Integrated Advisory Group International

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People in Focus

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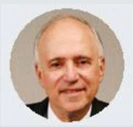

Harvey Burg

Harvey is a partner at Burns & Levinson LLP, he has also served as Chair of the International Section and the International Transactions Committee of the Boston Bar Association. He currently serves on its Steering Committee and has also served for six years on the IAG Executive Committee. Harvey has lectured on International Practice both for the Boston and Massachusetts Bar Associations' continuing legal education programs.
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Mr C.F. (Kees) Mijs

Mr C.F. (Kees) Mijs is a partner at Schipper Noordam, where he specialises in Corporate law (acquisitions, mergers, joint ventures and participations), Commercial and Contract and IT law. With his background and experience, Kees Mijs is mainly involved in complex (international) company structures and contracts. He is also a Deputy justice

INTRODUCTION

Welcome from Nick Burnett and Larry Crowther, joint conveners of the IBT Group, to the second of our IBT Group Bulletins.

This bulletin includes - a pattern we hope to continue - an eclectic mix of topics, commentaries and contributions, all connected to international business. Our first piece is the written note of the talk given by Professor Denis Philippe (a co-host of the Brussels General Assembly later this month) on the subject of the new Incoterms. Those within the group who attended the Zurich meeting will have heard Denis' presentation of these new Incoterms.

Our second piece has been contributed by Harvey Burg of Burns Levinson LLP on Undisclosed Foreign Accounts. This will be of interest to all of us who have US clients who may have a "forgotten" account outside the US.

Our "land mine" topic is presented by Kees Mijs on an important topic well-known to business advisers in Europe: the question of transfer of employment rights with the transfer of a business. This has been part of European law for a number of years, and is very well known as a land mine (and potential obstacle) not just to business to business transactions in Europe, but also in situations where service providers (including legal, cleaning - almost any variety) are transferred from one service provider to another. This is also a topic that would be well known to labour lawyers, but is identified as a land mine because of the interest to lawyers and business advisers outside the European Union. Kees' article is based on Dutch law, but very similar principles apply throughout the European Union.

It is intended that this article will form the basis of contribution and discussion (led by Kees) at the Brussels IBTG special interest group meeting.

Finally, we have an interesting note on the role of Portuguese law on the economic growth on Angola by João Alves Pereira from Lisbon. I found this interesting from the perspective of how one country's laws have derived from those of another. In the EU we are used to laws that derive (although flavoured differently) from EU directives, and the article from Kees Mijs on employment law is a good example of that. Other law has developed through the dominance of a particular country and industry - the development of US styled copyright and IP law for computer software is a good example - whilst other countries have derived their own legal systems from former connections, including colonial. That for Angola and Portugal is a good example. There are others in the case of former French and former British colonies, one example of which is the use of Hong Kong law and arbitration (through the Hong Kong International Arbitration Centre) as a compromise for contract negotiations and disputes with Chinese Suppliers. We would suggest that this is a topic for future study, perhaps with a view to the September bulletin, and October assembly.

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Zurich Presentation

The New INCOTERMS - by Prof.dr. Denis Philippe

Since almost 80 years, INCOTERMS regulate the allocation of risks and costs in international sales. The INCOTERMS are recognized all over the world and we can maintain that the INCOTERMS are the most anchored usages in international trade law.

The INCOTERMS are regularly updated. Since INCOTERMS 2000, the works of the ICC Group on INCOTERMS gave birth to INCOTERMS 2010, which entered into force on 1st January 2011.

The eleven INCOTERMS 2010 are the following[1]:

- DAT (Delivered At Terminal)
- DAP (Delivered at Place)
- EXW (Ex Works)
- FCA (Free Carrier)
- FAS (Free Alongside Ship)
- FOB (Free On Board)
- CFR (Cost and Freight)
- CIF (Cost, Insurance and Freight)
- CIP (Carriage and Insurance Paid to…)
- CPT (Carriage Paid to)
- DDP (Delivered, Duty paid)

Two new terms have appeared: DAP and DAT. Four INCOTERMS disappeared: DAF, DES, DEQ, DDU.

of the Court of Appeal of The Hague, Deputy chairman Association Dorp, Stad en Land and aMember of the Board of Boedel Wittens Foundation

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Nick Burnett

Nick heads the corporate and commercial team at Birketts LLP in Chelmsford. He has a broad business background and has a versatile ability to deal with a wide variety of commercial problems. His work includes corporate transactions of all types, including sales, purchases and refinancing. Nick is a past Chairman (2008/2009) of IAG.

