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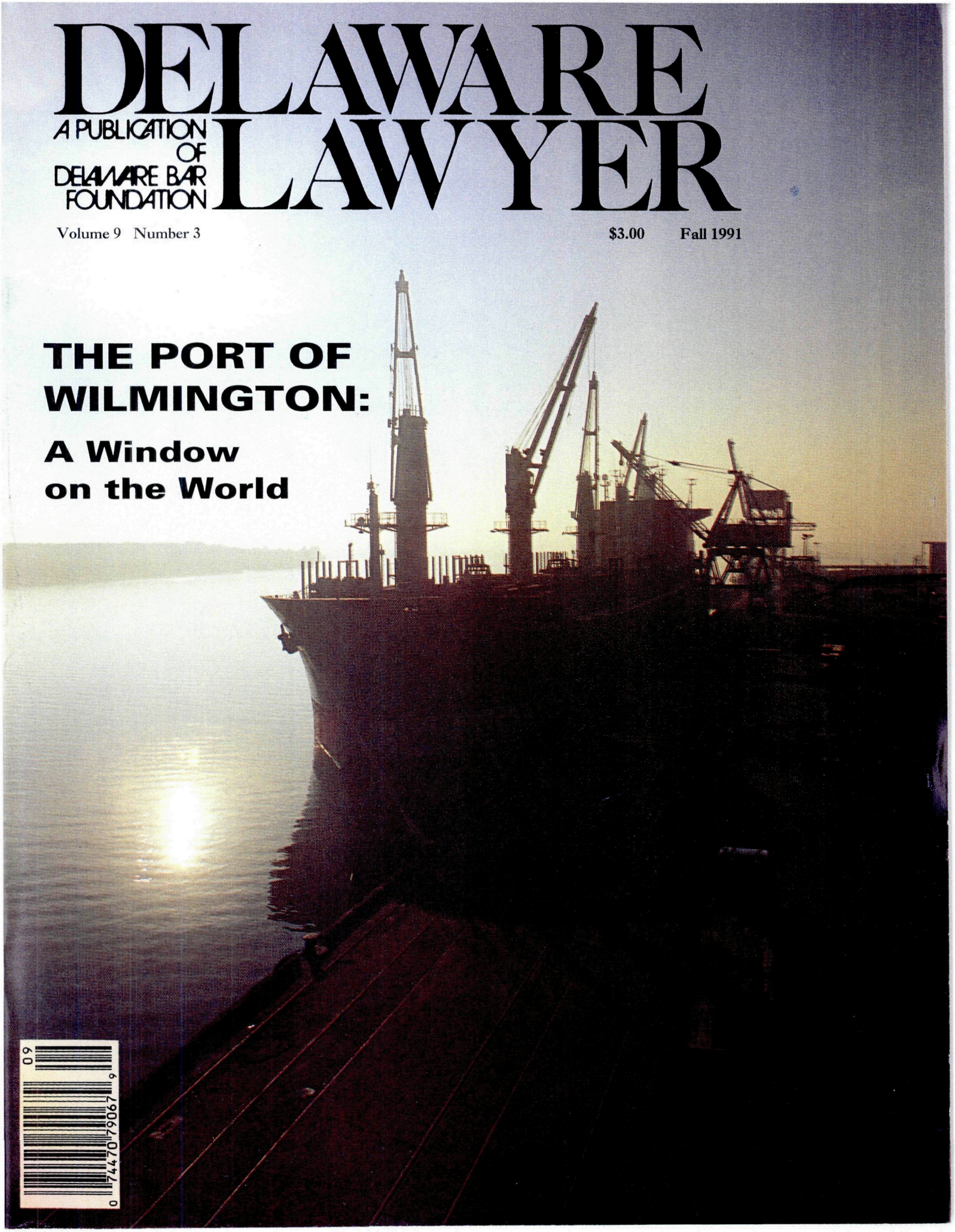

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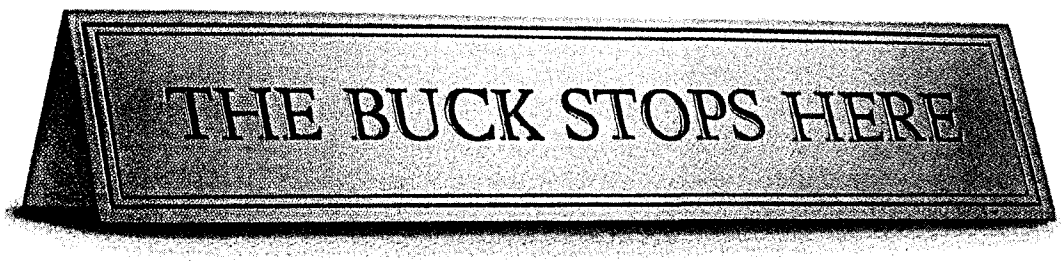

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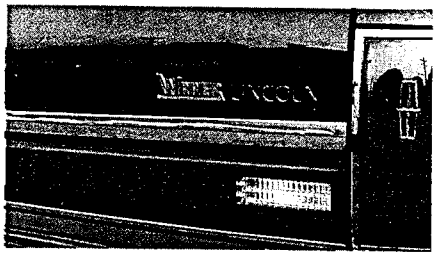

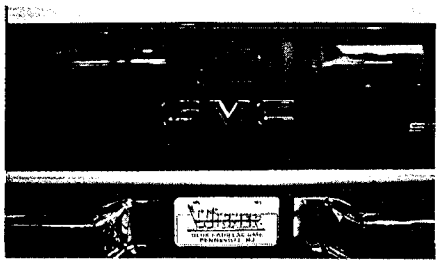

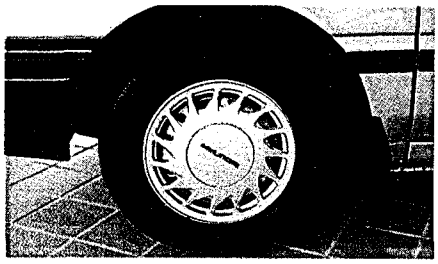

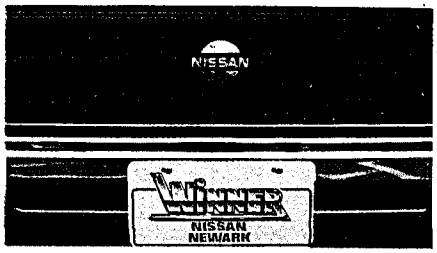

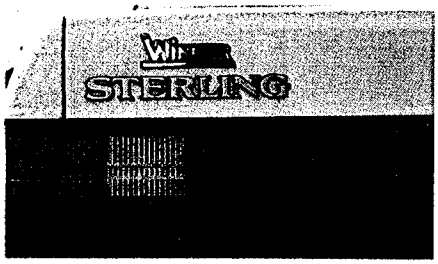

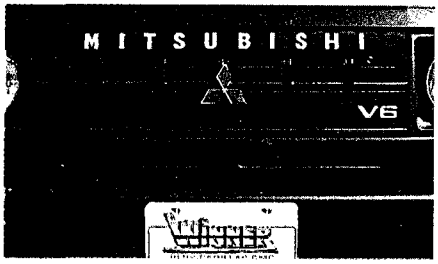

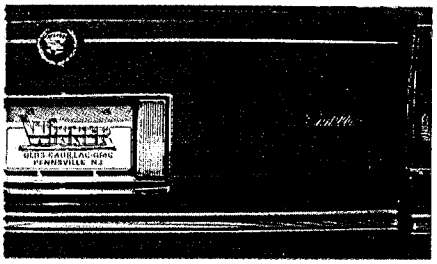

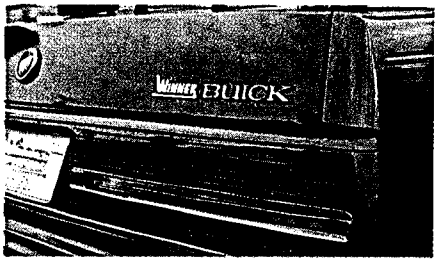

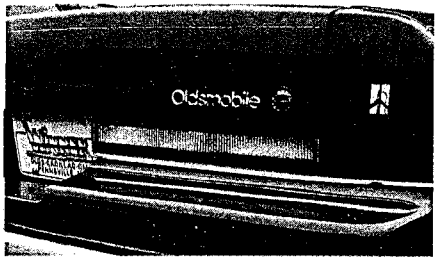

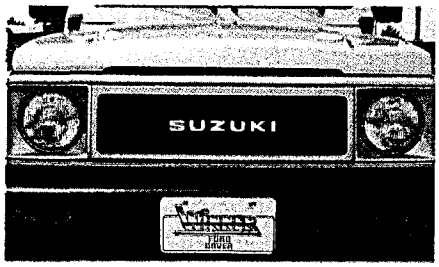

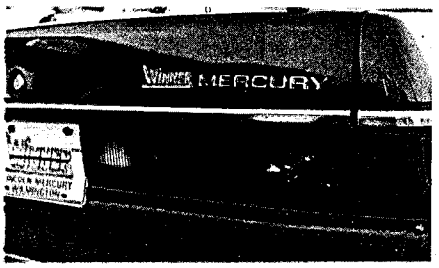

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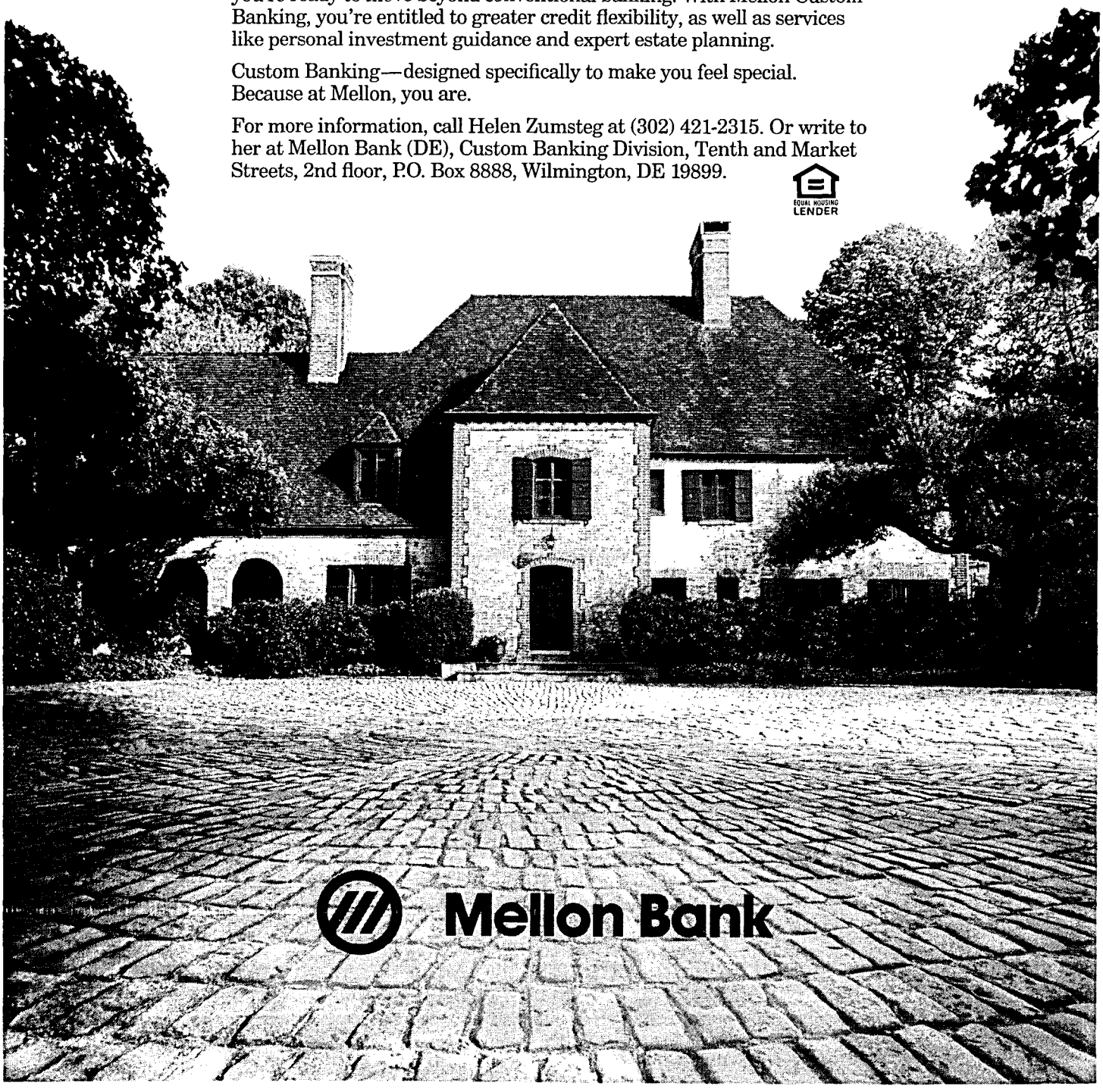

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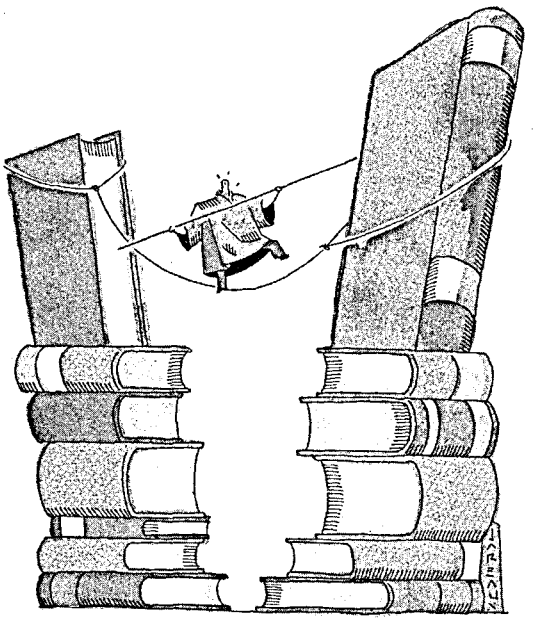

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EDITOR'S PAGE

Once thought limited to the workings of the Legal Advisor to the State Department and a few specialty law firms in New York and D.C., international law has emerged as an increasingly important part of the practice of Delaware lawyers. During the economic expansion of the eighties, businesses large and small reached out to foreign markets. This trend has continued through the current recession as exporting remains one of the few growth sectors of the economy. The opening of Eastern Europe and the reconstruction of Kuwait also hold potential for Delaware business. Most importantly, perhaps, its preeminence as a corporate domicile promises unique opportunities for Delaware in the global economy.

For private practitioners and house counsel, this has meant a growing demand by both national and local clients for expertise in international law. In the past year, the Delaware State Bar Association has formed an International Law Section, whose mission, in part, is to educate members in matters of international law. Through the Bar Association, the Section has sponsored the first two continuing legal education seminars in Delaware on topics of international law. The first, in February, focused on global trade. The second, in June, was on international commercial transactions. The Section called upon the considerable expertise of international lawyers in large Delaware-based corporations, which have long operated worldwide, as an important part of its educational efforts. The seminars were both well attended and well received. More seminars are planned, and it is expected that transnational legal topics will become a regular part of the Bar Association's CLE offerings.

This issue of DELAWARE LAWYER results from the burgeoning interest in international law. A variety of subjects is discussed - the Montreal Protocols and the protection of the ozone layer, the European Economic Community, and the international sale of securities among other subjects. These diverse topics reflect the breadth of international law itself. No longer a discrete specialty, international law has emerged as an important component of corporate, securities, environmental, and virtually every other branch of commercial practice.

James Dinnage
Erin Kelly

TO THE EDITOR

I read with great interest your Spring 1991 issue on Helping the Addicted Professional. It arrived at my office while I was away for 30 days at an addiction treatment facility in Tucson, Arizona. Although my problems were not substance related, much of the manifestations and dynamics and in some ways the treatment are the same as for the substance and alcohol addictions described in the articles in your issue.

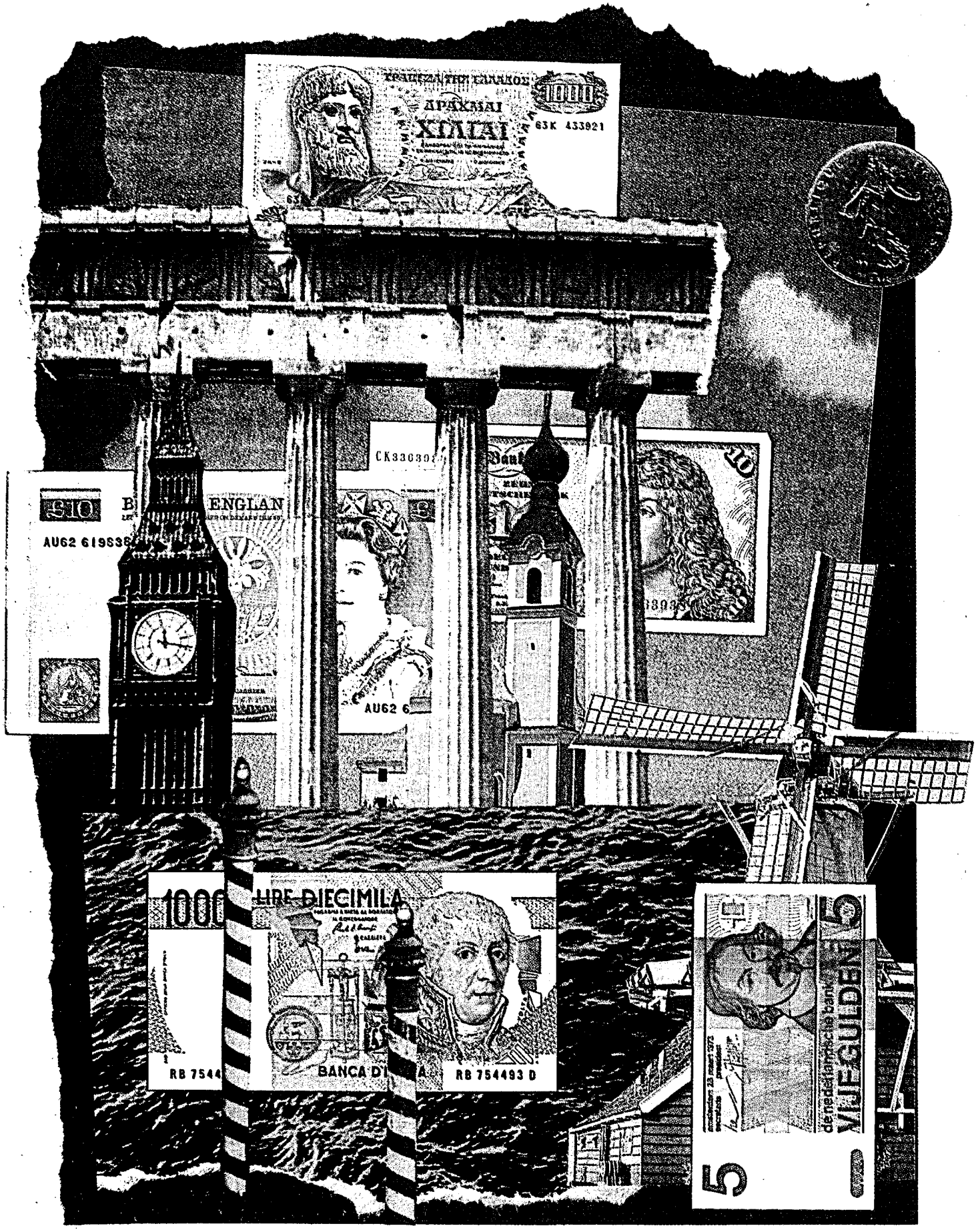
I am one of the lucky ones. My organization demonstrated tremendous concern and support for me. It was acceptable for me to stand up and say I needed help. It was acceptable for me to go away and get the help I needed. And, it was acceptable for me to return and to make the necessary changes in my professional life and career.

Letting down my facade of control and invulnerability and admitting that I had problems was difficult and very scary for me. But the changes in my life have been tremendous and well worth the pain and hard work of recovery. In my opinion, it is only through talking about these issues that people can identify the needs within themselves and the means for recovery.

I applaud your willingness to deal with these issues and Michael Tucker for sharing his story. There are helpful and potentially healing messages in these articles. People need only be willing to hear them.

