1989

Are Some Lawyers More Equal than Others?

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serving for the seller complete control over the company's managerial policies.

The corporate charter must be modified prior to transfer of the *usufruit* interest, so as to define the rights attaching to the *usufruit* and *nue-propriété* interests as follows:

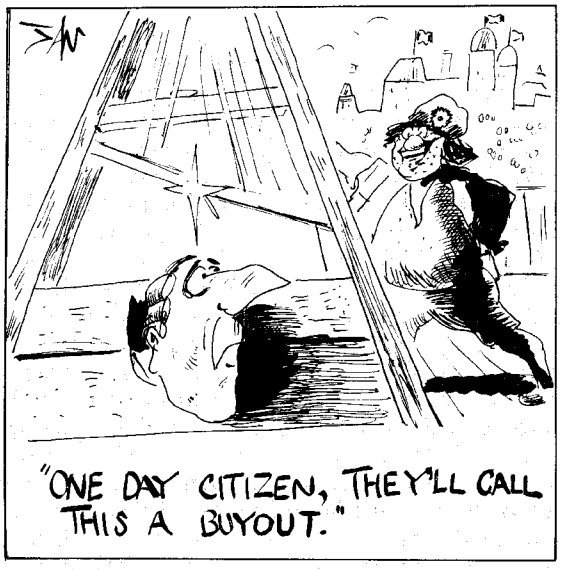
- *usufruit* carries the right to receive dividends, and no other rights;
- *nue-propriété* carries the right to vote on all decisions, ordinary (hence control of the board of directors and of dividend policy) and extraordinary (hence control of modifications of the company's capital and other decisions fundamentally affecting the company's legal identity or structure).

The *usufruit* can be transferred to the purchaser at the time of payment of the first instalment, and the *nue-propriété* can be transferred as it is paid for, up to a maximum of either 33⅓ per cent or 49 per cent of the share capital. The seller's retention of 66⅔ per cent of the company's capital would preserve for it the power to adopt both ordinary resolutions (which require the vote of a simple majority of the shareholders present or represented) and extraordinary resolutions (which require the vote of at least two-thirds of the shareholders present or represented). An ownership interest of 49 per cent would enable the purchaser to veto extraordinary decisions.

Contractually, the seller retains the right to repurchase all shares and *usufruit* rights previously transferred, in the event of default in payment of an instalment of the purchase price. In the event of such a repurchase, the seller will own a company that he has administered, with no risk of past mismanagement for the sake of maximising dividends or of other actions that might be incompatible with the seller's interests.

In this way, the purchasing managers can utilise the stream of dividends from the company to finance the purchase of the shares. The seller, who would otherwise be concerned that the managers might use their voting power to maximise dividends to the detriment of the company, determines the distribution policy of the company. Although the purchaser is dependent on the seller's voting to distribute dividends, failing which he may be forced to default, he is protected by the seller's interest in being paid in a timely fashion, which ensures that it will cause reasonable dividends to be distributed. In addition, this system enables him to purchase the company using limited personal resources.

The arrangement can extend over a long period: in extreme cases, a number of years equal to the multiple applied to annual profits to determine the value of the company. In such a case, the entire deferred part of the purchase price can be expected to be financed by dividends. □



Are some lawyers more equal than others?

Reciprocity, by definition, is a two-way street. The EC must keep the traffic with the US flowing, argues Sydney M Cone III of Cleary Gottlieb Steen & Hamilton, New York

A number of major US law firms maintain offices outside the United States, generally in international centres where businessmen or bankers find it convenient to consult lawyers and where local professional rules have permitted US law firms to establish offices for the conduct of legal practice. London, Paris, Brussels and Hong Kong are notable examples.

In recent years, two events have focused attention on the issue of US reciprocity, that is, on the terms under which the United States permits lawyers from other countries to establish offices in the US. The first was the insistence by the US Government, as a matter of trade policy, that Japan authorise US law firms to open offices in Tokyo. The Japanese raised the issue of reciprocity and in 1987 concluded that sufficient reciprocity existed to justify the licensing of US lawyers to open offices in Japan.

The second of these events is the re-examination of the rights of US law firms in the European Community in the light of 1992. Because the US is not a member state of the EC, the point is sometimes made that US law firms should be accorded rights of establishment within the EC only if reciprocal rights exist in the US for EC law firms.

At the outset, it must be recognised that, for two fundamental reasons, a substantial measure of effective reciprocity is seen to exist in the US by US practitioners. First, the very openness of the US legal profession

(in contrast to, say, the absolute barriers to entry or the mandatory periods of apprenticeship in certain foreign countries) has served to enable large numbers of residents and citizens of foreign countries to take local bar examinations in the US and thereby to gain routine admission as fully fledged members of the Bar in the US. Second, a number of US jurisdictions have adopted local rules (which will be examined later) permitting legal practice in the US by foreign lawyers who do not gain admission to a US Bar.

