee's consent. This has caused problems for employers who wish to harmonize terms and conditions of employment following a transfer, whether to save money or just to have both their old and new employees on the same terms and conditions of employment.

Under TUPE Regulations introduced in 2006, the prohibition on transfer-related changes was eased and it is now lawful for employees to agree to variations that are connected to the TUPE transfer, provided there is an "economic, technical or organizational reason entailing a change in the workforce." The courts have made it clear that this exemption does not apply to simple harmonization but can only be activated in circumstances akin to a redundancy.

However, a recent decision by the UK's Employment Appeal Tribunal (EAT) suggests that not all such changes may be void. Following the TUPE transfer in question, the employee's contract was varied so that his normal retirement age was increased from 60 to 65; however, when that employee turned 60, his employer forcibly retired him. The employer argued that the attempted variation was void under TUPE, but the EAT held that the variation was valid and that the employee's retirement age could be 65. The EAT made two interesting findings:

- Where an employer has voluntarily entered into a variation of contract, there is no reason not to allow an employee to have the ability to choose whether he or she wishes to rely on the old or the new term; and
- Perhaps more surprisingly, the EAT's president expressed the view that if an employee had been given a package of benefits in return for the variation, the employee might then have to give up those benefits if he or she wished to avoid the undesirable elements of the change.

Holidays

Under the Working Time Regulations, all employees are entitled to 20 days' paid leave (or a proportionate period of paid leave for part-time employees). While many UK employers provide public holidays on top of the statutory minimum leave, that is not a legal requirement; and there are some employers who include the eight UK public holidays in the 20 days' leave. The UK government has stated that it is introducing legislation that will oblige employers to let employees take public holidays in addition to the 20 days' leave. The legislation will be introduced in stages, the first four days with effect from October 1, 2007, and the second four days with effect from April 1, 2008. It remains to be seen how the details of the legislation will apply to part-time workers, as the impact of the actual days put in by these employees has

been the subject of substantial litigation in the UK. That is simply because most public holidays fall on Mondays, which can prejudice employees who do not work those days.

UNITED STATES

9th U.S. Circuit Affirms Class Action Certification of Wal-Mart Employees

On February 6, 2007, the 9th U.S. Circuit, in a 2-1 decision, affirmed the certification of the largest employment class action in U.S. history—a nationwide class of more than 1.5 million women who are either current or former Wal-Mart employees. The action claims that Wal-Mart engaged in sex discrimination both in compensation and promotions. In its ruling the court focused, in part, on whether the plaintiffs had provided evidence sufficient to support a finding of "commonality," meaning that significant factual and legal questions exist that are common to all class members. Wal-Mart argued that commonality cannot be shown for women employees nationwide because specific pay and promotion decisions are made subjectively by individual managers. The court disagreed, holding (in an arguably contradictory fashion) that commonality *was* shown because Wal-Mart had centralized personnel policies and procedures and, to the extent the company lacked such centrally imposed policies, there was a "common" policy of permitting subjective decisions by local managers. It is important to note that the 9th Circuit's decision did not address the underlying merits of the claim, which will be addressed by a separate hearing.

New Race and Job Categories on Revised EEO-1 Report

All private companies with 100 or more employees and all companies subject to federal affirmative action requirements must annually file the Employer Information Report, commonly referred to as the EEO-1 report. Various changes to the form will affect how employers classify managers and supervisors and categorize the race and ethnicity of employees before the next report is due, this September. The previous EEO-1 report called for workforce data to be broken down into nine job categories and five race and ethnic categories. The revised EEO-1 report contains changes to the latter categories. A new category, Two or More Races, has been added, and the category Asian or Pacific Islander has been divided into two separate categories: Asian and Native Hawaiian or other Pacific Islanders. In addition, the report increases the number of job categories by dividing the Officials and Managers category into two subgroups, Executives/Senior Level and First/Mid-Level Officials.

Bill to Expand Union Rights Passes U.S. House

On March 1, 2007, the U.S. House of Representatives passed the Employee Free Choice Act. The legislation would, among other things, require employers to recognize unions based on signed union authorization cards, would provide for binding arbitration to write first-time collective bargaining contracts (if, after 120 days, the employer and the union are unable to reach an agreement) and would impose significant financial and other penalties on employers who violate employees' rights during a union organizing campaign. President Bush has indicated he would veto the bill if the U.S. Senate passes it. FB

Last Word: Trusts and Estates

More than ever before, people have family members, residences, business interests, and investments in multiple countries. In many instances, more than one country —or even more than one political subdivision of a country—may seek death taxes on the same assets. In order to avoid double taxation, individuals with ties to more than one country need to order their financial affairs to take advantage of differences in estate and inheritance tax rules.

Double taxation issues can often be quite complex. While under U.S. law an individual is considered a U.S. "domiciliary" if he or she is either a citizen or a resident who intends to reside in the U.S. indefinitely, other countries can have overlapping or contrasting rules. Some countries and states impose inheritance taxes directly on a beneficiary who is simply a resident of their jurisdiction. And, in many cases, simply having assets in a country is sufficient to incur estate taxes, regardless of domiciliary or residency status.

The United States has signed treaties with multiple countries to avoid double taxation. Unfortunately, the treaties may not completely solve the double taxation problem. Some U.S. state courts have held that a treaty simply did not apply to certain *state*-imposed estate or inheritance taxes. Other states courts have held that while a treaty applies, the state can impose estate or inheritance taxes if the tax treaty is not followed with precision. Thus, individuals with ties to several countries must carefully plan to take full advantage of these treaties.

A careful review of one's estate plan coupled with the appropriate subsequent steps can serve to minimize or avoid double taxation. Given the complexity of these situations, we recommend you contact an attorney in our Trust and Estates practice to discuss your particular circumstances. FB

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