If other members of the Delaware Bar are interested in my experiences, I would be glad to discuss them.

Sincerely yours,
James David Dykes
Counsel
W.L. Gore & Associates, Inc.
Flagstaff, Arizona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The European Community and the Demise of the Nation State

by

James D. Dinnage

"We have not successfully rolled back the frontiers of the state in Britain only to see them reimposed at a European level with a European superstate exercising a new dominance from Brussels."

Margaret Thatcher, Bruges, Belgium, September 20, 1988

With these stirring words, the then British Prime Minister began in earnest a campaign against what she saw as the biggest threat to British sovereignty since the evacuation of Dunkirk. Not too long afterwards, one of her most stalwart supporters and a member of her Cabinet, Nicholas Ridley, made some characteristically unguarded remarks to a reporter (the publication of which for some reason surprised Mr. Ridley) about what he perceived as the growing domination of Germany and the dictatorial tendencies of the European Commission, the executive body of the European Communities. The attitudes expressed by these two leading lights of the Conservative party precipitated party upheaval that eventually toppled both politicians.

To non-Europeans, the strength of the feelings stirred up in Britain by "Europe" must seem puzzling. It is generally known that there is a push towards unification ("1992") but on the whole Europeans still present a disappointing lack of cohesion over important world issues, including of course the invasion of Kuwait. How can such a rabble constitute a threat to national sovereignty? Then again, while Mrs. Thatcher proffered the Soviet Union as an example of what happens to unpopular unification, others hastened to point out that the European Community is the only union of states in the world today that has a waiting list for membership. Attempts have been made to copy it in other parts of the world - Latin America, the Caribbean, East Africa. It also is held up as a model by members of existing federations that want a looser union - including the Soviet Union and, most recently, Yugoslavia. Surely such an organization must have something going for it?

To explain this paradox requires us to understand something of the "Community" principle as distinct from traditional international organizations, confederations and federal states.

The Community Legal System Contrasted With Federal and Confederate Systems

A federal constitution typically attempts in a single document or series of connected documents to assign powers and responsibilities to the federal and state authorities covering all areas of human activity.

There is no such all-embracing constitution for the Community, while it is convenient to refer to the "Community" as though it were a single entity; there is no single constitutive document. It is often overlooked that there are actually three Communities, of which the first was the Coal and Steel Community ("ECSC") founded in 1951. This Community set the pattern for the others, but each remains a distinct entity. Indeed, the ECSC Treaty contains some marked differences from the later Treaties: it had a pre-merger control built right into the Treaty; it was established for 50 years only; and it has only a unified, rather than a Community, external tariff. In giving extensive powers to regulate prices and terms of the trade to an unelected body known as the High Authority, it also went much further than the later treaties. The High

Illustration by Jamie Hogan

Authority subsequently was merged with the better known (EEC) Commission. Two 1957 treaties established respectively the Atomic Energy Community and the much broader Economic Community (the latter treaty being commonly referred to as the Treaty of Rome or the EEC Treaty).

The EEC Treaty is by far the most important today because it encompasses all other areas of economic activity. In addition, there are now more than a few amendatory treaties and other "Acts". The term "European Community" in the nontechnical sense is usually intended to encompass all three Communities.

The EEC Treaty states as its goal an "ever closer union among the European peoples" and designates a means for moving towards that goal, namely, the establishment of a common market. It provides specific measures only for the creation of that common market, while the means of progress from there to the "closer union" are left unstated. Certainly the responsibilities of the Communities have remained almost wholly limited to the economic sphere and, even there, vary greatly. Economic and monetary policy, for example, are still in the hands of the member states. There was initially no firm basis for environmental, social or industrial policy, while conversely, in agriculture, the Community has assumed almost total control. However, this "sectoral" integration in the economic sphere also distinguishes the Community from loose confederate systems, because at least in some sectors, there has been a real and permanent transfer of sovereign powers to a central authority.

Confederate and federal systems reflect some sense of nationhood. Despite the recent introduction of a Community passport (which has the words "European Community" above the name of the member state - a battle was fought over this issue for many years), and the institution of direct elections to the European parliament for the first time in 1979, it is clear that there still is today scarcely an embryonic sense of nationhood at the European level.

A federal (and frequently also a confederate) authority controls, among other things, foreign policy and immigration, thus rendering the constituent member states impotent at the level of international law. The powers of the states become domestic only. (There are partial exceptions in some federal or quasi-federal systems, such as Belgium, but the rule holds true in general.) Since each of the Treaties contemplates assigned areas of competence only (i.e. economic), member states remain competent on the international plane in most areas of activity. It took a daring decision of the European Court to ensure that the foreign relations powers of the Community would at least be co-extensive with the Community's "domestic" authority.

As the founding fathers of the United States discovered, a federal constitution will also have to speak to the protection of human rights and other core issues that concern the people of all of the member states. None of the Treaties expressly addresses these issues.

A primary function of a federal constitution is to determine which powers are assigned to the federal authorities and which to the states. The Community Treaties, however, do not speak in terms of a division of powers between Community and state, even in such core areas as the free movement of goods (discussed later).

It must be evident that it is not really possible to contemplate a permanent future for the European Treaties as federal Constitutional documents. They have already undergone significant revisions on many occasions, covering such key subjects as majority voting on some matters, the adoption of the budget, and direct elections to the European Parliament. More far reaching changes are likely in the near future. Although there is judicial recognition of principles for the protection of basic liberties and rights at the Community level, a truly constitutive document would have to articulate these. Eventually, therefore, the Treaties would have to be replaced by an entirely new arrangement if it is desired to transform the Community into a federation.

Community Law Contrasted With International Law

The primary subjects of public international law are sovereign states, which regularly arrange matters among themselves by Treaties or Conventions. Disputes may be settled in many ways, there being no single "court system". Recent events show that trial by battle still flourishes.

The Communities were created by Treaties among sovereign states and cannot be changed except by action of the states. Thus the Communities are still in these fundamental respects creatures of the international legal order. There is no European federal army nor even a rudimentary police force. If a member state ignores EC legislation or a ruling of the Court of Justice set up by the Treaties, the sanction is moral only.

The Community works where other international institutions have failed because of its place in time and history. It would not have worked in the 1920's or 30's, let alone earlier times, because regional interests, the nation state, and military might were too strong. Witness also the fate of the Articles of Confederation preceding the U.S. Constitution. The humiliation of Europe brought about by the rise of Nazism and the Second World War was a necessary precondition to a structure that could reduce and perhaps eliminate the power of blind nationalism by economic integration rooted in respect for the law. The importance of this dedication to resolving common difficulties by legal process should not be overlooked. it plays a forceful role in the external conduct of the community, where it is not always understood by others. The pacifist inclinations of the Community in the face of blatant aggression by Iraq are an example. The importance of law is not unique to the Community idea; but its importance contrasts strongly with the weak observance of the legal process generally in the sphere of public international law.

The Community concept in any case moves well beyond the confines of the traditional international order. It contains provision for the adoption, by its institutions, of legislative measures ("Regulations") having the force of law in the member states without any intervening action by their legislative bodies. Moreover, regulations were held early on to be superior to state laws, even those of a constitutional nature and intended to protect individual liberties. The Community's institutions were enabled from the outset to adopt legislation by majority vote, thus imposing laws on a member state against that state's will. While this rarely happened because of the insistence by the member states on unanimity in practice, majority voting has become the norm in many areas since the Treaty amendments (the "Single European Act" effective in 1987) that paved the way for the "1992 program". The Commission has draconian enforcement powers against private citizens and corporations in the competition law field, where it is empowered to impose fines on enterprises of up to 10% of their annual worldwide sales for violations of the Treaty provisions that prohibit restrictive

practices and the abuse of a dominant position (Articles 85 and 86).

Similarities Between the Growth of the Community and the Early Years of the United States

It would certainly be misleading to assume that the creation of a federal constitution instantly creates an effective "federal" power. If anything, the opposite is illustrated by the early years of the United States. For example, John Murrin has pointed out that for the first 60 or so years of its existence the federal government "remained minuscule, a midget institution in a giant land. It had almost no internal functions except the postal system and the sale of western lands. Its role scarcely went beyond what would have pleased even most Antifederalists in the 1780's, the use of port duties and the revenue from land sales to meet its own expenses".[1] Power and prestige remained in the state governments. Archibald Cox observes that Robert H. Harrison, an Associate Justice of the U.S. Supreme Court resigned from the U.S. Supreme Court after five days to become chancellor of Maryland. John Jay, the first Chief Justice, resigned to become Governor of New York.[2] A bitter war had to be fought to establish the authority of the federal government over a significant portion of the southern territory of the Union.

Conversely, the outward appearance of the Community Treaties as documents belonging to the realm of international relations belies the federalist tendencies of the Communities. The EEC Treaty in particular has undergone fundamental changes as a result of judicial interpretation, and today tempts us to see similarities with the early years of the United States.

The EEC, for example, has in the case of Costs v. ENEL[3] its own version of Marbury v. Madison.[4] The U.S. Constitution declares the supremacy of federal law but is silent as to who should decide whether a statute conflicts with the constitution; in the Community, the opposite is true. In both cases the respective courts acted to "correct" the omission.

There are also parallels between the development of free movement of goods in the Community and the evolution of the Commerce Clause of the U.S. Constitution. U.S. lawyers are of course aware that, in the early years of the United States, the Commerce Clause was perceived in a somewhat rigid way: Congress could regulate interstate commerce while states regulated the intrastate aspects. However, the U.S. Supreme Court determined that Congressional power to regulate interstate commerce included the ability to affect matters occurring within a state, so long as the activity had some commercial connection with another state (Gibbons v. Ogden[5]). States could continue to regulate areas not pre-empted by Congressional regulation where the subject matter was appropriate for local action, subject, however, to certain limitations (under the so-called "dormant" Commerce clause) intended to prevent an undue burden on, or discrimination against, out-of-state goods (or services): Cooley v. Board of Port Wardens of the Port of Philadelphia[6]. A qualitative test came into being that produces complex and not always consistent results. The grant of power to Congress to regulate commerce thus ceased to be viewed as a debate over where power lay and focused instead on the appropriateness of state action, provided such action was not discriminatory or otherwise unduly burdensome.

Ave atque vale, Mrs. Thatcher! Her anti-European views created upheaval within the Conservative Party and eventually toppled her.

In the Community there is no equivalent to the Commerce Clause, but there is a specific provision (Article 30 of the EEC Treaty) that expressly prohibits the imposition by the member states of quantitative restrictions on the movement of goods. At first, it was commonly believed that this provision, at most, prohibited actual discrimination against out-of-state goods. In two referral cases in the 1970's, however, (Dassonville[7] and Cassis de Dijon[8]) the European Court held that all "trade regulations" affecting the movement of goods were potentially subject to Article 30. As with the U.S. Supreme Court before it, the European Court then had to elaborate both on the types of purposes for which states might retain jurisdiction and on the limitations on those powers - i.e. that they must be reasonably related to the purpose and not be discriminatory. The void created by the absence of any direct power at the Community level to regulate areas thenceforth removed from state jurisdiction was a driving force behind the 1992 program. This program encompasses 279 areas of economic activity and is being achieved through the medium of directives which, as explained later, act to harmonize, or cause mutual recognition of, state legislation. In more than just a whimsical sense, the entire 1992 program could be viewed as a vast European "Commerce Clause".

More generally in Europe today there is increasing discussion of something called "subsidiarity". This doctrine would apportion legislative power between community and states in accordance with a pragmatic appraisal as to where regulation could be most appropriately administered.

In light of the above, the reader might be forgiven for drawing the conclusion that the Community is actually in transition from an international organization to a full fledged federation. Indeed there is growing support for a United States of Europe in some quarters including such eminences as Jacques Delors, President of the Commission, and the German Chancellor, Helmut Kohl. Yet even committed "Europeans" wonder about the wisdom of these proposals. The Community legal system has served it and its member states very well over the last few decades. Its unique quality stems from the supportive relationship that is required of the authorities of the member states towards the Community and the built-in compromise procedures among the conflicting interests of the member states.

The Interdependence of the Community and the Member States as the Distinguishing Feature of the Community Principle.

The legislative process itself is perhaps the most evident example of this interdependence. The Council of Ministers, the chief lawmaking institution of the Communities, is made up of one government representative of each member state. The identity of such representatives will vary according to the subject matter - foreign ministers, agriculture ministers, transport ministers, and so on. There is a permanent secretariat and staff for the Council, which usually meets in Brussels. The Council thus has a sort of disembodied existence independent of the physical persons who meet under its aegis. It is an "Institution" of the Community and has standing before the European Court. It

may be sued by its own members and by the Commission (and quite frequently is). The members are not directly elected but are subject to the democratic process only as elected members of their national legislative bodies. The Presidency of the Council is rotated around the member states at six month intervals (a pattern no doubt drawn from the practice of the U.N. Security Council). There is, however, a separate staff to serve the presidency, which functions largely as a "troika" comprising the next preceding and next succeeding Presidents as well as the incumbent.

The Commission consists of 17 members. The Treaties provide that the Commission members be chosen by common accord of the member states but it works a little differently from what one might expect. The member states have agreed that certain larger countries should be entitled to nominate two Commissioners, and smaller countries get one apiece. Each government puts up its own candidates, and it is rare that a name is withdrawn as a result of opposition from other states. The President and Vice Presidents also are chosen as a result of informal allocation. At the same time, the candidates must be persons whose dedication to promoting the ideals of the Community is unquestioned. Quite what the interest of the individual states is in getting their share of the pie is thus not immediately obvious. Indeed, on occasions, an apparently tame national politician has become a Thomas Becket full of fiery Euro-enthusiasm. Lord Cockfield, the British Commissioner who inspired the 1992 program, was just such a person and incurred the implacable wrath of his former Conservative colleagues.

The Commission usually has the role of making proposals for legislation and will consult all known interested parties before drawing up a final draft. It must on many occasions consult the Economic and Social Committee, consisting of industry and labor representatives. Proposals also are promptly referred to a separate body known as the Committee of Permanent Representatives of the member states. These Representatives do not change (they are in the nature of Ambassadors) and their job is to ascertain the views of their governments, advance such views, and, if possible, arrive at compromises before the Council considers proposals.

The European Parliament is directly elected by the people of the Community but has no power itself to adopt or even to propose legislation, at least in the formal sense. It does however conduct committee hearings aimed at soliciting views of all interested parties around the Community. The Parliament's role has increased in importance as a result of the changes brought about in 1987, in that it has more opportunity to propose amendments to proposed legislation, and those amendments now carry more weight. Parliament also does have the final say on the budget, but has to operate within strict confines on its discretion.

National parliaments regularly review proposals and make recommendations to their governments as to how they should approach the subject in Council.

Disputes may be settled in many ways, there being no "court system". Recent events show that trial by battle still flourishes.

This whole process may seem slow and cumbersome and may be to blame for the historically very slow progress on even extremely technical matters such as the content of a sausage or the noise level of lawn mowers. It does, however, reflect the essence of the Community: processes designed to achieve consensus among sovereign states are cemented by the existence of institutions at the Community level, institutions which are at the same time to varying degrees separate from the member states' governments but also dependent upon them.

Perhaps even more indicative of the uniqueness of the Community system is one of the types of legislation available to Community institutions, known as a directive. A directive, according to Article 189 of the EEC Treaty, is addressed only to member states and is binding as to the objectives it requires them to meet, while leaving them free to choose the means for achieving those objectives. The 1992 Single Market program is being implemented almost entirely through directives, as are other Community policies, such as environmental and social action. The effect of legislating through directives is to determine policy at the Community level while leaving implementation to the member states. Such an approach is by and large alien to federal systems, although the Federal government in the United States uses state agencies directly or indirectly to enforce Federal policy: for example in the environmental area, state agencies may be "delegated" to enforce the objectives of federal legislation; and the Federal government uses its financial power to force states to secure observance of Federally determined policies such as the 55 and 65 mph speed limits. However, the states in the United States do not assume anything approaching the role played by the member states of the Community, for it is evident that the latter are required players in the process, not merely optional ones.

While the above description of directives remains true for the most part, the European Court has intervened to change rather drastically the legal effect of directives. Two strands of development have become evident.

First, where a member state has failed to implement a directive within its stated time frame, it may be possible for an individual to invoke the directive against the member state if the member state seeks to apply national law that is in conflict with it (Van Duyn[9]. The member state may not however, invoke the directive against a private citizen if it is not itself in compliance with the directive, nor may one private citizen invoke it against another.

Second, a duty arises under Article 5 of the EEC Treaty requiring the authorities of the member states to facilitate the achievement of the Community's objectives and abstain from any action that might impede the operation of Community law. The European Court has extended the notion of "authorities" to include the court systems and in so doing has opened up a potentially much more significant role for directives in the application of national law. Where a directive has been implemented, says the Court, the courts of the member states must construe national legislation in a way that enhances the directive. Taken to a logical conclusion, this approach could mean that directives may be invoked by anyone against anyone else and take priority over conflicting national law. The closest analogy is probably to think of each directive as a constitutional type of law. National laws in the Community may be inapplicable if found in conflict with a directive in the same way that, in the U.S., state laws are subject to the Federal constitution and will

be invalidated if found in conflict. With this analogy the "Constitution" of the Community becomes the sum total of the Treaties and all Community directives, a curious and yet as it turns out, practicable result.

A third major characteristic of the Community system is found in Article 177 of the EEC Treaty. This article provides for the referral to the European Court of questions of interpretation and validity of Community law that arise in the course of proceedings before the national courts. Such references may take place at any stage in the national court proceedings, while a national court of last resort must refer. Thus the European Court does not play the same role as the United States Supreme Court. The purpose of Article 177 is primarily to ensure uniformity of application of Community law by the national authorities. Again, therefore, there is a recognition that in the Community system, Community law is essentially implemented at the national level and not as a free standing system formally separated from the legal systems of the member states.

Finally, the 1987 changes also confirmed that the pursuit of the "ever closer union" in non-economic matters was likely to enhance perhaps the most remarkable feature of the Community phenomenon. Since 1971, the member states had been progressively coordinating their foreign policies outside the Community structure. The foreign ministers met at regular intervals and at least twice a year the heads of government met to set policy directions. These meetings gradually became a fixed feature and a need grew for some form of permanent secretariat. The Single European Act solidified these arrangements under the broad heading of "European Political Co-operation". At this point, one may well ask, why did not the member states assign these responsibilities to the Council of Ministers? They did not, and for this reason: the Council is a Community institution but the States were not prepared to assign non-economic issues to the Community, for that would have meant that the whole panoply of the Community legal system would then have descended upon them — complete with the doctrine of Community supremacy and, most significantly, majority voting. Instead, a parallel Council, known as the European Council, was established, comprising the heads of government and the president of the Commission.[10] Furthermore, when the foreign ministers meet, they may act under the "Political Co-operation" provisions during a meeting of the EC Council, so that the meeting changes its character, depending on the subject matter.[11] The Commission must be "fully associated" with these proceedings and there must be consistency with Community foreign trade policy.[12] The Community Parliament must be kept informed. Thus, the Community has become a partner, with its own independent interests, in the broader field of foreign policy.

The Community's Future

The tendency to limit the Community's integrative mechanisms to the economic sphere is likely to become more pronounced (in the short term, at least) as a result of two Intergovernmental Conferences that were convened in December 1990 to negotiate economic, monetary and political union. These "ICG's" will probably produce heavily compromised Treaties by the end of 1991. Economic and Monetary Union will likely take the form of a two or three step move to a single currency and the creation of a European Central Bank, that in all likelihood will be a full fledged Community Institution answerable to the Council of Ministers and perhaps also the Parliament. Member States that presently are unwilling to accept a single currency will be allowed to put off a decision on whether to participate. Recognizing the greater responsibilities thus thrust upon the Community, institutional changes will likely result in more power going to the European Parliament generally.

On the other hand, political union probably will not be assigned to the Economic Community but rather will build upon the separate development of the European Council where all action must proceed unanimously. The structure is likely to focus more on harmonized state action than transfer of responsibility to an independent authority. The Member States are deeply divided on this issue, however, with some insisting on more direct Community authority over all foreign policy including defense.