As a practical matter, then, it has not been difficult for non-US law firms to establish and operate offices in the US. In terms of effective reciprocity, of what takes place in practice, US reciprocity is, for the US practitioner, either a non-issue or a question that will turn not so much on the examination of written rules as on the facts of actual experience. Indeed, American lawyers, accustomed to the daily reality of the activities of non-US law offices established in the US and to the periodic banality of non-US citizens becoming members of the Bar in the US (the latter having no comparable counterpart abroad), may sometimes wonder why they are being challenged on the issue of reciprocity.

Admittedly, it was not always thus. The watershed events were the June 1973 decision of the US Supreme Court in *In re Griffiths*, dealing with Bar membership; and the June 1974 adoption by the New York Court of Appeals of rules for the licensing, without examination, of lawyers from abroad seeking not Bar membership but the right to establish offices for the conduct of a consulting practice (New York rules). *In re Griffiths* invoked the federal Constitution to forbid the several states of the US from excluding non-US citizens from the Bar. Following that decision, certain major states adopted rules to facilitate the admission of law students and lawyers from abroad to the bar examination and, thence, to the Bar itself; and all US states were constitutionally prohibited from discriminating against non-US applicants. The result is that such applicants have been and continue to be routinely admitted to the Bar in every major legal centre in the US.

New York leads the way

Not unlike Paris, London, or Tokyo, New York City is the principal international legal centre in the US. In terms of US law firms alone (be they from New York or California or elsewhere), New York City is the country's leading international legal centre. In the overwhelming majority of cases where non-US firms seek to establish US offices, they seek not a 'US' office nor an office in a 'state' but an office in New York City (indeed, in a single borough of that city). Viewed in terms of international legal centres, therefore, New York is not one state in a federal system; rather, it is the most important single place in the US for foreign lawyers to find liberal rules under which to be licensed.

As mentioned above, in June 1974, the New York Court of Appeals adopted its legal consultant rules to provide an alternative to Bar membership (authorised by an enabling statute enacted by the New York Legislature). The spirit of the legislative history and of the drafting of the resulting rules (the enactment of the enabling statute and the drafting of the rules had been closely coordinated) was to make New York hospitable to lawyers from abroad in order to foster the state's development as an international centre for business, commerce, finance and law.

Under the rules, a lawyer from abroad (otherwise qualified) is entitled to be licensed, without examination, as a legal consultant authorised to 'render legal services' in New York, meaning all legal services not expressly forbidden by the rules. The principal restriction forbids a general practice before the courts (there is no restriction against handling administrative agency cases); there are also restrictions on engaging in a US conveyancing, testamentary or matrimonial practice.

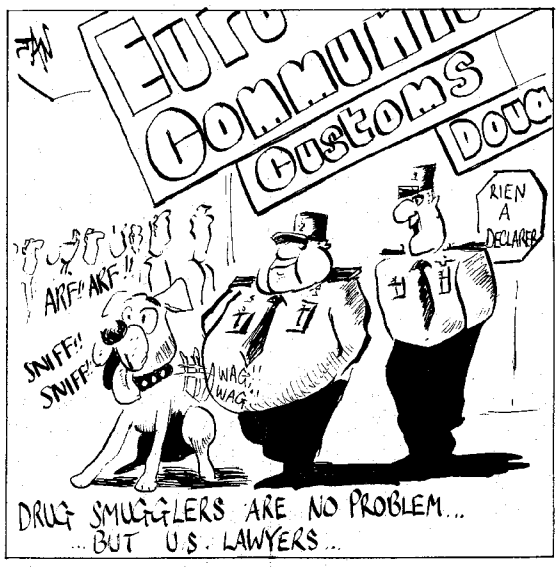
The New York rules do not forbid a legal consultant to provide legal services in respect of the law of any jurisdiction. If, however, the legal consultant renders advice on US or New York law, he must do so 'on the basis of advice' from a member of the Bar. As will be seen, the legal consultant is entitled to employ, or to enter into association with, a member of the Bar. It is therefore not surprising that the New York offices of certain non-US firms comprise both legal consultants and members of the New York Bar. Of course, each legal consultant and member of the Bar is subject to the Code of Responsibility of the New York State Bar Association, and thus is subject to the Code's requirement that a lawyer may not advise on a matter unless he is professionally competent to do so. The end result is the ability of the New York offices of these non-US firms to render advice delimited essentially by their professional competence.