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Lawrence S. Crowther

Larry is a partner at Wegman, Hessler & Vanderburg in Cleveland Ohio where he specialises in business and commercial Law, real estate services and creditors' rights. Larry is an experienced business lawyer with a focus on national and international transactions.

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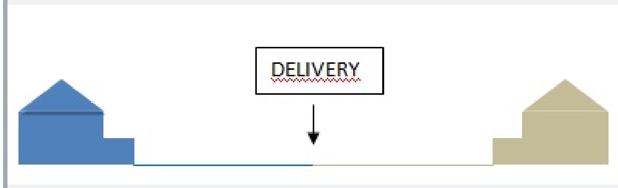
This is impossible to review here all these INCOTERMS; we will consequently limit our analysis to the two new INCOTERMS and to the explanation of what they change in comparison with previous ones.

DAP - DELIVERED AT PLACE

DAP (insert place of destination)



This rule may be used irrespective of the mode of transport selected and may also be used where more than one mode of transport is employed.

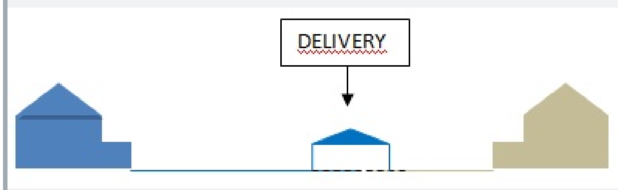
"Delivered at Place" means that the seller delivers when the goods are placed at the disposal of the buyer on the arriving means of transport ready for unloading at the named place of destination. The seller bears ail risks involved in bringing the goods to the named place.

The parties are well advised to specify as clearly as possible the point within the agreed place of destination, as the risks to that point are for the account of the seller. The seller is advised to procure contracts of carriage that match this choice precisely. If the seller incurs costs under its contract of carriage related to unloading at the place of destination, the seller is not entitled to recover such costs from the buyer unless otherwise agreed between the parties.

DAP requires the seller to clear the goods for export, where applicable. However, the seller has no obligation to clear the goods for import, pay any import duty or carry out any import customs formalities. If the parties wish the seller to clear the goods for import, pay any import duty and carry out any import customs formalities, the DDP term should be used. [2] DAP substitutes DES,DEQ, and DDU.

DAT - DELIVERED AT TERMINAL

DAT (insert name terminal at port or place of destination)



This rule may be used irrespective of the mode of transport selected and may also be used where more than one mode of transport is employed.

"Delivered at Terminal" means that the seller delivers when the goods, once unloaded from the arriving means of transport, are placed at the disposal of the buyer at a named terminal at the named port or place of destination. "Terminal" includes any place, whether covered or not, such as a quay, warehouse, container yard or road, rail or air cargo terminal. The seller bears all risks involved in bringing the goods to and unloading them at the terminal at the named port or place of destination.

The parties are well advised to specify as clearly as possible the terminal and, if possible, a specific point within the terminal at the agreed port or place of destination, as the risks to that point are for the account of the seller. The seller is advised to procure a contract of carriage that matches this choice precisely

Moreover, if the parties intend the seller to bear the risks and costs involved in transporting and handling the goods from the terminal to another place, then the DAP or DDP rules should be used.

DAT requires the seller to clear the goods for expert, where applicable. However, the seller has no obligation to clear the goods for import, pay any import duty or carry out any import customs formalities.

DAT substitutes the previous Delivery Ex Quay but is now broader, as the terminal can be broader than only the quay. [3]

What is the main difference between DAT & DAP? In DAT, the seller is responsible for unloading the goods but not in DAP.

We can finally draw the attention of the reader that the Incoterms regulate only a small part of the contractual relations between seller and buyer and that the value of a well drafted sales contract remains unaltered.

Prof.dr. Denis Philippe

[1] INCOTERMS 2010, ICC publication n°715 E, p. 7

[2] INCOTERMS 2010, ICC publication n°715E, p. 61.

[3] INCOTERMS 2010, ICC publication n°715E, p. 53.