Mixed up with these considerations is the issue of enlargement - with Sweden, Austria, and Turkey already knocking on the door for full membership (Sweden has recently linked its currency to the European Monetary System), and central and eastern European States hoping anxiously for at least some form of association leading eventually to full membership. The Community decision-making structure could well break down if membership were to increase to 15 or 20 states, but should this problem be addressed now or later? If the Community is true to form, the answer will be "yes".

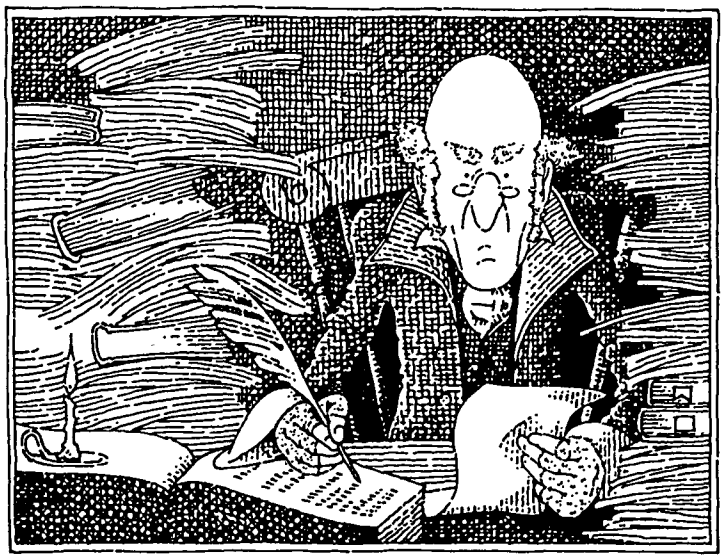
The author is indebted to professor John Murphy, Villanova University School of Law, and P. Michael Walker, an attorney with the DuPont Company, for their comments and suggestions. All errors and omissions are of course entirely the author's responsibility.

James D. Dinnage, a law graduate of Cambridge University, joined the British subsidiary of the DuPont Company as legal counsel in 1979. In 1985 he transferred to DuPont's Wilmington office, where he now specializes in corporate and securities law. He teaches European Community Law at Villanova, and speaks and writes frequently on that subject.

FOOTNOTES

1. John Murrin, "The Great Conversion, or Court versus Country: A Comparison of the Revolution Settlements in England (1688-1721) and America (1776-1816)", in Three British Revolutions: 1641, 1688, 1776 (J.G.A. Pocock ed. 1980) at 425. Cited by jack N. Rakove in "The First Phases of American Federalism", Comparative Constitutional Federalism, Europe and America, M. Tushnet ed. 1990.
2. Cox, "The Court and the Constitution", Houghton Mifflin Company, Boston, 1987.
3. 6/64, [1964] ECR 585; [1964] CMLR 425
4. 1 Cranch 137, 2 L.Ed. 60(1803)
5. 9 Wheat. 1 (1824)
6. 53 U.S. (12 How.) 299(1851)
7. 8/74 Procureur du Roi v. Dassonville (1974) ECR 837, [1974] 2 CMLR 436
8. 120/78 Rewe Zentral v. Bundesmonopolverwaltung fuer Branntwein [1979]ECR 649, [1979] 3 CMLR 494
9. 41/74 Van Duyn v. Home Office [19/74] ECR 1337, [1975] 1 CMLR 1
10. Single European Act, Article 2
11. Ibid., Article 30, paragraph 3(a)
12. Ibid., Article 30, paragraph 5

Photograph by Albert C. Johns



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RODMAN WARD, JR. & ERIN KELLY

Why Delaware Leads in the United States as a Corporate Domicile

The following article will also appear in the Japanese publication, Mergers & Acquisitions Report.

A Japanese company that wants to acquire a United States company or operate a United States subsidiary typically forms a corporation in the United States to act as its vehicle. Under the United States federal system of government, corporation law, that is, the body of law that governs the creation and internal governance of corporations, is, for the most part, established by the individual states. Each of the fifty states has its own corporation code to regulate its corporate citizens. Thus, in setting up an acquisition or operating company, a business person will have to decide where to incorporate among the 50 United States. While a small operating company or wholly intrastate operation tends to incorporate in the state of its principal place of business, Delaware has long been viewed as the most popular jurisdiction of incorporation for holding companies and multistate corporations.

The Honorable Randy J. Holland presents the Bar Association's Government Service Award to Marie Schultie, the Corporation's Department Administrator

Photograph by Albert C. Johns

Over 200,000 companies are now incorporated in Delaware, including more than half of the 500 largest United States industrial corporations. In fact, more large companies have incorporated in Delaware than in all other states combined. Delaware is the chartering state for over 40% of the companies listed on the New York Stock Exchange and for 37% of the companies listed on the American Stock Exchange. Since 1965, over 80% of the companies changing their states of incorporation have moved to Delaware.

Moreover, many acquirors, both domestic and international, form Delaware subsidiaries to accomplish acquisition transactions. Two prominent examples involving Japanese acquirors are Sony/Columbia Acquisition Corp., a Delaware subsidiary of Sony USA, which was incorporated in September 1989 to effectuate the acquisition of Columbia Pictures, and Yamanouchi Acquisition Corp., which was incorporated in Delaware in March 1989 as a vehicle to acquire Shaklee Corporation.

WHY DELAWARE?

Historical Development

The question many people, including many Americans, ask is: why do so many companies choose Delaware as their domicile? In part, the answer is a matter of historical accident. In 1896, Delaware's neighboring state of New Jersey adopted the first modern corporation law. A great number of major interstate corporate enterprises, such as Standard Oil (now Exxon), Du Pont and U.S. Steel (now USX), were incorporated in New Jersey. In 1899, a group of New York lawyers wanted to create an alternative to New Jersey incorporation should problems arise in that state. These lawyers persuaded Delaware to enact the Delaware General Corporation Law or, in short, "DGCL". The DGCL closely paralleled the then existing New Jersey statute.

In 1913, New Jersey's governor, Woodrow Wilson, in a populist and re-

forming mood, encouraged changes in New Jersey's corporate code to increase internal regulation and increase taxes. The large companies reacted quickly: within a few years, nearly all the major New Jersey corporations had migrated to Delaware. History knows Wilson as the 28th President of the United States, and a great supporter of the League of Nations. Delawareans have good reason to appreciate his achievements for one additional reason.

Delaware Strives to Maintain Its Prominence

Delaware did not repeat Wilson's mistaken foray into corporate reform. Instead, Delaware retained its law in the spirit in which it was enacted, and refined it. As a result Delaware has continued to this day as the major corporate domicile for larger American corporations. Delaware's continued success may be attributed to three essential factors: its flexible and current corporate statute; its expert judiciary whose many considered and consistent interpretations of the DGCL over the years have imbued the statute with certain and predictable meaning; and the commitment on the part of the State to promote Delaware incorporations and service to its corporate citizens.

The Statute

Delaware has maintained the DGCL as a practical and up-to-date statute. The most comprehensive revision of the law occurred in 1967, at which time the statute was given a very careful review and modernization. Most of the changes further simplified procedural requirements for filing and record keeping. Certain substantive changes made the law the most advanced in the nation. Examples of such changes were the elimination of stockholders' preemptive rights except when explicitly adopted by the stockholders, the validation of interested director transactions that do not injure the corporation, the broadening of the power of corporations to indemnify wrongfully accused directors, and the facilitation of various forms of merger transactions. Since 1967, with the exception of anti-takeover legislation and permitted exoneration by stockholders of directors for gross negligence, amendments to the DGCL have been restricted to fine tuning.

A group of skilled Delaware corporate lawyers, representing the State's major law firms, constitute a Corporation Counsel which is vigilant in keeping the DGCL current. The Council monitors existing statutes, determines evolving needs and, when required, drafts amendments to the DGCL to recommend to the State legislature. Proposed amendments are reviewed and approved by the Bar Association's Executive Committee and introduced into the Delaware legislature by a bipartisan group of State legislators. Although debate takes place and the legislature questions the Committee, the credibility of the Delaware State Bar Association is very high and the amendments are usually adopted in the form in which they are proposed.

The Expertise of the Court of Chancery

Efforts have been made in other states to copy the DGCL and, in fact, many of the DGCL's statutory provisions are available in other states. Indeed, Nevada has adopted the DGCL outright, changing only its name. What other states have not successfully duplicated, however, and what remains perhaps the most significant factor distinguishing the Delaware corporate law is its expert judiciary, which has been called upon to interpret virtually every provision of the DGCL and has done so in a careful and consistent fashion. In a common law system, the existence of consistent reliable precedent is of great importance, and most litigants in corporate cases want sound, impartial, and predictable results.

Unlike most states, Delaware retains the bifurcated court system extant in England at the time of the American Revolution. Delaware has both a law court, with jurisdiction to decide claims for money damages, and an equity court, the Court of Chancery, empowered to decide claims for equitable remedies, such as injunctions and accountings, and to decide disputes related to relationships of special trust, such as fiduciary relationships. Because directors and officers historically were considered fiduciaries for the stockholders and because many corporate cases seek the equitable remedies of injunctions or accountings, over the years a number of corporate law cases gravitated to the Court of Chancery. In addition, an increasing number of provisions of the DGCL explicitly granted enforcement jurisdiction to the Court of Chancery. From the early 1900's until today, the Court has written literally thousands of opinions interpreting the DGCL and defining the duties and obligations of directors. These are far more corporate cases than have been decided in any other state.

The Delaware Chancery Court now consists of a Chancellor and four Vice Chancellors. The judges are appointed by the Governor of the State of Delaware for twelve year terms and are confirmed by the State Senate. There is a long tradition of reappointing judges who have achieved a reputation of competence, upon the completion of their first, or second terms. Upon taking office, each judge, if not already steeped in the tradition of the Court, the DGCL, and case law interpreting it, rapidly becomes so. Delaware's court of last resort is its Supreme Court. Members of that court, too, are appointed by the Governor for twelve year terms. Of its five justices, three may be considered expert in corporation law and the remaining two are quite knowledgeable in the field. Both the Court of Chancery and the Supreme Court are experienced in deciding corporate matters and understand the national impact of their decisions.

In contrast, in other states, corporate questions go in the first instance to judges who, because of the unity of their court systems, must deal with contract, tort, and criminal law claims as well. The diversity of their dockets precludes the bench as a whole from developing the special expertise in corporate matters that is found in Delaware. These other states have a paucity of court opinions interpreting their corporate statutes, and, often, the judicial interpretations that do exist do not afford the same level of certainty and predictability to practitioners using their corporate codes. Other states also frequently have elected judges who are highly political in their outlook.

Moreover, unlike the judiciaries of larger or more populous states with more crowded dockets, Delaware courts routinely provide prompt judicial resolution of corporate disputes. The courts permit expedited treatment of many corporate cases and have developed a facility for dealing with complex corporate matters in a very short time. A great many of the hostile takeover battles during the 1980's were decided by the Delaware courts in an expedited fashion. For example, in 1988, the British publisher, Robert Maxwell, bid in an auction for the sale of Macmillan Publishing Company. When Maxwell, a victim of a corrupted auction, initially lost the bidding to Kohlberg, Kravis & Roberts ("KKR"), he filed suit in the Court of Chancery. Through its expedited procedures the Delaware court system heard and resolved the dispute in just over one

Delaware's Division of Corporations strives to accommodate fast-paced corporate transactions and is often the first to offer innovations in corporate services. The Division is the only state corporate department that puts all corporate filings on line immediately after they are filed via a computer scanner. This allows for more efficient access to and prioritizing of corporate documents. So that filings may be handled promptly, the Division is staffed from 8:00 a.m. until midnight. Corporate documents may be cleared in advance to insure that they are acceptable for filing and may be filed by facsimile. The Division also offers a "Special Service Department" that guarantees same-day or next-day service.

The Division insures that the simple incorporation process set out in the DGCL may be accomplished quickly.

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The Delaware Chancery Court now

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month. The court condemned the auction process and awarded Macmillan to Maxwell just before the KKR transaction was to close. Other major expedited cases resolved in this period include disputes related to RJR Nabisco, Revlon, Paramount/Time Inc., Unocal/Mesa Petroleum, Polaroid, and many others. Outside the takeover process, however, most Delaware corporations do not find themselves in litigation. The process of decision in the litigated cases has so refined the law that business planners may usually order their affairs to avoid law suits.

Delaware's Commitment to Serving Its Corporate Citizens

As the DGCL and the Delaware judiciary gained recognition among corporate practitioners nationwide, the State itself recognized almost from the beginning that the revenues derived from incorporation could become a vital part of Delaware's economy. The State undertook to support and promote the efficiency of incorporation. Delaware's Secretary of State developed an expert Division of Corporations to serve Delaware's corporate citizens. Delaware has also sought to promote Delaware incorporations among international businesses. To this end, the State employs representatives in Tokyo, London, and the Hague who serve as contacts for business people interested in establishing Delaware companies

The State has profited from the efforts. Since 1967, the Division's annual corporate franchise revenues have increased from about $18 million to in excess of $183 million, which represents about 16% of the state's total budget.

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The Division insures that the simple incorporation process set out in the DGCL may be accomplished quickly.

Corporations are incorporated by "incorporators", who, under the DGCL, may be natural persons, partnerships, associations, or corporations. Incorporation is accomplished by filing a certificate of incorporation, signed by the incorporator(s), with the Division of Corporations. The certificate must include, among other things, the name and address of the corporation's "registered agent". A registered agent acts as the corporation's agent in Delaware and is the only Delaware presence that a corporation is required to have. The agent is authorized by the DGCL to accept service of legal papers for the corporation. Most Delaware corporations that operate outside the State engage one of the many professional registered agents who operate in Delaware.The Corporation begins its existence on the day the certificate is filed. The incorporators may then meet to adopt bylaws, elect directors and do any other further acts to perfect the organization of the corporation.

The reasons for Delaware's preeminence in corporation law are largely institutional. In an area in which results frequently confuse and concern business people, Delaware is an island of efficiency, competence, and predictability. Of course, any institution is subject to criticism and Delaware's legislature and judiciary have received their share, some of it valid. Because the corporation law is so important to the state and its economy, Delaware heeds its critics and makes appropriate reforms. Time is the best test of an institution and, over time, Delaware's law has earned respect and emulation. Such success is not dramatic but the result of careful, conservative, long time attention.

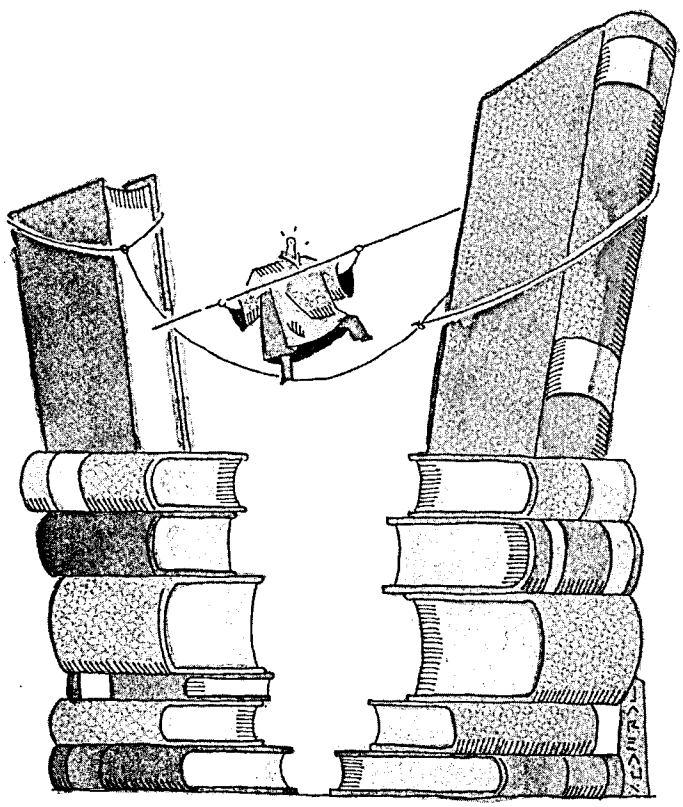
Mr. Ward is a partner and Ms. Kelly an associate in the Wilmington, Delaware office of the international law firm of Skadden, Arps, Slate, Meagher & Flom.

E. N. CARPENTER, II

Defining Your Honor's Honor

New Delaware Code of Judicial Conduct

In public life the tide of morality and ethics appears to be creeping even higher, notwithstanding the occasional scandal in prominent places, and, as time passes our public officials are held to stricter and more demanding standards. There are Codes of Ethics for legislators, new financial disclosure requirements for political executives, and elaborate and complex conflict of interest rules. All these developments and many more reflect the higher expectations of the general public. This trend has extended to judges, with some recent and dramatic developments. The most significant is the action of the American Bar Association at its Annual Meeting last August; the Association adopted a Model Code of Judicial Conduct, updating the previous Model Code prepared in the early 1970s, which was the basis of Delaware's current Rules set forth in The Delaware Judges' Code of Judicial Conduct. In over thirty tightly packed and densely worded pages the conduct requirements imposed on judges both on and off the bench are spelled out in detail.



The Model Code imposes an amazing set of restrictions on judicial activity.

Following the American Bar Association action, the Delaware Supreme Court, late in 1990, appointed a Delaware Code of Judicial Conduct Study Committee headed by Justice Randy J. Holland. The Committee includes both judges and lawyers.[1] Thus Delaware, long a leader in many branches of the law, is once more about to set an example for other States in being among the first (if not the very first) to consider the current Code in light of the new American Bar Association Model Code.

At the Delaware Judicial Conference on December 6, 1990, all of the judges of the State had an opportunity to hear a full discussion and critique of the Model Code by Francis Zemans, Executive Director of the American Judicature Society, Gerald Stern, Administrator of the State of New York Commission on Judicial Conduct, and Peter Mozer, of the ABA Commission that drafted the new Model Code. Since then the Committee has been meeting in sessions to review intensively and line-by-line the proposed changes in our existing Code.

It is somewhat surprising that Delaware on this occasion is taking the lead in studying the Model Code of Judicial Conduct, because this State has been fortunate to have a judiciary that is the envy of both lawyers and litigants from many other jurisdictions marred by judicial scandals, corruption trials of judges, and a low quality of judicial performance. Indeed, Court decisions interpreting our Judicial Code are very few indeed in Delaware, and apart from a few rather well-publicized matters involving Justices of the Peace and some ancient cases involving a couple of judges of the Municipal Court, the record in Delaware is exemplary.

The superb performance of our judiciary is a tribute to Governors of both parties who, over the years, have taken special care in making their nominations for judicial office, recognizing that their appointments will continue to reflect the

Illustration by Robin Jareaux

caliber of their performance as Governors long after they have retired from office. Credit goes, too, to our Senate, which, although its recent record has been marred by delays and petty political bickering, has generally confirmed quickly the fine appointments submitted to it over the years.

But the fact that Delaware is again ahead of other states in considering revisions to its Model Code is consistent with its legal leadership especially in the adoption of a new Delaware lawyers' Rules of professional Conduct in 1985, the constant revisions and upgrading of the Delaware General Corporation Law, and the outstanding, nationally acclaimed decisions of its Courts, particularly in corporation law.

The New Code

The new ABA Model Code is the result of intensive study and consideration following a survey conducted by the American Bar Association Standing Committee on Ethics and professional Responsibility in 1986.

In the course of its investigations the ABA was able to obtain the opinions of a number of members of the legal community, including judges, lawyers, and members of the general public. Thereafter, the results of its work were considered by the full ABA House of Delegates, were debated, and were further revised. Thus, we now have before us a Model Code, which is the product of intensive scrutiny, research, and comment by many branches of the legal profession and interested non-lawyers.

Delaware has a special reason to seek guidance from such a Model Code. Because of the small size of this jurisdiction, and - as suggested above - because of the integrity of our judiciary, it is expected that the number of decisions in Delaware interpreting our Code will continue to be relatively small. Thus, much is to be gained by decisions and interpretations of such a Code by other jurisdictions, a benefit which could not be fully realized if we did not continue to follow, at least in its most significant provisions, a Model Code.

Nevertheless, there continue to be thoughtful attorneys and judges in Delaware (and in a similar Committee set up by the United States Court of Appeals for the Third Circuit, which is the Federal Appellate Court covering Delaware, Pennsylvania, and New Jersey and the Virgin Islands) who feel we should not make any changes, since our existing Code has proved adequate. ("If it ain't broke don't fix it.") The Holland Committee will have to decide which way to go on this point in its recommendations to the Supreme Court.