The New York rules expressly authorise the legal consultant to use in New York the name of his firm in his country of origin. In practice, his firm usually opens and operates the New York office as an office of the firm, and (subject only to an unwritten rule of reason) as many or as few lawyers in that office obtain legal consultant licenses as the firm deems appropriate. To be licensed as a legal consultant, an applicant must have practised the law of his country of origin for five of the seven years preceding his application. The rules have been expressly liberalised to make it clear that, while the five years must comprise practice of the

Reciprocity not required

A word on the New York legal consultant rules: they do not contain a reciprocity requirement. The New York Legislature and Court of Appeals considered whether to include such a requirement in the rules, and determined (a) that it would not be in the public interest to make the issuance of New York licences subject to restrictions obtaining in other countries, and (b) that any definition of 'reciprocity' might be too elusive to be susceptible of meaningful application.

Because legal systems and the regulation of the legal profession vary widely from country to country, what constitutes reciprocity as between any two jurisdictions would rarely be self-evident; and enforcing reciprocity would involve the troublesome matter of obtaining affirmative evidence on the availability of reciprocal treatment in other countries. Rather than burden the licensing authorities with these issues, New York decided to forgo any reference whatever to reciprocity.



law of his country, the applicant need not have practised exclusively in that country. Accordingly, so long as an applicant from country A has practised the law of country A for five years, he may count toward the five years time spent in, eg, his firm's branch offices outside country A.

As has been mentioned, a legal consultant in New York is entitled to employ, or to enter into association with, a member of the Bar. These relationships are governed in New York not by the legal consultant rules but by deontological rules of general applicability. Under these general rules, a member of the New York Bar may function as such although employed by a non-member of the Bar or even by a non-lawyer. As regards association, New York rules of general applicability permit a member of the Bar to enter into partnership with a lawyer from another country if that country imposes on its lawyers both educational requirements and ethical standards as regards admission, practice and professional discipline that are 'comparable' to those imposed on members of the New York Bar.

Partnerships

New York has thus generally permitted partnerships between its lawyers and lawyers from abroad who are subject to the rules of recognised, organised legal professions in their countries of origin. Of course, the partnerships regulated by New York are New York partnerships that admit foreign partners. Here we have the question of a foreign firm associating itself with a member of the New York Bar. While New York, as just discussed, may permit the association, the rules governing the foreign firm in its home country will also be relevant. Subject to those rules, a foreign firm could enter into an association with members of the New York Bar who themselves would be entitled to practise before the courts and otherwise to act as lawyers fully entitled to practise in New York.

Over a hundred licences have been issued to date by New York to legal consultants from aboard. Since a single licence can support a sizeable office of a non-US firm the issued licences represent a great many lawyers and law firms from foreign countries. In fact, New York's status as a leading international legal centre has been materially enhanced by the substantial number of offices of major non-US law firms that have been opened there over the years; and it seems beyond doubt that the legislative purpose underlying New York's legal consultant rules has been realised.

As already mentioned, every US jurisdiction is subject to the constitutional ruling of *In re Griffiths* that in effect requires the admission of non-US applicants, otherwise qualified, to the Bar. Following the adoption of New York's rules, a total of nine jurisdictions, in addition to complying with *Griffiths*, have also authorised the licensing of legal consultants without examination; a tenth US jurisdiction is reportedly about to adopt legal consultant rules; and others may well do so in the future.

The US jurisdictions with legal consultant rules, in addition to New York, are Alaska, California, District of Columbia, Hawaii, Michigan, New Jersey, Ohio and Texas; at this writing, Wisconsin is expected to be the tenth.

The California and New Jersey rules are identical to New York's on the issue of reciprocity (see box p17): they do not mention it.

The District of Columbia, while generally following the New York rules, deals with the practical substance of reciprocity as follows:

> 'In considering whether to license an applicant to practice as a Special Legal Consultant, the court [DC Court of Appeals] may in its discretion take into account whether a member of the Bar of this court would have a reasonable and practical opportunity to establish an office for the giving of legal advice to clients in the applicant's country of admission. . . . Any member of the Bar who is seeking or has sought to establish an office in that country may request the court to consider the matter, or the court may do so *sua sponte*'.

Matter of fact

This provision in the DC rules has the merit of dealing with reciprocity neither as an abstraction nor as a necessary prerequisite to licensing, but as a discretionary and factual matter for consideration in appropriate cases, and then in terms of actual experience and of 'reasonable and practical opportunity'. Alaska, Hawaii, Michigan and Ohio have adopted the DC formulation on reciprocity in their legal consultant rules; and the proposed Wisconsin rules would also use the DC approach.