A non-lawyer (and many lawyers) reading the Model Code of Judicial Conduct, and the provisions that already exist in the current Delaware Code, would be amazed at the nature and extent of the restrictions on judicial activity. A person becoming a judge in a state court system like ours gives up a very significant part of his freedom in both his public and private life in order to maintain not only the high caliber of judicial performance that is required, but to avoid any activity that might give rise to criticism, the suggestion of prejudice, or the appearance of deviation from an extremely high standard. Provisions in the existing Code, which are phrased in terms that are aspirational ("a judge should") in the new Model Code are phrased in mandatory terms ("a judge shall") and impose requirements governing not only the judge's performance of his duties ("a judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socio-economic status, against parties, witnesses, counsel or others") but also his extra-judicial activities. A judge is prohibited from appearing at a public hearing before an executive or legislative body or official except on matters concerning the law, the legal system, or the administration of justice (except when acting on his own behalf on a private matter). He is prohibited from accepting appointment to a governmental committee not involved with the law. Chief Justice Warren's service as Chairman of the Committee investigating the assassination of President Kennedy would no longer be possible under the Model Code.

A judge may not participate in the solicitation of funds for a charity. He is prohibited from being a speaker or guest of honor at a fundraising event for any type of organization. He may not accept gifts, bequests, favors or loans from anyone except under restricted circumstances. His right to receive any non-judicial compensation or reimbursement is severely limited. He must report his extra-judicial activities whenever he does receive compensation. He is largely forbidden to participate in any political activity.

Many of these restrictions apply not only to judges, but to those working under their supervision, and to candidates for appointment to a judicial position. While judges are urged not to live a monastic, isolated life, they nevertheless must conduct themselves so as to avoid any suggestion of bias or impropriety. It is hard to imagine any other governmental office-holder who is so severely limited.

Problem Areas

There will be many difficult questions to resolve before the Holland Committee concludes its investigations and submits its report. The provision of the new Model Code that has attracted the most publicity is set forth in Canon 2, Section C:

"C. A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion or national origin."

This provision, and the extensive Commentary under it making it perfectly clear that judges must resign from all-male clubs, or clubs that otherwise discriminate (doubtless including all-female clubs, too) was viewed by some as impinging on a judge's private lie, and his Constitutional right to freedom of association. Now, however, the tumult and the shouting appear to be dying down, probably in part because so many of the well-known clubs around the country that judges belong to have modified their policies and no longer discriminate. While the Section will undoubtedly continue to cause some problems in interpretation, we expect that its adoption will not cause any great stir in Delaware or elsewhere.

But there are other problems with which the Holland Committee must wrestle. For example, Canon 4 of the current Code relating to a judge's extra-judicial activities to improve the law, the legal system, and the administration of justice, and Canon 5 of the current code providing that a judge should regulate his extra-judicial activities to minimize the risk of conflict with his judicial duties (and dealing with non-legal extra-judicial activities) have been combined into a new Canon 4 in the Model Code. This aspect of the Model code has been the subject of some criticism in the literature considering the changes, and some authors have noted that the effect of this combination is to impose unnecessary restrictions on extra-judicial legal activities, and inadequate restrictions on extra-judicial non-legal activities. The Holland Committee will have to resolve this problem.

Furthermore, the language in the Model Code defining what type of money-raising activities a judge may

properly engage in have also been the subject of some severe criticism, and there is a question whether or not the provisions relating to a judge being a speaker or guest of honor at a fundraising event are adequate. The Commentary in the Model Code dealing with this same area takes a liberal approach, permitting a judge's name to appear on the letterhead of stationery used in fundraising activities, and this has evoked further criticisms by some commentators.

Of particular interest in Delaware where some members of the Judiciary participate in family businesses are the Model Code provisions that take a rather lenient approach on such activities, resulting in criticism by some commentators who feel such activity should be absolutely forbidden. the Committee will have to decide which approach is preferable, or should the revised Delaware Code seek some middle ground?

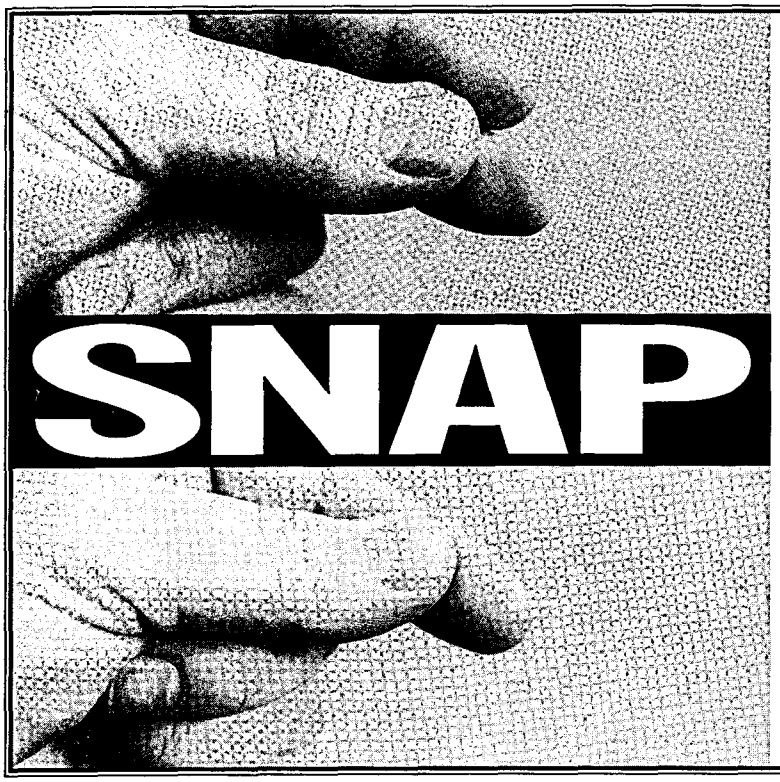
Also of special interest in Delaware is the Model Code's absolute prohibition against the practice of law by a judge. In our current Code there is no such mandatory prohibition, although Canon 5, Section F provides:

"A judge should not practice law." (Emphasis supplied.)

At the present time a part-time judge of the Municipal Court of the City of Wilmington does practice law, and there may be one or more Aldermen, who may also be governed by this Code, engaged in such practice. The Justices of the Peace, however, are prohibited by statute from any private practice of law. The Holland Committee will have to tussle with various alternatives, including the possibility of some sort of grandfather clause, to resolve this problem.

While the Holland Committee has not announced any deadline for the conclusion of its deliberations, it is expectedit will complete its work before the endof the year, and will probably hold some sort of a hearing in order to permit the Bench, the Bar and members of the public generally to comment on its proposal, and suggest further improvements. The task before the Committee is not an easy one. It has already solicited ideas and suggestions from attorneys and judges in a publication in the May, 1991 edition of In Re, the Journal of the Delaware State Bar Association. Ideas from others would also be welcome, and should be sent to Stephen D. Taylor, Administrator, Supreme Court of the State of Delaware, P. O. Box 1997, Wilmington, DE 19899.

(continued on page 25)



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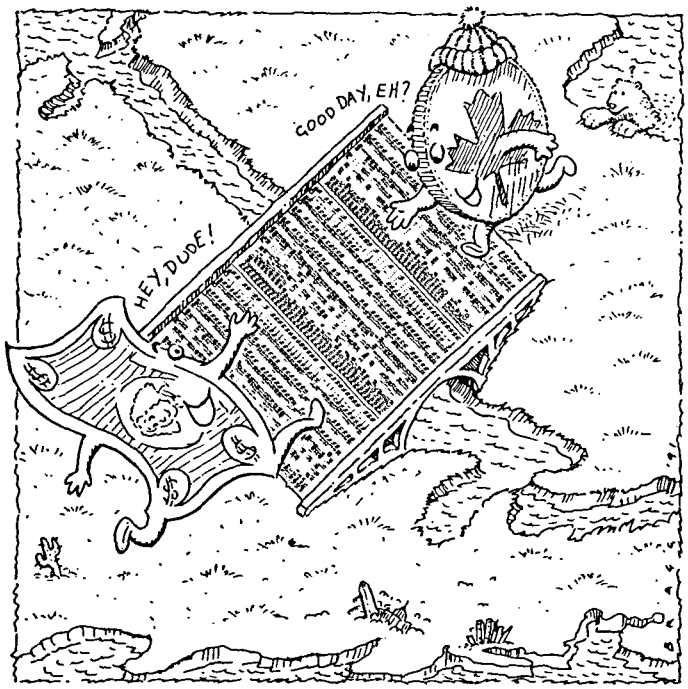
CARL J. FERNANDES & ROBERT L. SYMONDS, JR.

Streamlining the Conduct of International Finance

In which the authors describe a first step to deBalkanizing the international capital market



Crossing the investment bridge.

Any lawyer whose client has recently conducted a public stock offering simultaneously in the United States and Canada knows to costly and complicated it was to raise funds this way. It required the preparation and filing of at least two separate registration statements, one with the United States Securities and Exchange Commission ("SEC") and another with each appropriate Canadian provincial securities commission, along with any necessary pre-effective and post-effective amendments. In addition to satisfying the Blue Sky requirements of each state in which the securities were offered, the client also had to comply with the securities rules and regulations of each applicable Canadian province and territory. Now, as a result of a joint initiative by the SEC and the Canadian securities administrators, it will be possible for United States offerors or Canadian offerors seeking to raise funds in the United States and Canada simultaneously to do so with only one registration statement. The registration statement will have to satisfy the rigorous disclosure requirements of the respective regulatory commissions, but the cost and complexity of completing a cross-border offering will be significantly reduced.

On July 1, 1991 the Canadian version of the Multijurisdictional Disclosure System ("MJDS") became effective after months of deliberation by the regulatory commissions on both sides of the Canadian/United States border. MJDS is a joint initiative "to reduce duplicative regulation in cross-border offerings, issuer bids, take-over bids, business combinations and continuous disclosure and other filings." MJDS will permit United States issuers who meet specified eligibility requirements to make public offerings in Canada based primarily on disclosure documents prepared according to United States securities law. Herewith a brief overview of the Canadian version of MJDS including a discussion of oversight responsibilities, eligible issuers and offerings, and the mechanics of registering an offering under the new system.

Background

Before the adoption of MJDS, a United States issuer offering securities in Canada and the United States had to file separate disclosure documents in both countries and were subject to the scrutiny of regulators in both countries. Further complicating any such public offering in Canada was, and remains to a certain extent even today, the absence of a federal securities commission in Canada and comprehensive federal laws governing the Canadian securities markets. Securities regulation in Canada is primarily under the authority of each of Canada's ten provinces and two territories. Each province and territory has its own rules and regulations for securities transactions that take place within its

Illustration by Shokie Bragg

jurisdiction. As overseers of Canada's two principal stock exchanges, the Ontario Securities Commission ("OSC") in Toronto, Ontario and the Commission des Valeurs Mobilieres due Quebec ("CVMQ") in Montreal, Quebec, perhaps the two most influential provincial authorities, were primarily responsible for the development of MJDS in Canada.

Similar to United States securities law, Canadian securities law requires the registration of securities to be offered to the public. Any distribution of securities must be registered by filing a prospectus with the appropriate provincial authority. An issuer will normally designate one jurisdiction, usually Ontario or Quebec, and the primary jurisdiction for review purposes. An identical prospectus must be filed with each additional province in which the securities will be distributed (and in French, too, if distributed in Quebec!). Like the United States, Canada has a waiting period triggered by the filing of disclosure documents. During this period a coordinated review of documents is undertaken by the provinces where the securities will be distributed.

While an SEC review focuses primarily on the adequacy of disclosure regarding a particular offering, a review by Canadian authorities may also evaluate the merits of an offering. If a provincial securities commission believes "the offering will not be conducted with integrity or in the public interest" it has the legal authority to withhold approval. As in the United States, a final Canadian prospectus must outline the issuer's property and business as well as its capital structure. In addition, offerors of securities in Canada, like offerors in the United States, are subject to periodic disclosure requirements, and their insiders subject to reporting requirements.

Oversight of MJDS

In 1989 the OSC and the CVMQ in coordination with the SEC published for comment the original proposal for MJDS. This proposal as adopted in Canada is titled "National Policy Statement No. 45" Multijurisdictional Disclosure System ("Policy Statement"). It permits a United States issuer desiring to make a public offering in Canada to use disclosure documents prepared in accordance with United States laws with specified additional Canadian disclosure. Under the Policy Statement the SEC is primarily responsible for review of all documentation. The applicable Canadian authorities will monitor disclosure documents to insure compliance with the Policy Statement.

MJDS does not alter the authority of Canadian securities regulators in the exercise of their "public interest" jurisdiction to "halt a distribution, remove an exemption, cease trade [of] the related securities or refuse to issue a receipt for a preliminary prospectus or final prospectus." MJDS also does not alter liability provisions contained in the securities laws of any province or territory. In addition, a United States issuer who issues securities in Canada under MJDS must also comply with all applicable United States laws.

Filings made in Quebec must be in both English and French.

Eligible Issuers and Securities Under MJDS

Under the Policy Statement an issuer may distribute by prospectus eligible securities in Canada provided that:

(1) the issuer is a United States issuer;

(2) the issuer (i) has a class of securities registered pursuant to section 12(b) or 12(g) of the Securities and Exchange Act of 1934, as amended ("1934 Act"); or (ii) is required to file reports pursuant to section 15(d) of the 1934 Act;

(3) the issuer has filed with the SEC all the material required to be filed pursuant to sections 13, 14 and 15(d) of the 1934 Act for a period of at least 36 calendar months immediately preceding the filing of the preliminary prospectus with the principal Canadian province or territory;

(4) the issuer is not registered or required to be registered as an investment company under the Investment Company Act of 1940, as amended; and

(5) the issuer is not a commodity pool user.

An eligible issuer may use MJDS for distribution of four different categories of securities. The first category is non™convertible debt securities and non-convertible preferred shares that have an "Approved Rating." In order to have an "Approved Rating," the security must be rated as investment grade by C.B.R.S., Inc., Dominion Bond Rating Service Limited, Moody's Investors Service, Inc. or Standard & Poors Corporation.

The second category is debt securities and preferred shares that have an "Approved Rating" and are not convertible for at least one year after issuance. An issuer in this category also must satisfy a "substantiality requirement." The "substantiality requirement" is that:

> the equity shares of the issuer of the securities into which the offered securities are convertible have a market value and a public float of not less than US $150,000,000 and US $75,000,000, respectively, determined as of a date that is within 60 days prior to the filing of the preliminary prospectus with the principal jurisdiction.

The stated purpose of the MJDS "substantiality requirement" is to limit availability of MJDS, in certain circumstances, to only those issuers whose size is such that information about them is publicly disseminated and whose market following is significant.

The third category is "other securities." This category enables securities that do not have an "Approved Rating" to be issued using MJDS. However, MJDS imposes a greater "substantiality requirement" with respect to issuers who intend to distribute securities in this category. In particular, the market value and public float of the equity shares of such issuer must not be less than US$300,000,000 and US$75,000,000, respectively.

The fourth category is certain rights to acquire securities of the issuer. For a rights offering the issuer must have a class of securities listed on either the New York Stock Exchange, the American Stock Exchange or quoted on the NASDAQ National Market System for 12 months prior to the filing of a prospectus. Moreover, any rights offering is subject to certain limitations as outlines in the Policy Statement. Rights offerings are subject to the following limitations:

(a) the rights must be exercisable immediately upon issuance;

(b) subject to (c) below, the rights issued to residents of Canada must have the same terms and conditions as the rights issued to residents of the United States; and

(c) beneficial ownership of rights issued to a resident of Canada may not be transferable to a resident of Canada (other than residents to whom rights of the same issue were granted), provided that (i) the securities issuable upon exercise of the rights may be so transferable,

and (ii) this limitation shall not restrict the transfer of rights on a securities exchange or inter-dealer quotation system in Canada.

If a United States issuer or its proposed offering does not meet the requirements outlined above, it may be eligible to offer certain guaranteed issues if it meets additional requirements set forth in the Policy Statement. The Policy Statement also specifies procedures for offering securities under Rule 415 (dealing with shelf offerings) and Rule 430A (with respect to the omission of pricing information at the time a registration is declared effective) of the Securities Act of 1933, as amended ("1933 Act").

MJDS may not be used for offerings of derivative securities such as stock index or currency warrants; however, it may be used for derivative securities where the issuer of the underlying securities to which the warrants, options, rights or convertible securities relate is eligible under the Policy Statement to distribute the underlying securities.

Making an Offering Under MJDS

If an issuer and the securities to be issued meet the eligibility requirements of the Policy Statement, the initial step in the registration process is to prepare a registration statement for filing with the SEC. The issuer is also required to prepare for filing a related preliminary prospectus and/or a prospectus, and any amendments or supplements thereto, according to United States disclosure requirements.

An issuer may have either a separate Canadian prospectus or a wrap-around Canadian prospectus that accompanies the prospectus filed with the SEC. A United States issuer is required to prepare a preliminary prospectus for use in Canada even if one is not prepared for use in the United States. If an offer is also made in the united States, the Policy Statement requires specific registration and disclosure documents to be filed with the principal Canadian jurisdiction as well as other appropriate regulatory authorities in Canada. Furthermore, filings made in Quebec must be in both English and French. If an offering is made only in Canada, all preliminary prospectuses, prospectuses and any amendments or supplements thereto are required to be "prepared as if the offering was also going to be made in the United States." In addition, any Canadian securities law that applies to advertising and the making of representations or undertakings with respect to securities offerings in Canada also is applicable to MJDS offerings.

The prospectus (including any preliminary prospectus) used in Canada must contain additional legends and disclosure specified by the Policy Statement, including a statement to the effect that the offering is being made under MJDS. The Policy Statement also sets forth specific statements that must be included in each issuer and underwriter certificate, as well as specific certificate requirements, for offerings under Rules 415 and 430A of the 1933 Act.

The prospectus also must include a reconciliation of the issuer's financial statements to either Canadian GAAP or International Accounting Standards (with some minor exceptions). However, according to a recent article in Corporate Financing Week, regulators are seriously considering eliminating even this reconciliation requirement. As one Canadian official has stated, "we know that detail will kill the incentive for United States companies to offer here."

A Canadian (including any preliminary prospectus) is not required to contain disclosure that is relevant solely to a United States issuance. Under the Policy Statement, disclosure that may be omitted includes, without limitation:

(i) any "red herring" legend required by United States law;

(ii) any legend regarding approval or disapproval by the SEC;

(iii) any discussion of United States tax considerations other than those material to Canadian purchasers; and (iv) the names of any United States underwriters not acting as underwriters in Canada or a description of the United States plan of distribution, except to the extent necessary to describe facts material to the Canadian offering.

A United States issuer at the time of filing a preliminary prospectus under MJDS must select a principal Canadian jurisdiction and inform the appropriate regulatory authorities. If the chosen jurisdiction does not agree to act as the principal jurisdiction, the issuer must select another jurisdiction willing to act as such. In fact, according to the Policy Statement, the authorities of New Brunswick, Prince Edward Island, Newfoundland, Yukon Territory and the Northwest Territories have indicated that they will not agree to act as principal jurisdictions. A United States issuer must also inform the SEC of the principal jurisdiction it has selected unless the offering is made only in Canada.

The advantages of MJDS are: - Provides clear procedures for registering a cross-border offering.- The offering procedure is simplified.

- The costs of preparation and printing are reduced by coordinating the SEC and Canadian filings.

- The time needed to initiate and complete an offering is shortened and this should reduce legal fees.

The disadvantages are: - The use of MJDS is limited in some cases to large companies.

- It does not address the needs of small issuers looking to raise funds, i.e. private offerings.

These are by no means serious draw backs, especially in a program in the early stages of development. We may confidently expect that experience under the new scheme will lead to refinements and changes conducive to more efficiently raising capital in a multinational setting.

Carl J. Fernandes and Robert Symonds practice with the Wilmington firm of Morris, James, Hitchens & Williams.

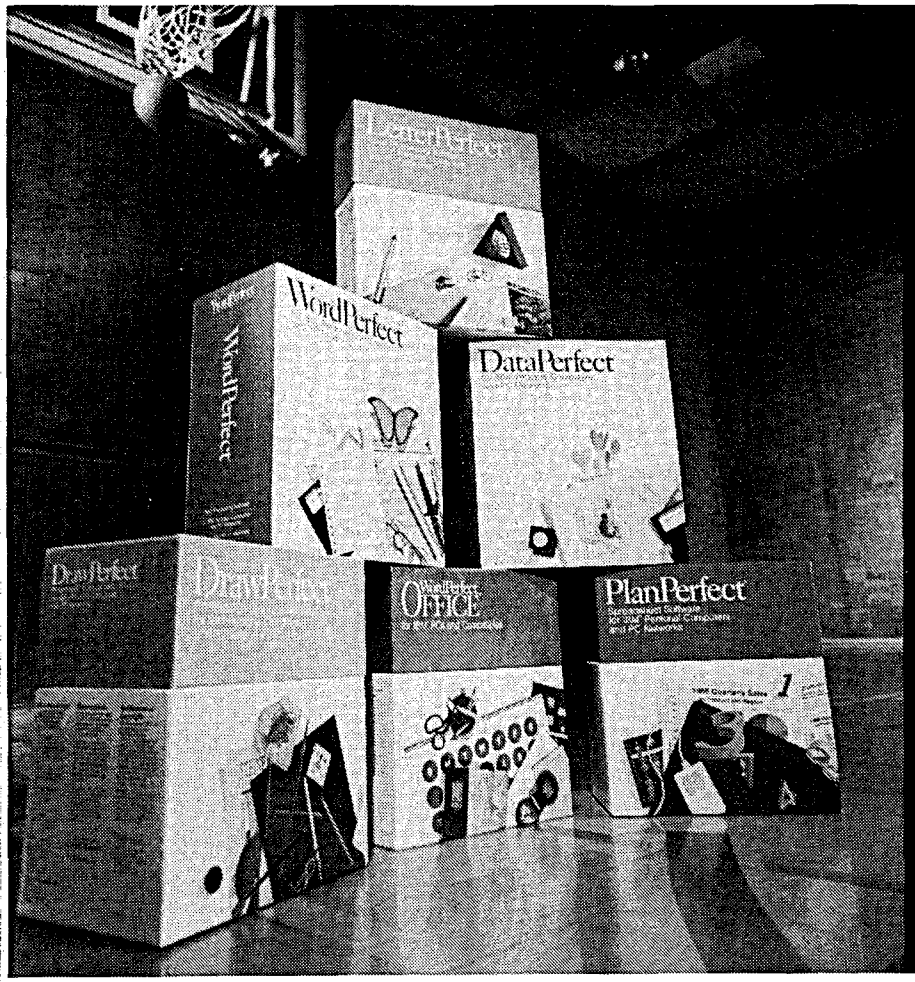
CONDUCT

continued from page 21

Edmund N. Carpenter, II is a member of the Bar of the State of Delaware and also a member of the Delaware Code of Judicial Conduct Study Committee. The views expressed in this article are his own views, and do not necessarily represent the views of any other member of the Committee.

(FOOTNOTE)

1. The Committee members are: Hon. Randy J. Holland (Chrmn.), Hon. William Duffy, Hon. Jack B. Jacobs, Hon. Bernard Balick, Hon. Battle R. Robinson, Hon. William F. Richardson, E. N. Carpenter, II, Arthur G. Connolly, Jr., Howard M. Handelman, and Rodman Ward, Jr.



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GERALD A. HAPKA

The Montreal Protocol

A Review of Global Environmental Action

A rosy picture of the almost perfect chemical, non-toxic to humans and animals, chemically stable, versitile, and inexpensive was clouded by the hypothesis that it posed a risk to the environment.

Transnational and transgenerational issues require a global forum for resolution. The approaches undertaken by U.N.E.P. (United Nations Environment Program) to address ozone depletion are suitable for use in designing future global programs. Ozone depletion is particularly suited to resolution by global consensus since it affects every country in the world and will require creative policies and cooperation between developed and developing countries.

It is calculated that as little as one percent continued long term emissions of fully halogenated chlorofluorocarbons could prevent the atmosphere from returning to the state that existed before the appearance of the Antarctic Ozone Hole. (The Antarctic Ozone Hole is a shorthand term for a condition under which stratospheric ozone over Antarctica has been severely reduced as the result of chlorine formed from the release of man-made compounds.) Modifying the production and use of materials that affect stratospheric ozone will continue to be troublesome, and policies and programs to ensure global compliance with control measures will require a delicate balancing of interests between developed and less developed countries in fairness to all.

Uses of Chlorofluorocarbons (CFCs)

CFCs are ideal refrigerant gases. They are non-toxic and inert. Therefore they do not decompose in use or corrode refrigerators or other appliances. CFCs are the materials of choice for refrigeration and air conditioning. Less well known to the public is their role in electronics. One CFC (CFC 113) is particularly suited for critical cleaning during electronics manufacture because it has great wetting properties, it doesn't bead up like water, and it can get into all the nicks and crannies on printed circuit boards to clean without harming surfaces. The evolution of CFCs as a solvent for cleaning in the electronics industry has been important to increased reliability and miniaturization. This translates into more reliable electronics for such important needs such as planes and cars, the ubiquitous computer, consumer electronics, and much more.

Ozone and the Depletion Theory

This rosy picture of the almost perfect chemical, non-toxic to humans and animals, chemically stable, versatile, and inexpensive was clouded when, in 1974, Dr. Sherwood Rowland and Mario Molina published their hypothesis that the very properties that made CFCs valuable posed a risk to the environment because of their potential to deplete stratospheric ozone.

Ozone is a trace gas present in the atmosphere. It is found in greater proportion in the stratosphere than at any other altitude. Although that proportion only amounts to a few parts of ozone per million parts of air, even that tiny amount is vital for life on earth, because ozone absorbs ultraviolet (UV) radiation at a wavelength (UVb) that is harmful to humans and ecosystems. UVb exposure in humans in small amounts is necessary to allow the body to manufacture vitamin D. In excessive amounts it causes sunburn and has been associated with the development of skin cancer. Significant increases in UVb light could also have adverse effects on plants and animals.

During the years since the ozone depletion theory was published there have been ebbs and tides in computer model calculations of possible future depletion of the ozone layer (known as steady state conditions) as scientific understanding of the chemistry and meteorology of the atmosphere advanced and as future use scenarios were postulated.

In view of the lack of global consen-

sus surrounding the need for regulation it was essential to develop a reliable predictive capability for determining the possible future effects of CFCs. Once a CFC is released into the atmosphere it remains there for about 100 years. If policies for controlling the emission of CFCs were not developed until after actual harm to plants or animals, the effects could persist for decades. Thus, one lesson learned from the ozone depletion issue is that when society is dealing with a global and intergenerational concern it must develop, in parallel, the capability to define the state of the science, to measure and test theory with hard evidence, and to predict likely future outcomes resulting from man's activity. Only when there is confidence in these data will a scientific consensus be available to lawmakers, diplomats, and policy analysts.

One observation that significantly advanced knowledge about the effect of chlorine on stratospheric ozone occurred in 1985 when scientists from Great Britain published an article reporting substantial ozone decreases over Antarctica during the Antarctic spring. They observed that the Antarctic depletion, which is popularly called the Antarctic Ozone Hole, had first occurred in 1979 and had occurred every spring in the interim.

After several years of study, followed by a meeting of a panel of over 100 of the world's top atmospheric scientists known as the "Ozone Trends Panel", it was concluded:

> Antarctic Ozone Hole: the weight of scientific evidence strongly indicates that chlorinated (largely man-made) and brominated chemicals are primarily responsible for the recently discovered substantial decreases in stratospheric ozone over Antarctica in the springtime.

This information has been used by policy makers at the national and international level to determine the future course of action.

International Agreements

The first international action important to the future of global response to environmental issues was the formation by the United Nations, of the U.N.E.P. in 1973. In 1977 the U.N.E.P. formed the Coordinating Committee on the Ozone Layer, which provided a mechanism for scientists to present timely scientific assessments to the policymakers. In 1976 the U.S., the U.K. and France entered into a regional agreement to monitor the stratosphere, which provided for the exchange of data and for the study of the practicality of initiating additional cooperative research.

The Vienna Convention

The first global treaty to deal with ozone depletion was the Vienna Convention for the Protection of the Ozone Layer, signed March 22, 1985. It established a framework for international cooperation in developing scientific information through research and determining what adverse effects have resulted or were likely to result from human activities that modify the ozone layer. The treaty established a formal commitment to cooperate in developing information needed to make an informed judgment on whether to take steps to control man's activity on a global scale. The treaty also established a procedure to adopt regulatory protocols if regulation of human activity was found to be needed. Acceptance of a treaty obligation to support research to determine man's impact on the ozone layer developed an approach to international environmental decision making that should stand as a model for the future. As of March 1990 sixty one countries have ratified the Vienna Convention.

The Montreal Protocol

the Montreal Protocol is the first environmental treaty calling for regulation of commerce to deal with potential harm to the environment. It was generally agreed that CFCs had not caused environmental harm but there was concern about their future impact on the ozone layer. At the time the treaty was negotiated it was known that the use of CFCs was growing and calculations indicated that continued growth in CFC emissions could lead to appreciable ozone depletion. The Parties to the Protocol had been discussing control measures since the adoption of the Vienna Convention in 1985 and decided that it would be prudent in view of the potential CFC impact on the ozone layer to restrict their consumption and production.

Negotiation of the protocol was extensive and often heated. Some countries felt no regulation was needed. Others believed a simple freeze would be protective. Negotiators at the State Department, led by Ambassador Benedick, and at EPA were insistent however, that significant reductions in emissions should be adopted. The Nordic countries also supported this approach. The environmental community argued strongly that such control measures should be a total phase-out of all CFCs. U.S. industry supported controls on growth of certain CFCs until the science was cleared up. Ultimately, a compromise was reached, which regulated large volume CFCs and halons, which are fire extinguishing compounds of unique value. The Protocol includes specific CFCs and halons as Controlled Substances. The parties agreed that the consumption and production of the Controlled Substances should initially be frozen and gradually reduced by half. To induce less developed countries, called Article 5 countries, to agree to the regulation of controlled Substances they were given a grace period of ten years for compliance with the protocol.

Initial Control Measures

The initial protocol provides that as of July 1, 1989, the calculated annual consumption of CFCs could not exceed the 1986 level. On July 1, 1993, the allowed consumption of CFCs drops to eighty percent of 1986 levels and in July 1998 the allowed consumption level falls to fifty per cent. Halons were also addressed but at a less stringent pace. The Protocol defines Consumption as production of controlled substances plus imports minus exports. The U.S. implemented this regime in a rule promulgated by EPA, allocating production and importation rights in accordance with a party's 1986 importation or production. Because of increased demand in the U.S. for CFCs during this period, the consumption freeze, in fact, resulted in about a 20% reduction in domestic production for the year beginning July, 1989.

Assessment and Review of Control Measures

One important feature of the protocol was the inclusion of a review and assessment mechanism. The Protocol provides that beginning in 1990 and at least every four years thereafter, the parties are to assess the effectiveness of the control measures in light of scientific, environmental, technical, and economic information. This process has been undertaken and the 1990 review has been completed.

Computer predictions of the initial Protocol terms indicated that calculated future ozone depletion would be prevented. Scientific information developed after 1987 predicted that more stringent controls were needed, and the Protocol has been changed in response to these data to provide that all fully halogenated CFC production be banned by about the year 2000 and that additional compounds be included in the protocol to assure that chlorine levels in the atmosphere will be returned to the pre-"Hole" levels.

The parties to the Protocol met in

June of 1990 to consider further controls on halons, totally phasing out production and consumption of the controlled CFCs by the year 2000 or before, and adding additional fully halogenated CFCs, carbon tetrachloride, methyl chloroform and hydrochlorofluorocarbons (HCFCs) to the list of controlled substances. The changes adopted in 1990 confirmed the effectiveness of the assessment process established under the Vienna Convention and the Protocol to adapt their terms to changing scientific knowledge.

Under Article 2, Paragraph 9 of the Protocol adjustments binding on all parties can be adopted by a two-thirds vote of parties presenting 50% of global production. Adjustments to the protocol are adjustments to the ozone depleting potentials specified in Annex A and further adjustments and reductions of production or consumption of the controlled substances.

As can be seen from the above description, changes in the Protocol that were adopted at the June 1990 meeting of the Parties go beyond the protocol definition of "Adjustments". To assure legitimacy each proposed change is reviewed by a group of legal experts to determine the appropriate form for adoption. In addition a group known as the Mechanical Working Group reviews the proposed changes to determine how to integrate them into the Protocol to avoid inconsistencies. As can be imagined, with the scope of coverage expanding and the stringency of control measures being increased, all of the economies of the world are potentially affected.

One concern of the negotiators is the manner in which changes in the protocol will be adopted. As indicated above, there are many permutations that can be considered. In rough terms, some of the compounds such as halons are unique and essential to preserve life and property from fire. For example, during one of the early debates over how the protocol provisions regarding halons should be strengthened the delegate from the U.S.S.R. pointed out that a halon system protected the crew of nuclear submarines from fire damage and was the only extinguishant that would not harm the crew when used to put out a fire. Loss of a nuclear submarine near a coastline could pose risk to the inhabitants.

As the reader can see from the above example, a change that affects one country's use of a Controlled Substance may also affect another. Many competing interests will need to be balanced. If each change were to be voted on individually it would be impossible to police compliance around the globe and, as additional countries join as parties, it would be impossible to ensure compliance and fairness. Thus, the parties developed a limited number of packages for adoption.

The challenge in addressing ozone depletion and other global environmental issues will be to develop procedures ensuring that international agreements are both flexible and enforceable. The first test of this challenge has been faced by the parties to the Montreal Protocol.

The Developing Countries

The Controlled Substances play an important role in the life style of developed countries and although use of them is low in those countries, it is growing rapidly. The definition of a developing country for purposes of the Montreal Protocol is one whose per capita annual consumption is less than 0.3 kilograms of CFCs. By way of comparison, the U.S. annual consumption was about 3.0 kilograms in 1986.

To provide for sustainable economic growth in developing countries and to ensure their consent to controls on their consumption of CFCs, special concessions were included in the Protocol.

So long as per capita annual consumption of CFCs is below 0.3 kg. a developing country would not need to curtail its consumption and would be given an additional ten years to come into compliance. In addition the developed countries have agreed to give access to alternative substances and technology so that the developing economies can continue to grow without additional CFC consumption. This is an especially important provision, because complete global compliance with the Protocol is essential to restore pre-Antarctic hole chlorine conditions. If adequate supplies of refrigeration and other affected technologies are not available, a developing country could forego participation in the Protocol and could build new CFC production facilities. In fact, several countries without CFC production capacity and low consumption have begun or constructed new plants for current and future needs. According to calculations made by U.N.E.P.'s science advisors, a total phase out of CFCs will be necessary for a speedy return to atmospheric conditions predating the Antarctic ozone hole. Even a five percent non-compliance will prevent a return to those desirable conditions.

The major producing countries have taken the first and easiest step toward the phase out of the CFCs. This is to limit consumption during 1989 and beyond to 1986 consumption levels. In some areas, such as in the EEC in which about half of the CFCs were used as aerosol propellants, reductions in CFC use have dropped by about 50% since the Protocol was signed. In the U.S. aerosol propellant use of CFCs was de minimis and cutbacks have occurred primarily in the cleaning and foam blowing segments.

Recognizing cultural differences in usage and the natural pressure to continue commerce in these chemicals through imports and exports as domestic markets decline, the parties have built trade provisions into the Protocol. Imports from non-parties were banned as of January 1990. Parties may not export to non-parties after January 1, 1993. Future scheduled regulations will prohibit imports of products containing and products made with Controlled Substances. For example, this could mean a ban on import of an automobile with a CFC air conditioner if the auto or air conditioner were made in a country not a party to the Protocol. This could also result in a ban of import of computer chips from non-parties or other electronics normally made, using CFCs as cleaning agents. Discussions are underway to identify products containing CFCs. Lists of these products will be prepared for the guidance of the parties. These products will presumptively be barred from import to parties from non-parties. Thus, if your client does business with a country such as Taiwan, which cannot be a party, you should review developments in this area so that future business will not be jeopardized.

In addition, as the protocol is changed it will be important to distinguish adjustments from amendments. The status of a change requires answers to important legal and practical questions in determining the status of a country. Regulating trade between parties and barring trade with non-parties will become exceedingly complex. It will also be difficult to police and enforce. In the 1990 negotiations many new compounds were added to the Protocol. Thus, lawyers, businessmen, and diplomats will need to pay particular attention to the trade issues to be faced over the remainder of this decade.

Amendments to the protocol are governed not by the provisions of the protocol but by the Vienna Convention of March 1989, which provides that amendments to a protocol must be adopted by either three-fourths of the parties to the Convention or two-thirds of the parties to

the protocol that is being amended. The difference between an adjustment to an annex to the Protocol and an amendment to the convention is that adjustments are binding on all parties. Amendments to a protocol are binding only on parties who have ratified them.

The June 1990 meeting of the parties was a true test of the commitment of the countries of the world to preserve the integrity of the Protocol and establish a global standard to protect stratospheric ozone.

The parties passed the test with flying colors. The following is a summary of the principal changes that were made in the provisions of the Protocol:

All fully halogenated CFCs will be included within the scope of the Protocol — not only the five originally covered.

The reductions in consumption of CFCs is speeded and a total phaseout will occur by 1-1-2000. (the LDCs will have an additional period of time before they are required to phase out consumption.)

Halons will be phased out by the year 2000, except for those uses the parties find are essential and for which no adequate substitute is known. (The parties will meet in1993 to agree on essential use exemptions.)

Methyl chloroform is added to the list of Controlled Substances and will be phased out by 2005.

Carbon Tetrachloride is added to the list of Controlled Substances and will be phased out by the year 2000.

The Parties agreed to a non-binding resolution, which calls for a phase out of "Transition Substances" no later than the year 2040, but by 2020 if possible. The Transition Substances are HCFCs, which have calculable but very low ozone depletion potentials. As recently as 1988, EPA indicated that the HCFC 22 was appropriately excluded from coverage [in the regulations and the Protocol] for several reasons.

A fund established for the purpose of providing financial and technical cooperation under which Article 5 Countries could obtain assistance in determining how to undertake a transition away from production and use of Controlled Substances. This fund will be contributed by the developed countries, and will have $240 million available for disbursement.

The parties agreed that the Article 5 Countries would receive financial aid that would compensate them for their incremental costs of adopting technologies for production and use of alternatives to Controlled Substances.

The combination of the more aggressive phase-out schedules for the Controlled Substances and inclusion of additional substances coupled with agreement by the developed countries to provide technology and financial assistance to the LDCs satisfied the political and social needs of all parties. As a result, the above changes were accepted by a consensus of the parties present and voting and it was not necessary to revert to the voting procedures established in the treaties.

Global Compliance

If CFC use is continued at a level of even 5% of current levels the atmosphere will not return to pre-Hole conditions. The parties to the Protocol recognized that it would be necessary to provide developing countries with an incentive to participate and that they would need technical assistance to adopt non ozone depleting technologies. Thus, it was necessary for the parties to develop an approach that could induce developing countries to join. The latter argued forcefully that they should be given alternative technology on a non commercial basis and that the developed countries should provide sufficient financial aid to eliminate any incremental costs resulting from adoption of alternative technology. These proposals triggered vigorous debate on how to meet the needs of developing countries. The provision of technology on a non commercial basis could in effect abrogate the intellectual property laws in the donor country. In addition, donation of the technology and financial support of an enterprise in a developing country could significantly reduce the incentive to develop new technologies. Under the Protocol, developing countries will be forced to forego the long term use of inexpensive and proven technologies and materials for the sake of environmental enhancement. Accordingly, they require some inducement to forego continued growth in CFC use that would lead to construction of additional CFC plants. These tensions were resolved in the establishment of the fund to assist in new technologies and by agreement on the approach to the transfer of technology.

The implementing of the new Protocol provisions will require creative legal, economic, technological, and policy guidance to bring about non CFC technologies throughout the world.

The revised Protocol has set the stage for a rapid transition from the Controlled Substances and eventual elimination of the transition substances that are needed in the near term, but which also contain chlorine and must be phased out. It is now up to the individual governments to adopt policies that will ensure the earliest possible transition to more acceptable technologies.