As to permitted scope of practice, the DC rules are similar to, though more specific, than the New York rules. In DC the licensed legal consultant may advise not only on non-US law but also on US (including state) law if such US law advice is rendered 'on the basis of advice' from a member of the Bar 'who has been consulted in the particular matter at hand and has been identified to the client by name' (the final 19 words do not appear in the New York rules). Hawaii, New Jersey and Ohio have adopted this DC formulation on scope of practice; and the proposed Wisconsin rules would also adopt it.

In Alaska, California, Michigan and Texas, the licensed legal consultant may advise only on the law of non-US jurisdictions.

In an age when even professionals use the jargon of market access it seems appropriate to observe that lawyers from outside the US enjoy effective access to

the US market for their services. To the extent that they have gained this access by becoming fully fledged members of the Bar in the US, they have done so in a manner as to which effective reciprocity does not exist outside the US. To the extent that they have gained this access under legal consultant rules, they have done so under US rules that, for the most part, have either purposely refrained from inquiring into questions of reciprocity (as in New York, New Jersey and California), or have deliberately limited such inquiry to the applicable facts in those discretionary situations where circumstances may call for reciprocity (as in DC, Michigan, Ohio, Hawaii and Alaska).

Against this background, the member states of the EC, mindful both of their own firms' access to the US market and of the establishment of US law firms in Europe, can weigh the degree of effective reciprocity afforded EC lawyers in the US. Having done this, the member states could reach one of three conclusions.

First, the member states could conclude that the US, viewed as a whole, measures up to the level of reciprocity required for post-1992 Europe. Such a conclusion would obviously lay the issue of reciprocity to rest in a manner acceptable to the US.

The second possible conclusion for the member states would be the opposite of the first. Whatever the consequences of such a negative conclusion, it could be expected to invite an exchange of the type classically engaged in by differing parties who do not share a consonant view of reality.

A third possibility would be to take a Japanese-type approach (or a variation thereof) toward reciprocity. Under a Japanese-type approach, the US, viewed as a whole, would be deemed to comply with the EC's reciprocity requirements, but the right to establish law offices in the member states would be limited to US law firms whose principal offices were in the US states that had adopted legal consultant rules. (The variation might be to limit the right to US law firms whose principal offices were in certain of the US states that had adopted legal consultant rules).

For Europe, however, a Japanese-type approach may prove less feasible than for Japan. In 1987, both Japan and the US were writing on a relatively clean slate; Japan had just enacted its first post-Occupation law for the licensing of foreign lawyers; and no Japanese law firm had yet sought to open an office in the US. The EC and the US are in a decidedly different posture, and must deal with the acquired rights and future expectations of law firms on both sides of the Atlantic that have established offices on the other side. In short, the member states, in developing their post-1992 policy toward US law firms, may decide to consider reciprocity in the context of mutual EC and US concern for their respective law firms' overseas operations. □

Legal practice in Europe

John Toulmin, QC, leader of the UK delegation to the CCBE and a practising barrister, explains how EC law applies to lawyers active within the single market

The recent upsurge of interest in European law and practice is not surprising. The 1992 Programme with its 279 Directives will deal with such areas of substantive law as competition, dumping, financial services, reinsurance, product liability, company law, telecommunications and free movement of goods and services including the professions. On the most practical level, all lawyers in Europe will have to be conversant with EC law to ensure that it is fully taken into account in advice which they give to their clients.

Overriding principle

However, the greatest change taking place in legal practice is in the mobility of lawyers. Throughout the EC, lawyers are looking to set up offices or form links with lawyers in other member states. Article 3(c) of the Treaty of Rome makes it clear that the Community intends to abolish obstacles to the freedom of movement of persons, services and capital between member states, in particular discrimination on the grounds of nationality. This overriding principle has to be kept in mind in considering the legal framework for the practice of law in the EC and in construing the later provisions of the Treaty which deal specifically with rights of establishment and provision of services by lawyers. The Treaty provides the framework for the practice of law by nationals from the member states. It does not deal with the rights of other lawyers, from eg the US or Japan, to establish themselves or to set up branch offices in EC countries.

A qualified EC lawyer can either provide legal services in another member state by visiting on an occasional basis (ie by providing services under Articles 59-66 of the Treaty) or by setting up a permanent establishment (ie by establishing an office under Articles 52-58). He may provide the legal service using his original home qualifications (under home title) or by obtaining an additional qualification from the place where he is established (as an integrated lawyer). Unless he is an integrated lawyer, he will be prevented from undertaking activities specifically reserved to full members of the local legal profession. In the UK this is confined to appearing in court on his own and to undertaking probate and conveyancing work.

In practice this gives foreign lawyers great freedom. Most wish to give legal and commercial advice to their clients and this they can do without restriction. There are well over 100 foreign law firms established in London, and they play an important part in maintaining