The U.S. industry has estimated that in the year 2000 about 32% of CFC demand will be satisfied by non fluorocarbon technologies, about 29% will be satisfied by conservation and recycle of existing CFCs, that 9% of demand will be satisfied by HFCs (which have no ozone depletion potential) and that 30% of demand can only be satisfied by HCFCs. Few HCFCs are presently in commercial manufacture. Policies must be adopted therefore to encourage investment in facilities to produce and use these materials, if CFCs are to be phased out. No other technology has been identified that can fill the refrigeration and air conditioning needs of the U.S. in the time established under the Montreal Protocol. It was this recognition by the parties at the London meeting which led to establishment of 2040 as the target year for the phaseout of HCFCs.

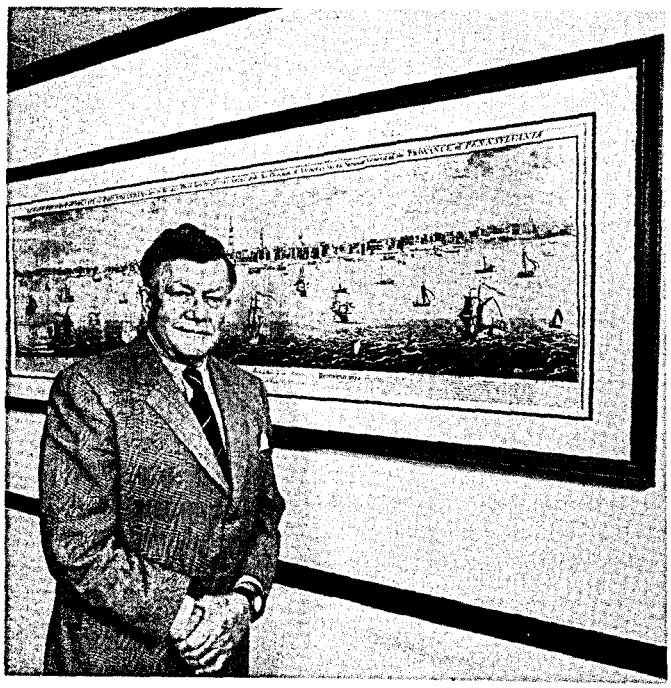
As can be seen from the above, the Montreal Protocol is a landmark document that has set the stage for the first global environmental program. The rapidly advancing science has changed the rules of the game and made the job of obtaining global compliance with the Protocol extremely difficult. The challenge will be to develop laws and regulations to insure that the Protocol as amended is an economic and environmental step forward.

(This article is an abridgement of a scholarly study with extensive citations to pertinent authority. The Editors will be glad to make copies of the full manuscript available to those who wish to pursue this subject in greater detail.)

The author, Corporate Counsel in the Environment Divison of the DuPont legal department, holds both law and pharmacy degrees from the University of Wisconsin. He belongs to the D.C. Bar and the Virginia Bar.

WILLIAM PRICKETT

Scull & Heap



In which author Prickett describes - among other things - an 18th century device for boosting international trade.

From the title of this small effort, some readers might be licking their literary chops thinking that they have stumbled, however implausibly, on a pirate story along the lines of Howard Pyle's "Book of Pirates" that delighted us so much in the far off days of our youth. Perhaps some readers may think from the title that this is a medical treatise or horror story. On the other hand, a literary reader might think that this is some sort of a scholarly dissertation on the Dickens character "Uriah Heap". Wrong, wrong - all dead wrong. None of the above is even vaguely close. Furthermore, if the reader backtracks and notes the spelling of the title (unless one thinks that this article starts with typographical errors), the careful reader, if there are any such left, probably can figure out this slow starting little essay refers to none of the above.

Rather, this is an account based on my recollections about a giant black and white print that Nicholas Scull, who was the King's Surveyor General for the Commonwealth of Pennsylvania in 1753, and his colleague, George Heap, who was an engraver, drew, published, and sold. In a word, they drew a dramatic view of the City of Philadelphia from the Jersey shore in 1753. This is a story about one of the few copies of that print that is still left in the whole wide world. Now, hold on: do not throw this little essay in the trash can or into the gutter and turn the T.V. on to watch "Wheel of Fortune" and Vanna White's captivating legs. This account has some tidbits that are guaranteed to tickle the fancy of at least readers with some cultural pretensions. For example, it includes how a well known New York art gallery was outsmarted or outnegotiated by a country lawyer from Delaware (my father). It also includes an account of how a high official of the Internal Revenue Service lost his nerve, playing "chicken", with another Delaware lawyer (guess who?). And, it has a smashing conclusion: one copy of the print in question ended up where it certainly belongs —

But, let's start with a few background facts. First, as all reasonably educated Americans know, in 1753, Philadelphia was the second largest city in the British Empire. It was, of course, absolutely owned and controlled by Thomas and Richard Penn, the proprietors of Pennsylvania. In order to market Philadelphia and the Pennsylvania Commonwealth, the Penns retained Messrs. Scull and Heap to make a large print of their handsome City. Thus, Scull and Heap rowed themselves over to the Jersey shore across from "Philly" (as those from Camden were apt even then to call the City of Brotherly Love). The print shows basically all of what has now been so beautifully restored in the Society Hill section of Philadelphia today. In the foreground, sailing on the Delaware River, are a plethora of little boats as well as sea-going ships. The print itself shows the skyline of Philadelphia as it existed in Ben Franklin's youth: its church steeples, houses, warehouses, docks, and other commercial establishments. Implausibly, there is a rather large

Photograph by Carl Kleinschmidt

windmill built right out in the river. Why?, one might well ask (only, well, it's sort of too late for that sort of question, isn't it?). Below the print there is a written inscription describing (and "plugging") the land, industry, and trade of the City of Philadelphia.

The Scull and Heap print is about 7 feet long and 2 feet high. Apparently, it was widely distributed in England, Scotland, and Ireland to attract and recruit colonists to the New World. However, because of its immense size, most copies of the Scull and Heap print were chopped up or used to wrap fish. Very few of these "elephant-size" prints survived to the present. At the time our account really gets underway, copies were scarce indeed — there were only seven or eight left in the whole wide world. Thus, they were and are a real rarity — that is, provided you were interested in such graphic monsters.

Of course, I, as a feckless young lawyer, knew absolutely nothing at all of the Pennsylvania history that I now so urbanely recount. Certainly, I had never heard of Scull or Heap or knew that the City of Brotherly Love was the second biggest city in the British Empire. Indeed, having graduated from Princeton and Harvard Law School, I doubt that I knew that the Commonwealth of Pennsylvania was part of the British Empire at the time: ignorance was youthful bliss.

However, one fine day my father and I were walking back from a deposition in New York. I had watched my father tear a hapless witness apart. Suddenly my father stopped in front of the window of a large well known art gallery on Fifth Avenue. He grabbed my arm. I thought that something dramatic had happened, like a robbery or a lady taking off all of her clothes. (Something like that would have been of some interest to me at that time, and indeed still might.) Nothing of the kind: instead, my father pointed to a large black and white "picture" displayed on an easel in the window. He said to me, "My God, that's the Scull and Heap print!" I replied, sort of lackadaisically, "Oh, really?", thinking quite seriously about just how good a steely cold martini would taste if I could just get my father on back to the Princeton Club.

But my father took me even more firmly by the arm and quick-stepped me on into the gallery. A dignified young man in a morning coat and pinstripe trousers minced up to us. He lazily inquired in a snotty tone of voice as to whether he could be of service, clearly implying by his manner and his tone that he could not possibly conceive how two such country bumpkins could have any possible interest in anything in his high-tone gallery. My father was not put off at all by the young man's airs. Instead, he came right to the point, saying "Young man, I see you have a copy of the Scull & Heap print in the window."

"Yes", the young clerk replied somewhat haughtily. "It's a beautiful copy. It's one of the few left." My father inquired the price. The clerk was somewhat surprised at this direct approach and replied that it was "X"-thousand dollars. My father shook his head and said, "Young man, I am prepared to offer this gallery one-half of the price in cash here today." The young man looked as shocked as if a dish of cold water had been thrown in his smug little puss and replied somewhat indignantly, "Our gallery doesn't deal that way."

My father replied, "Nonsense, young man! Get me your manager." The little snit wiggled away. Presently the aristocratic-looking manager came on the scene: he spoke with a distinctly English accent, though I now suspect he probably was born and raised in Kansas or some place thereabout. My father repeated his offer to this somewhat more urbane art dealer. Clearly, he was interested in making a sale but he told my father that the print was for sale but only at the stated price. He said that the fact that my father recognized the print meant that my father clearly understood that it was only one of nine or ten Scull & Heap prints left in the world, that it was a great bargain at that price, and that surely a "real collector" would come in and snap it up. My father replied, "Ah, well, but it's been in your window for some time, hasn't it? No one has snapped it up yet, have they?" The floor manager made his first mistake — he paused ever so slightly but then grudgingly admitted that that was true. My father turned to go and said, "Well, is my offer refused?" the dealer made a second mistake — he hesitated again but then reluctantly affirmed that the asking price was firm.

With that, my father turned on his heel and, motioning me, walked firmly on out. I was mortified. I told my father when I got him safely out on the street that I was ashamed to be with him. I pointed out that he had haggled like a veritable Armenian rug merchant in a bazaar. My father told me firmly that I was a young idiot. He said that anybody who knows what he's doing, especially in the art world, always negotiates. "If you do not do so, the person on the other side would take you for a fool or an American or both. For goodness sake, can't you think of anything beyond your next martini?" (Just how did he know that was what I had been thinking about!) "Why not pay attention. Perhaps you just might learn a little bit about history and the art of successful negotiation!"

My father then said that he would bet me a week of my pay that he would end up with the print. I had long since learned never, never to bet with my father. Besides, I certainly needed every cent and more of the princely sum of $45.00 a week that my father paid me for six and a half days of law work that I did for him.

Well, the following week, my father was back in New York. He told me on his return that he had gone by the gallery and saw that the Scull & Heap print was no longer in the window. However, he had gone in and had spoken directly to the manager. My father said he had begun by remarking that the print was no longer in the window. He then got the dealer to make a third mistake: he admitted that the print had not been sold but had been put back into inventory. My father then said that, while he had been willing to offer half of the stated price the week before, he was now cutting his price by an additional $250.00. The manager looked pained: again, the floor manager hesitated but reluctantly declined my father's lowered offer.

Several weeks later, my father and I were in New York. We were there for depositions but I knew my father well enough to know that he was hot on the trail of the Scull & Heap print and that was one of the real purposes of our trip to New York. After I had cross-examined an evasive witness under the careful guidance of my father, we trotted briskly on over to the gallery. My father told me on the way that he would be able to tell immediately whether he was going to get the print by the manner in which we were greeted. This time, when we came on into the gallery, we were greeted amiably by the original clerk. He now came forward, exclaiming with an ingratiating smile, "Oh, Messrs. Prickett, Pere et fils, how nice to see you again." We were welcomed equally effusively by the aristocratic manager. My father promptly got down to business as any astute Armenian rug merchant would. Thus, my father said, "I am tempted at this point to cut another $250.00 from my

did spring later for a martini or two.) Of course, killjoy that I was, I tried to temper his keen pleasure by pointing out to him that he had taken quite a risk: after all, somebody else could have come along and bought the print right out from under his fine Armenian nose. Then, where would he have been? First, my father calmly pointed out that he was used to taking risks. Second, he said that if he had not gotten the print, he would have been no worse off for having tried. Finally, he put me firmly in my place, saying that the print was a bargain, even at the original price: from the outset he was determined to have the print and would have paid the full original price or even a tad more - "So, there, Mr. Smarty Pants!" (Of course, that was the reason he was so ready to make a bet that he would end up with the print.) He then presented the print to me as a paternal

Nor were most of the attorneys in our office wildly concerned about the beauty or historical niceties of the Scull & Heap print of Philadelphia in 1753.

Eventually my father died. Of course, father had made me insure "my" print at double the original price that the gallery had demanded. (Fear Greeks bearing gifts.) The insurance premium kept going up year by year since at least the insurance company understood the value of the Scull & Heap print. Indeed, the premium soaked up a good deal of my pay. I never disclosed the mounting value of the print simply because I was afraid some burglar would get wind of the value of this artistic gem hanging in our office and, instead of taking the typewriters, he might make off with the Scull & Heap print. (That scenario now seems highly implausible as I think back on the burglars who plied their trade in

there were damned few that ever came into our offices). In short, I took the original out of the frame and had two copies made by a commercial copying firm. I gave one to Primitive Hall out in the Unionville hunting country since it seemed not entirely unlikely that there might have been one hanging there before it was cut up and used for scratch paper or something like that. I, of course, retained the other.

Then I somewhat diffidently approached the curators of Independence Hall. Would they be at all interested, not in buying a copy of the Scull & Heap print but having one donated entirely gratis? Words can hardly describe their amazement, surprise, joy and gratitude. Quite out of the blue (i.e., Delaware), they finally would get a copy of the prized Scull & Heap print for Independence Hall. Wow!

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offer of several weeks ago." The manager could not conceal a wince. "However, I will not do so", my father said with a definite air of magnaminity. "I will in fact renew my offer for a last time but only provided it is accepted forthwith, with no further quibbling. Understood?" The floor manager protested that the print was worth a good deal more, etc., etc., but in the end he said that the offer was accepted. He went on to justify the gallery's acceptance by saying the gallery was interested in having the Scull & Heap print in the possession of someone who clearly knew the artistic merit and historical significance of the print. However, my father was not interested in "bells and whistles": he now owned the print. However, he wanted every last jot and tittle of his pound of artistic flesh: he insisted that the rather handsome black and gilt frame be thrown in by the gallery, pointing out that the gallery would have no possible use for the frame since they had now sold him the print. He also got them to agree to ship the print down to Delaware at their cost, including the insurance. The manager rather ruefully remarked as we said good-bye (and got an "au revoir" and a little wave from the clerk) that my father was a hard bargainer. Of course, I could have told him that from the outset. (Indeed, quite a number of other people learned that fact both before and after that particular afternoon.)

Be that as it may, my father was quietly ecstatic, not only at having acquired the print but at having outnegotiated a large prestigious New York gallery. (He did spring later for a martini or two.) Of course, killjoy that I was, I tried to temper his keen pleasure by pointing out to him that he had taken quite a risk: after all, somebody else could have come along and bought the print right out from under his fine Armenian nose. Then, where would he have been? First, my father calmly pointed out that he was used to taking risks. Second, he said that if he had not gotten the print, he would have been no worse off for having tried. Finally, he put me firmly in my place, saying that the print was a bargain, even at the original price: from the outset he was determined to have the print and would have paid the full original price or even a tad more - "So, there, Mr. Smarty Pants!" (Of course, that was the reason he was so ready to make a bet that he would end up with the print.) He then presented the print to me as a paternal gift, gruffly justifying the gift by saying he saw no reason why the print should swell his estate.

Some weeks afterwards, the gallery manager anxiously called up. Was there any chance that my father would part with the print, of course at a profit? The inquiry stemmed from the fact that Independence Hall in Philadelphia, run by the National Park Service, now desperately wanted that very print. The Park Service somehow found it had the funds to buy the print. I was all for a sale at a profit (i.e., my profit since I was the owner of the print). One look from my father was enough to convince me that it had been a very bad idea even to make such a helpful suggestion along these lines. (Who now had the keen nose for a fast artistic buck?, I thought, albeit to myself.) However, it was my father's turn to pause. He told me that the print was really a national treasure and Independence Hall really should have one, perhaps "our" copy. But in the end, my father called the manager and declined... "at least for the present". He said to me, "Someday you really should give that print to Independence Hall." All in all, I learned a good deal from this little episode.

Thereafter, the print was hung in the main conference room of our Wilmington law office. My father never failed when he came into the conference room to shoot a fond sideways glance at his giant print. I also came to think of it as rather handsome. However, it was "pearls before swine" generally. The witnesses who came to face the tortures of depositions could not have cared less. Nor were most of the attorneys in our office wildly concerned about the beauty or historical niceties of the Scull & Heap print of Philadelphia in 1753.

Eventually my father died. Of course, father had made me insure "my" print at double the original price that the gallery had demanded. (Fear Greeks bearing gifts.) The insurance premium kept going up year by year since at least the insurance company understood the value of the Scull & Heap print. Indeed, the premium soaked up a good deal of my pay. I never disclosed the mounting value of the print simply because I was afraid some burglar would get wind of the value of this artistic gem hanging in our office and, instead of taking the typewriters, he might make off with the Scull & Heap print. (That scenario now seems highly implausible as I think back on the burglars who plied their trade in Wilmington, Delaware, in the 1950's.) However, I did have sort of a twinge of conscience about the print. While it looked very handsome in our conference room and I had begun to enjoy it, I knew that this national treasure deserved a better place to be displayed than in the main conference room of our offices (even though our offices were located in the Starr House dating from 1802). Indeed, a couple of collectors heard about the print and attempted to "steal" it from me (a little bit along the lines of the way Manhattan was bought from the Indians). However, since I knew that the print was increasingly valuable, I firmly declined to sell to any private collector.

However, as I have noted above, I had something of a nagging conscience that told me the print really belonged in Independence Hall. I consulted with a number of print collectors, dealers and historians: they agreed to a man that I really should donate the print to Independence Hall. Thus, I firmly made up my mind at that point to give the print to Independence Hall. They went on to round up three appraisals that would do something quite handsome for my tax returns by way of deductions for the foreseeable future. Thus, I was urged on by my father's wishes, my own conscience, and with a tax incentive that longed to be satisfied. Any lingering doubts that I might have had vanished when I was assured that, since the Scull & Heap print was a black and white engraving, I could have a photo copy made that would appear to be the genuine thing except to a really discerning artistic eye (of which I can assure you there were damned few that ever came into our offices). In short, I took the original out of the frame and had two copies made by a commercial copying firm. I gave one to Primitive Hall out in the Unionville hunting country since it seemed not entirely unlikely that there might have been one hanging there before it was cut up and used for scratch paper or something like that. I, of course, retained the other.

Then I somewhat diffidently approached the curators of Independence Hall. Would they be at all interested, not in buying a copy of the Scull & Heap print but having one donated entirely gratis? Words can hardly describe their amazement, surprise, joy and gratitude. Quite out of the blue (i.e., Delaware), they finally would get a copy of the prized Scull & Heap print for Independence Hall. Wow!

I told the curators I would donate the print provided the IRS would agree to the appraised value of the print (and, hence, my deduction), though I had already decided to give, deduction or no.

In due course, the IRS, which would have to "pay the piper" in terms of the tax deduction for me, duly delegated a fairly high tax official to see the print and pass on its value. He called and made an appointment to come down to see me, see the print, and discuss the proposed deduction. On the appropriate day, this grim tax reaper came in, introduced himself, and glanced casually at the seven-foot document lying on the conference room table and the three written appraisals. I could see at once that he was not nearly as impressed with the print as I was, nor did he agree at all with the appraisals that I had obtained as to the print's value. Of course, this was long before the IRS had its own appraisal service. After some sparring about, he said that he could not really believe that "an old picture of Philly" was worth nearly what was reflected in the appraisals. In fact, he said flatly that he was going to disallow the proposed deduction entirely or cut it way down. I looked him square in the eye and told him plainly that that was his privilege but if one arm of the United States government was going to quibble on the value of a gift to another arm of the U.S., that had the effect of entirely drying up my desire to be generous.

He said sternly, "What do you mean?" I replied: "I have a copy of the print. If the U.S. government really believes the Scull & Heap print is worth nothing, I am going to burn the original. Let me point out to you, sir, that I will make it known that this loss of a national treasure will have occurred because the IRS is too chintzy to appreciate the value of what was to be given to the shrine of our country, Independence Hall." He looked unimpressed by my patriotic oratory. I went on to warn him that if this in fact did happen, it could lead to some unpleasant professional repercussions so far as he personally was concerned. However, I went on, it might be a service to the IRS since, in the future, the IRS would be led to deal on a more reasonable basis with those who wanted to do something handsome for the United States of America. The agent continued to feign total indifference but I detected a fatal moment of hesitation. However, he said, "Well, you do just as you damned well

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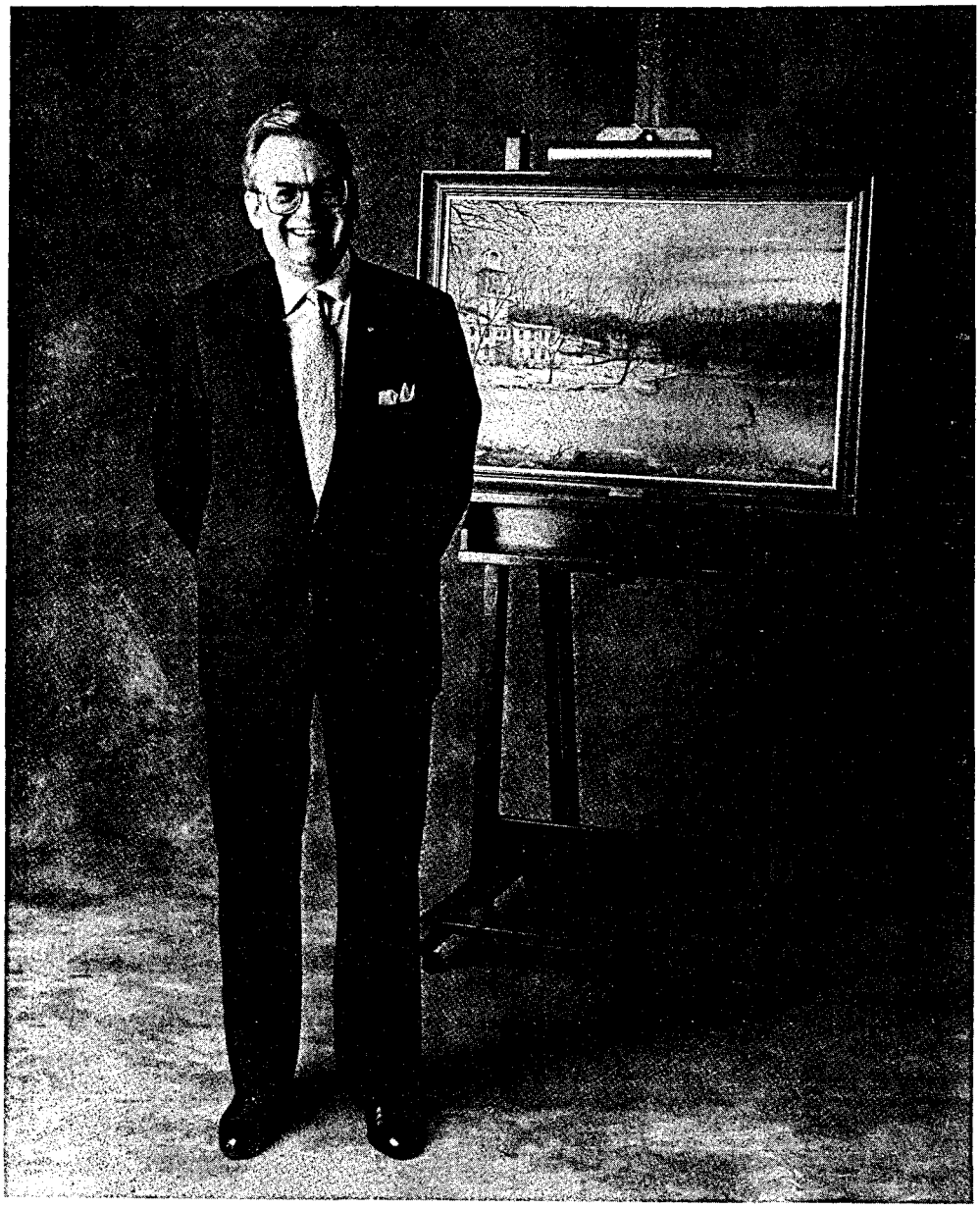

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please, but I know what I am going to do. I am going to allow you almost nothing by way of a deduction for that big piece of paper showing nothing more than the skyline of Philly a couple of hundred years ago. So there!"

All this occurred at a time before I quit smoking. I therefore pulled out my trusty Bic lighter and flicked it open. I went over to the print, which, as I say, was lying on the table. I said quietly to the agent, "I am going to count to ten. If you don't have the good sense to re-think your position or rather the position of the government, at the end of that count, you and I will have the sultry pleasure of watching and smelling this national treasure go up in smoke and flames right here and now before your very own eyes. Undestand?" He hesitated but said with false bravado, "You don't mean it."

My reply was, "Oh, yeah? Well just you wait and see." I then began to count. "One, two, three ..." At the count of six, I could see in his eyes that he was thinking of "caving" but he still wasn't ready to throw his hand in quite yet. At the count of ten, I lit one tiny corner of the print: the "national treasure" was alight and burning. He walked quickly over and blew out the flame. One corner was slightly charred. He said, "You win, son. But, by the Living God, your tax returns better be dead right for the next twenty-five years." He then stalked on out.

Of course, I had only "torched" a copy. As my father had remarked, life is full of risks and one of the pleasures is in successfully running a risk.

Well, the original of the Scull & Heap print, of course, is hanging on the landing of the steps to the second floor of Independence Hall. On the other hand, in our main conference room, there is a framed photocopy of the Scull & Heap print: one corner has a small imperceptible burn mark on it. I come into the conference room from time to time. Each time, I glance over at my copy of the Scull & Heap print with a sort of double satisfaction. Nobody else cares very much.

Now those who have waded through to the very end of this little account know a good deal more about the Scull & Heap print than most of their fellows. I am not sure what good it does to know this much about the Scull & Heap print but, on the other hand, time spent watching Vanna prancing back and forth, spinning the Wheel of Fortune probably does not do one much good either.

BEN L. IRVIN & LUCIAN MIHAI

Romania: An Open Market

An informed acccount of how a severely challenged but courageous people are struggling to achieve the benefits of democratic capitalism. Our guides: two experts, one American and one Romanian, both versed in international law.

The people of Romania, emerging from the asperities of a Communist regime and the economic anemia of Socialism, are engaged in an historic struggle to achieve a market system on the capitalist model. The following is a first hand account by experts in issues of international trade and international law, one of them a Romanian. It is a heartening account of the ingenuity and hard work - both legal and economic - whereby the people of Romania seek the advantages of foreign investments and international trade in a democratic world community. *Ed.*

Romanians began their liberation in 1989, as did other Eastern-Europeans, but, unlike those others, they had to tread a very brutal path to liberation from totalitarian rule.

Romania's break with the past caused a total dissolution of all former political and government-run institutions. Therefore, the rebuilding of Romania's new governing structures did not originate in a pre-existing order, but from a power vacuum, and this caused greater problems than those encountered by Romania's East European neighbors. Nevertheless, the reform process in Romania currently is virtually irreversible. Romanian public opinion is on the side of fundamental structural change, and Romanians are dedicated to dismantling a system of central planning and creating a free market economy.

INVESTMENT OPPORTUNITIES IN ROMANIA

According to the Romanian Development Agency, foreign investors may be interested in the following sectors:

1. Agriculture and food processing industry: Romania needs to modernize is agricultural and food production, such as milk processing, production of soft drinks, beer, cigarettes, meat processing, and new and improved plant varieties. Romania also needs to improve food packaging, storage, transportation, and distribution facilities and techniques.

2. Energy: Romania needs to improve its national power system and its electricity networks. It also needs to reduce fuel and electric power consumption and waste within the power stations, transportation and distribution systems and to use low caloric solid fuels and nonconventional fuels more efficiently, while reducing corrosion in power plants operated with high grade sulphur naphtha.

3. Tourism: Hopes are high for tourism to become a major industry. Investment is encouraged in management and training operations, improved hotel standards, entertainment facilities, and promotion of new tourism areas.

4. Transportation and road infrastructure: There are major developmental needs in highway construction and equipment, guidance systems for computer-aided railways, and sea, river, and air transportation facilities.

5. Telecommunications: Short, medium, and long term programs ar needed for a new switching system for telephone exchanges, earth station for communication in ENTELSAT system, digital systems and optical fiber transmission network, high-speed data transmission, second TV program transmission, cellular lines, and microwave digital system for rural telephone stations.

6. Medical equipment: There is a large demand for X-ray equipment, blood gas analyzers, micro and classic analyzers, nuclear medical diagnosis and therapy equipment, EKG monitors, general and specific surgical instruments, electrosurgi-

cal units, surgery lasers, general and gamma sterilizers, equipment for AIDS testing kits, cat scanners, and disposable syringes.

7. Environmental equipment: There is a serious shortage of equipment for environmental protection and accident prevention, such as instruments for measuring air, soil, and water pollution levels, de-polluting and cleaning equipment, control, alarm and protection systems.

FOREIGN INVESTMENT IN ROMANIA TODAY

In the movement to a free market economy, foreign capital plays an important role. In 1990 and 1991, Romania passed several laws to encourage foreign investment.

Following its first step in liberalization of investment legislation (Decree-Law No. 96 of March 14, 1990 regarding the Promotion of Foreign Capital Investment in Romania - statute which was recently replaced by more favorable legislation), Romania experienced a significant rise in foreign investment. According to a March 1991 official report, "In 1990 alone, more than 1,500 new companies with either wholly-owned foreign capital or in participation with Romanian legal or natural persons were established. [...] More than 1,000 companies with foreign capital participation were incorporated from January to March 1991. However, foreign investment in Romania mainly consists of small investment sums in the [...] [service sector] and not in the producing sector; the volume of foreign investment reached the level of only US $ 150 million in 1990.

The investment inflow come from 71 counties, the largest part [...] [from] Western Europe (in US $ millions): Germany - 22.4; Italy - 16.3; Holland - 11.5; Greece - 10.1; Switzerland - 9.2; France - 6.1. [...] As for the activities developed by foreign investors, the stress is on trading and services, but, depending upon the declared options, a company can find itself both in trading and services or production." (Romanian Development Agency, *Investing in Romania,* Bucharest, March 1991, p.4).

Foreign investment in Romania increased after the April 3, 1991 Law No. 35 on Foreign Investment in Romania was passed.

THE LEGAL FRAMEWORK FOR TRANSITION TO A FREE MARKET ECONOMY

The legal means of transition to a free market economy and to a proper climate for foreign investment is growing. Consider by following statutes:

1. Decree-Law No. 54/1990 on the Organization and Development of Economic Activities Based on Free Initiative;
2. Decree-Law No. 122/1990 on the Authorization and Functioning in Romania of the Representations for Foreign Trade Companies and Economic Organizations;
3. Order of the provisional National Union Council No. 139/1990 on the Chambers of Commerce and Industry in Romania;
4. Law No. 15/1990 Concerning Restructuring of State Economic Units as Autonomous Administrations and Trading Companies;
5. Law No. 26/1990 on Commercial Register;
6. Law No. 31/1990 Regarding Commercial Societies;
7. Decision of the Romanian Government No. 6/1991 Concerning the Export and Import Regime;
8. Decision of the Romanian Government No. 9/1991 Concerning the Application of Several Provisions of the Law No. 15/1991 and the Organization of Activities on the Currency Market with a View to Passing to the Convertibility of the Romanian currency "lei;"
9. Law No. 12/1991 on Profit Tax;
10. Law No. 35/1991 on Foreign Investment in Romania.

Further on, we will briefly present some of the new rules contained in Law No. 35/1991 and Law No. 31/1990 of interest to American investors in Romania.

RULES CONTAINED IN LAW NO. 35/1991 ON FOREIGN INVESTMENT IN ROMANIA

General principles

Romanian foreign investment policy is based on three fundamental principles: equal treatment for national and foreign investors alike; free access to the various markets and economic segments; and the State's minimum interference in regard to their activity. These principles are expressed by detailed rules contained in Law No. 35/1991.

It is impotant to emphasize that, according to Article 11 of Law No. 35/1991, *"The foreign investors shall enjoy the legal status set forth by this law irrespective of their citizenship or, as the case may be, nationality."*

The priniples of *"foreign investment"* and of *"foreign investor"*

According to definitions contained in Law No. 35/1991, the term *"foreign investment"* includes:

- establishment of new companies, subsidiaries, and branches, either by wholly foreign capital or by association with Romanian legal or natural persons, with observance of the Law No. 31 of 1990 rules on Commercial Societies; - participation in the increase of assets (registered capital) of an existing commercial society or the acquisition of shares or capital stock, bonds, and other securities belonging to such commercial societies;
- concession, leasing or management contracts, as provided for by law, of business, public services, production subunits pertaining to autonomous state administrations or commercial societies;
- acquisition of ownership rights over movable (personal estate) and immovable (real estate) property as well as other real estate rights, except for the land ownership rights;
- acquisition of industrial and intellectual property rights;
- acquisition of claims rights or of other rights related to services having economic value that are associated with an investment;
- purchase of production spaces and other buildings, except for residence buildings not related to the investment, as well as the construction thereof;
- participation in agreements for exploration, exploitation and production sharing of natural resources.

Article 3 of Law No. 35/1991 considers a *"foreign investor"* to be *"any natural or legal person residing or, as the case may be, having its place of business abroad, and which is conducting investment in Romania under any of the forms set forth by this law."*

Domains open to foreign investment

Practically, all domains of the Romanian economy are open to foreign investment. Indeed, according to Article 4 of the above mentioned Law, *"Foreign investments may be effected in all sectors of industry, exploration and production of natural resources, agriculture, infrastructure and communication, civil and industrial works, scientific research and technology development, trade, transportation, tourism, banking and insurance services and other services, provided that they shall not:*

a) infringe the regulations in force meant to protect the environment;

b) affect Romania's national security and defense interests;

c) harm the public order, health and good morals."

Types of allowed participation

Foreign investors use the following kinds of participation:

- funds in freely convertible currencies;- machinery, equipment, means of transport, components, spare parts, and other goods;

- services, industrial and intellectual property rights (patents, licenses, know-how, trademarks, copyrights), expertise and methods of organization management;

- profits lawfully obtained in freely convertible currencies or in Romanian currency ("lei") from business activities carried out in Romania.

Investment guarantees

Current Romanian rules of law are consistent with international standards:

Article 5 states that *"The foreign investments in romania shall not be nationalized, expropriated, requisitioned or subjected to other measures of life effects, except in public interest, with observance of the legal procedures set forth by the law and against payment of a compensation equivalent to the affected investment which shall be prompt, adequate and effective"*

Articles 6, 7, and 8 add that the compensation shall be assessed in relation to the market value of the investment upon the date of occurrence of the acts set forth in Article 5 (nationalization, expropriation, or requisition). But in case compensation cannot be ascertained in this way, then it is determined by the parties on equitable principles, taking into account the capital invested, appreciation or depreciation, and current returns. However, if these ways of determining compensation are not satisfactory to the foreign investor, he may request that compensation be established through the courts of law, in accordance with legal provisions.

As of the writing of this article, the Overseas Private Investment Company does not provide insurance for U.S. companies investing in Romania.

Guarantees-Rights of foreign investors

Under the title *"Guarantees"* of its Chapter II, the Law No. 35/1991 also provides foreign investors in Article 9:

- the right to participate in management and administration of the investment, according to the terms of the contracts and By-Laws agreed upon;

- the right to assign contractual rights and obligations to other Romanian or foreign investors;

- the right to transfer abroad the profit in freely convertible currency to which they are entitled, as well as a portion of the profits in Romanian lei (see *infra, "Repatriation of profits")*;

- the right to transfer abroad, in keeping with the contract, amounts collected for copyrights, technical assistance, expertise, and other services;

- the right to transfer abroad amounts obtained in freely convertible currencies from total or partial sale of stocks, shares, bonds, and other securities, or from liquidation of investments;

- the right to transfer abroad in freely convertible currencies in three annual installments amounts in Romanian lei obtained as a result of winding up investments;

- the right to transfer abroad in agreed upon freely convertible currency amounts achieved as compensation in the event of nationalization, expropriation, or requisition.

Incentives

In order to encourage foreign investment - imported machinery, equipment, installations, transport equipment, and any other imported components that constitute the contribution of a foreign investor are exempt from import custom duties. Raw materials, supplies, and components imported for production purposes are exempt from import customs duties for a period of two years after the project is started.

Profit from foreign investments are exempted from taxation as follows:

- investments in industry, agriculture, and the construction sector, for a period of 5 years from starting productive operations;

- investments in exploration and production of natural resources, communications and transports, for a period of 3 years from commencing operations;

- investments in trade, tourism, banking, and insurance services, as well as any other services, for a period of 2 years from commencing operations.

In addition to these exemptions, Article 15 states that *"... reductions of tax on profits are further granted after expiration of the initial tax-holiday, as follows: a 50% reduction of the tax free for the profits reinvested in enterprises set up in Romania with a view to widening and upgrading the technical and material basis, improving the manufacturing technology or expanding the activity to obtain additional profits, as well as for the investments aimed at securing the protection of the environment;b) a 25% reduction of the tax due, on one of the following conditions:*

- at least 50% of the necessary raw materials, energy and fuel are provided through importation;

- at least 50% of the products and services are exported;

- more than 10% of the expenditures are made for scientific research nd development of new technologies in Romania and for professional training;

- at least 50% of the machinery and other equipment necessary for developing existing investments are obtained from domestic production;

- at least fifty new jobs are created through a new investment or expansions of existing investments.

Repatriation of profits

Beside the rights provided by Article 9, paragraphs c, d, and f (see supra, *Guarantees-Rights of the foreign investors),* Article 16 adds: *"foreign investors are entitled to transfer abroad in freely convertible currency, through currency exchanges conducted by the Romanian Bank for Foreign Trade or other authorized banks, a portion of the annual profits in Romanian lei equivalent to 8-15% of their contribution in cash and in kind in freely convertible currency paid to the registered capital, as follows:*

a) 15% for investments made in the fields of special importance for the national economy, including manufacture of anti-polluting technologies, as established by Government Decision;

b) 12% for investments made in the fields of exploration and production of natural resources, industry, agriculture, the construction sector, communications and transports, other than those provided for at paragraph (a) hereinabove;

c) 10% for investments made in the fields of finance, banking and insurance;

d) 8% for investments made in other fields of activity."

But, upon suggestions prepared by the Romanian Government, additional repatriation incentives could be granted by Law for investments effected in the fields of special importance for the national economy (Article 17).

According to Article 30, profits in freely convertible currency and in Romanian lei, due to the foreign investors, can be used to make new investments in Romania, to buy Romanian goods and services, or may be exchanged on the financial market with due consideration to the legal provisions.

Financial, foreign currency, and commercial operations

Collection and payment operations related to foreign investments will be effected through Romanian lei and freely convertible currency accounts opened

with banks having their place of business in Romania, or through freely convertible currency accounts opened with banks having their place of business abroad. In all cases, joint ventures and other foreign investors may freely dispose of balances in their own accounts.

Labor force

Foreign investors may use either Romanian or foreign personnel for their activities. Foreign personnel essential to the foreign investment will be agreed upon by the contracting parties or designated by the foreign investor, Nonetheless, foreign personnel must be employed in management and expert jobs only.

Article 33 states that the wages of local or foreign personnel employed by foreign investments are settled by agreement of the parties.

RULES CONTAINED IN LAW NO. 31/1990 REGARDING COMMERCIAL SOCIETIES

The term *"commercial societies"*

"Society" is the English translation of the Romanian term *"societate"*, which corresponds, for instance, to French *"la societe"*, or to Spanish *"sociedad,* or to Italian *"societa."*

We are using "society" as a general conception, in order to cover any kind of commercial body (partnership, company, corporation, firm, etc.) known by "common law" system. (Romanian law belongs to the continental system of law, i.e. it is a "civil law" not a "common law" system).

Types of commercial societies

Establishment of commercial societies with foreign capital, either in association with Romanian legal/natural persons or with integral foreign capital will be carried out by observing the rules of Law No. 31/1990 Regarding Commercial Societies and those of Law on Foreign Investment in Romania. However, commercial societies with foreign capital established before the effective date of Law No. 31/1990 (i.e., December 17, 1990) are allowed to operate in accordance with their legal By-Laws.)

Currently, a commercial society may be established in Romania if it belongs to one of the following types: general partnership, limited partnership, stock corporation, stock partnership, or limited liability company.

General partnership

In a general partnership (Romanian *"societate in comandita simpla"*), there are two different kinds of partners:

- one or more general partners, whose position is similar to that of members of a general partnership, because all the debts and obligations of the limited partnership are guaranteed by its assets (registered capital) and also by unlimited and joint liability of the general partners;
- one or more limited partners, who are liable only to the extent of their contribution to the limited partnership and who may not be "representative organs" (administrators).

Stock corporation

In a stock corporation (Romanian *"societate in comandita pe actiuni"*) consists of two kinds of partners:

- one or more general partners whose situation is similar to that of general partners in a limited partnership;
- one or more limited partners, who are treated as shareholders and bear losses only to the extent of their shares.

Limited liability company

In a limited liability company (Romanian *"societate cu raspundere limitata"*), all debts and obligations are guaranteed by its assets (registered capital) and partners bear losses only to the extent of their contributions.

Legal status of the commercial societies

According to Article 1, *"Commercial*

(continued on page 47)

RAYMOND F. SULLIVAN, JR.

Down in the Dumps in Foreign Trade

Injury Requirement to Remedy Unfairly Low-Priced Imports

An expert exploration of the administrative force invoked to test the asserted unfairness of certain practices in international trade.

The term "dumping" is commonly applied to low-priced imports, but legally speaking price is only one part of it: material injury is the other. Without material injury there can be no dumping. In United States practice, these two issues are determined separately: the Department of Commerce (DOC) investigates the price aspect, that is, whether imports are being sold at less than fair value. The United States International Trade Commission (ITC) is responsible for the material injury aspect of the investigation.

A torrent of foreign goods invites charges of "dumping" from threatened domestic competition.

Material injury means injury to a U.S. industry, or the "threat" of such injury to a U.S. industry, or the material retardation of the establishment of a U.S. injury by reason of the less than fair value (LTFV) pricing of imports.

While a number of comparisons are provided for in the antidumping statutes to permit the DOC to conduct its pricing aspect of the investigation, even if less than fair value sales are presumed, there must be a determination by the ITC that this practice in injurious, within the material injury standards, to a U.S. industry before the pricing practice can be remedied.

The ITC is charged with determining what kind of injury is, in fact, material. While the statute* defines material injury as injury that is not inconsequential, immaterial, or unimportant, it also directs the ITC to consider factors of volume of imports, effect on prices in the U.S. for like-products, and the impact of imports on domestic producers of like-products. Volume is examined in industry-relative terms to assess impact, since a small volume in absolute terms may still have a significant impact on the market in certain industries. Similarly, pricing must be examined on an industry-relative basis to determine price undercutting and its impact on causing depression or suppression (preventing price increases) of U.S. prices of like products. Finally, the ITC must consider all relevant economic factors that bear on the state of the industry in the U.S., which include but are not limited to:

1. actual and potential declines in output, sales, market share profits, productivity, return on investments, and utilization of capacity;

2. factors affecting domestic prices;

3. effects on cash flow, inventories, employment, wages, growth, ability to raise capital, investment, and existing development and production efforts, including derivative or more advanced versions of a like product.

The statute defines the term United States industry as:

1. all the U.S. producers of products like the investigated articles, or, if there is no like product made, the product most nearly similar in characteristics and in uses to the imported article subject to the investigation;

2. those U.S. producers, wherever

Photograph by Carl Kleinschmidt

located in the U.S., if the total output of the smaller group constitutes a major proportion of the total output of the smaller group constitutes a major proportion of the total U.S. production of the product; or

3. a regional industry.

The statutory language together with the requirement that the ITC assess the effects of LTFV sales in relation to U.S. production of a "like-product", often results in the ITC's examining the production of specific product lines within

Injury is not enough: it must be *material.*

the traditional meaning of an "industry", thereby defining an "industry" for ITC investigation purposes. Consequently, in Motorcycle Batteries from Taiwan, Inv. No. 731-TA-43(1982) the ITC found that there were two distinct like-products and therefore two industries, one for lead acid storage batteries of six volts and one for lead acid storage batteries of twelve volts. Therefore, the U.S. industry upon which the ITC assesses the impact of LTFV pricing may be defined by the product or market segmentation for the products produced.

Once the U.S. industry has been determined, and the ITC has progressed in its analysis of this industry to determine that it is injured, it then must determine whether the injury is by reason of the LTFV imports. The statute does not require that LTFV imports be a principal, a substantial, or even a significant cause of material injury, nor, does it require that injury from such imports be weighed against other factors that may be contributing to overall injury to an industry. It is, nevertheless, the ITC's investigative duty to consider evidence presented to it that demonstrates that the injury suffered by a U.S. industry is caused by something other than LTFV imports. The evolution of these considerations has led the ITC to make negative determinations when the condition of the U.S. industry is completely attributable to other factors or when LTFV imports do not "materially contribute" to the injury suffered by the U.S. industry. In Sodium Nitrate from Chile, Inv. No. 731-TA-91(1983) the ITC viewed competition between the LTFV imports and the like U.S. product for

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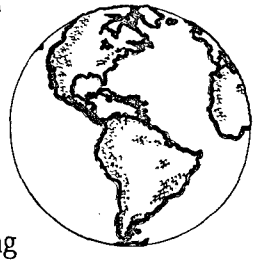

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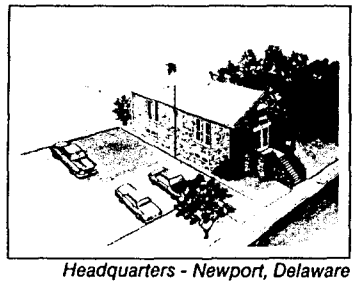

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10% of the market to be an insufficient causal connection between the imports and the injury experienced by the U.S. industry. Similarly, a low volume of imports alone may be a sufficient reason for the ITC to determine no causal link exists between LTFV sales and injury. However, the causal link, given sufficient volume and market competitiveness, will be established by demonstrating lower relative pricing for the LTFV imports resulting in lost sales of U.S. produced articles.

A normal antidumping investigation begins with a petition filed simultaneously with DOC and the ITC. DOC must determine, within 20 days, whether the petition alleges all of the elements necessary for the imposition of antidumping duties. If so, DOC is required to initiate the proceedings, if not, the matter is terminated. In either event, the ITC is informed, and if the DOC determination is to initiate the investigation, the ITC must determine by the 45th day after the filing of the petition whether there is a "reasonable indication" of material injury. If the ITC determines that there is no such indication, the DOC investigation is terminated. If the ITC determination is affirmative, that is, there is reasonable indication of material injury, the DOC investigation goes forward.

Because of the statutory time constraints the preliminary determination standard of "reasonable indication" of material injury of necessity involves a rather perfunctory examination of the U.S. industry and its condition. The examination of investigation of injury, or threat thereof, in forty-five days from the date of the filing of the petition results in the ITC's relying primarily upon the allegations of the petition, since respondents preparation time is abbreviated byu the required preliminary decision deadline. Consequently the ITC is required to act much in the way of a judge in a civil action where a motion to dismiss has been filed. All presumptions and allegations of the petition, if minimally supported, are accepted as true and the presentation of prima facia evidence of injury from LTFV imports is sufficient to survive a preliminary negative determination. More complex questions as to what kind of injury is actually "material", causal connection requirements, and defining what is the U.S. industry and what are "like-products" are rarely considered more than superficially at the preliminary stage.

The final ITC determination of whether imports sold at LTFV prices are a cause of material injury to the U.S. industry is a far more extensive and thorough investigation, during the course of which the ITC will know what the Commerce Department has determined concerning dumping margins.

The ITC's Office of Investigations assigns a supervisory investigator to the case who heads a team that includes representatives of the Commission's Office of Economics, Office of Industry, and Office of General Counsel. Very detailed questionnaires are submitted to U.S. importers and to domestic produces, and the investigative staff will frequently interview those concerned with the trade in the United States. Often questions are submitted to foreign producers through the U.S. Embassy in the capital of the exporting country.

In the course of its investigation, the ITC holds a public hearing at which all interested parties may testify. Prior to the public hearing the ITC usually requires the parties to submit prehearing statements that set out the overall bases of their case. These are exchanged with the

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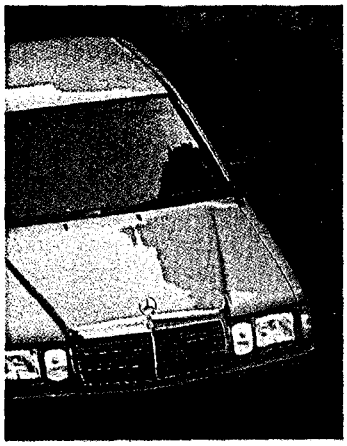
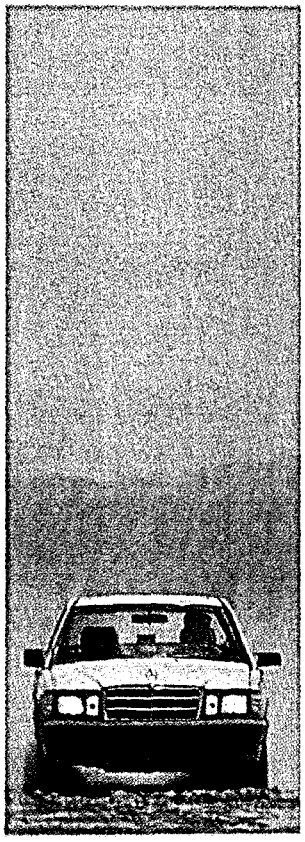


With a Manufacturer's Suggested Retail Price of just $29,250,* the 190E 2.3 makes true Mercedes attributes truly affordable. And its nimble handling, standard safety features and interior comforts make it the rival of other automobiles costing far more.

This new 190 also includes a standard feature that puts other luxury dealers at a distinct disadvantage: our incomparable standard of Mercedes owner care. From the reassurance of a four-year/50,000-mile limited warranty to our unwavering commitment to service and support, you may find that the advantages of owning this automobile could spoil you for all others. Forever.

So if you've ever wanted a Mercedes-Benz but felt you had to settle for less, now is the time to visit. We'll do all we can to make buying or leasing the Mercedes-Benz 190E 2.3 as easy as driving it.



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other parties. Oral presentation at the hearing normally is confined to (1) a brief summary of the position given in the prehearing statement; (2) information or argument that was not available at the time of the filing of the prehearing statement; and (3) comment and rebuttal of the prehearing statements of other parties. Witnesses are subject o questioning by the members and staff of the ITC and other parties to the investigation. Following the public hearing, the ITC calls for post-hearing briefs.

The ITC staff then drafts a comprehensive report, which is circulated among the commissioners for their comments and approval. Subsequent to this the ITC meets and votes, and the individual commissioners prepare statements giving reasons for their votes. Commissioner's statements, the staff report, and statistical data are published together.

It is at this final investigative stage that the complexity of the ITC's inquiry into crucial questions of defining industry and the "like-product", establishing a causal nexus, and making determinations from the analysis of economic data presented by parties and obtained by the ITC staff if in fact the injury, if it exists, is material injury.

* 19 U.S.C. 1673 et seq. ("The Trade Agreements Act of 1979")

Raymond F. Sullivan, Jr. is of counsel to the firm of Schnader, Harrison, Segal & Lewis in that firm's Washington, D.C. office. His practice concentrates in customs and international trade law. Mr. Sullivan is admitted to practice in the District of Columbia, Maryland, and New York. He is a member of the Customs and International Trade Bar Association and the Maryland State Bar Association Section on International Commercial Law.

ROMANIA

continued from page 40

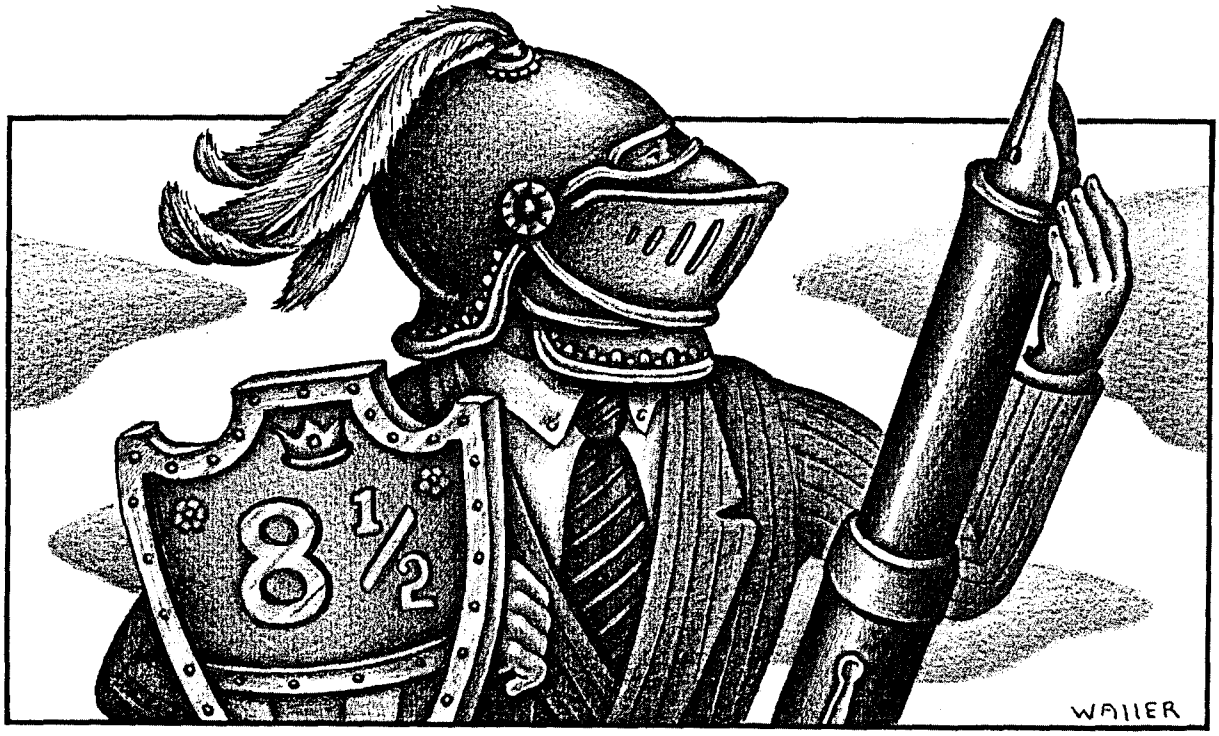
societies with their registered offices in Romania are Romanian legal persons."

And, Article 35 states that *"Except for an eventual different stipulation, contributions delivered to the commercial society become its assets."*

Ben Irvin, a previous contributor to this magazine and a principal speaker at a recent seminar on international law cosponsored by the Section on International Law of the Delaware State Bar Association, is a senior partner in the Washington, D.C. law firm of Irvin, Ellis & Diedring. He is a highly experienced international trade and customs attorney, a former GATT negotiator and a high level official of the United States Custom Service, the United States Commerce Department, the Treasury Department, and the Executive Office of the President.

Professor Mihai, an Associate Professor at the University of Bucharest Faculty of Law, is a member of the Bucharest Bar. He is presently in this country as a Fulbright visiting scholar at the University of Missouri. We are privileged to have him among our contributors. His presence in this country is yet another heartening evidence of the breakdown of old barriers between the West and the nations of Eastern Europe, and a part of a growing internationalism that this issue celebrates.

THE 8½ GOLDEN RULES OF BUYING PROFESSIONAL LIABILITY PROTECTION



1 YOU GET WHAT YOU PAY FOR. If price is your only consideration, skip the next 7½ rules.

2 WRITE YOUR OWN POLICY. A great professional liability policy protects *you* and *your* company and everything that's unique and different about *you*. We never forget this.

3 ALL CARRIERS ARE NOT CREATED EQUAL. Like the wind, some carriers come on strong, then blow out to sea. Others are consistently dependable. Our professional liability carrier, American Home/National Union, earns the highest rating in the insurance business. You can't do any better.

4 DON'T PAY FOR WHAT YOU DON'T NEED. The key to reducing premium costs is knowing the possible problems you might face. We can adjust coverages to reduce your premiums. We do it every day.

5 ALWAYS LOOK BACKWARDS. If you don't have our "prior acts" coverage, you could be in trouble for something that's already happened.

6 NEVER UNDERESTIMATE YOUR COVERAGE. In today's market, there's no such thing as almost right. It's far better to have more coverage than less. We can provide exceptionally high limits each claim/aggregate for both lawyers and accountants.

7 MAKE SURE YOU GO WITH AN ADMITTED CARRIER. The state protects you by reviewing *their* financial strength, policy forms, and rates. A non-admitted carrier may need more protection than you do.

8 EXPERIENCE COUNTS. Everything you've been told about experience is true. You can't beat it. We know from experience. Fifty years of it.

½ IF YOU BUY PROFESSIONAL LIABILITY INSURANCE, BETTER NOT DO IT BY HALVES. Give us a toll free call right away.

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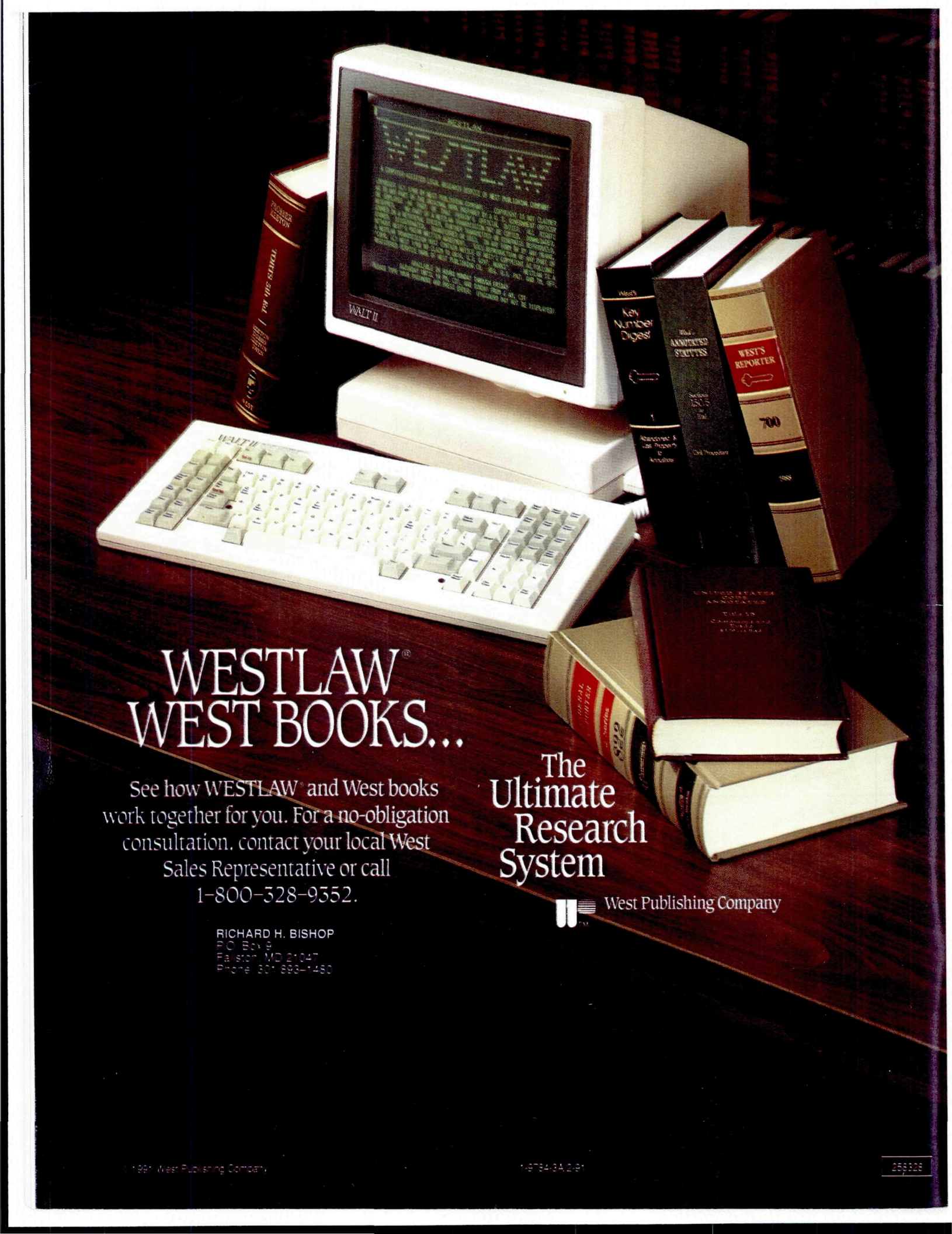

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