Special Topic

Undisclosed Foreign Accounts:
A Partial Amnesty in the U.S. through August 31, 2011 by Harvey Burg

If you represent a U.S. citizen or U.S. Green Card holder, or a foreign national or entity considered a U.S. resident under an applicable tax treaty, whether or not domiciled in a non-U.S. jurisdiction, or, if you represent a non-U.S. national who is married to a U.S. citizen or U.S. Green Card holder, amendments to the U.S. Bank Secrecy Act require the filing each year of a Foreign Bank Account and Financial Report (commonly called an FBAR). This is in addition to a 1040 NR which is the annual U.S. Non-Resident Income Tax Return.

The client, if you represent such person, has an absolute obligation annually to report income from all sources, and to file the FBAR reporting each account in which the client individually, or in conjunction with one or more other persons, can issue instructions to the account-holding entity for payment or transfer. There is a low threshold to the FBAR filing requirement: a person's "foreign" accounts and assets in the aggregate must exceed (using highest values for the reporting period) U.S.$10,000 in value.

The BAD NEWS is that failure to comply with these annual filing requirements results in the client being subject to severe and substantial penalties – which are huge.

The GOOD NEWS is that the U.S. Internal Revenue Service has instituted a Partial Amnesty Program. This Program limits the penalties significantly, and criminal liability, provided both income tax and FBAR returns from 2003 through 2010 as applicable are filed by August 31, 2011. Further, a taxpayer can notify the IRS immediately, and before filing.

NOTE FURTHER: The partial amnesty is only available to taxpayers who voluntarily disclose their income and accounts before the Internal Revenue Service learns about them and has initiated its own investigation. As you know, from such examples as the UBS cases, and the existence now of 38 bilateral financial information exchange treaties, and the multilateral efforts to track terrorism-related funding and money-laundering, as well as the efforts to enforce economic sanctions against designated countries like Iran, the governments of Western Europe and the U.S. are engaged in unprecedented coordinated and computerised data-mining efforts.

Here are some fact patterns of non-filers with which our firm has engaged:

(1) A dual citizen, a resident and citizen of his adopted Asian country, for more than 30 years, has businesses in multiple countries around the world from which he has earned income and has authority over these company's bank accounts and assets.

(2) A dual citizen who married a European citizen and has lived with her spouse in Europe for nearly 15 years. She holds minority ownership income-producing companies and is a signatory on company accounts with her husband. She and her husband also maintain joint checking and savings accounts at a local bank, and investments with a European brokerage firm.

(3) An African citizen long ago set up a Jersey Trust for the benefit of family members. Distributions have been made from the Trust to benefit a son living in the U.S., who has certain withdrawal rights. Son started as a student in the U.S. He now works in the U.S. and has obtained status as a permanent resident, via securing a so-called Green Card.

The bilateral tax treaty between your country and the U.S. may help. However, in most instances such a client is exposed for non-filing of the annual tax return or FBAR to the prospect of monetary penalties, interest, and, if applicable (depending on intent) criminal prosecution.

Again, the good news to consider is that a partial amnesty is available, subject to the August 31, 2011 deadline, which can include a cap on fines and penalties, and removal of criminal liability.

Harvey M. Burg
Burns & Levinson LLP

Landmines!

Transfer of a business under European and Ducth Law - by Kees Mijs

Directive 2001/23/EC of the Council of the European Union rules that, in case of the transfer of a business or part of a business, the transferor's rights and obligations arising from a contract of employment or employment relationship pass to the transferee. This rule and the other provisions of the Directive are incorporated into the Dutch Civil Code and the laws of other EU member states. The Directive is intended to ensure continuity of employment relationships following the transfer of a business. The employees of a transferred business become employed by the transferee by operation of law, whilst maintaining their existing employment conditions and accrued rights, and may not be dismissed on account of the transfer.

The wording of the Directive prevails over the wording of the domestic legislation of individual member states. Domestic courts may refer questions on the interpretation of the Directive for a preliminary ruling to the European Court of Justice (ECJ). Consequently, the ECJ is the prime source of case law on the transfer of a business in the European Union.

In order to qualify as "the transfer of a business or part of business":

- the transfer must result from an agreement (the English text of the Directive refers to a
"legal transfer") or merger;
- the transfer must concern an economic entity which retains its identity.

The ECJ has given a broad interpretation to the wording "resulting from an agreement". No direct contractual relationship needs to exist between the transferor and the transferee. The Directive applies whenever the person or legal entity that runs the business changes within the scope of contractual relationships. The ECJ has found that such a change did take place in the following circumstances:

- a car manufacturer terminated a dealership and appointed a new dealer (Merkcx / Ford);
- the subsidy to a foundation engaged in the provision of assistance to drug addicts was terminated and the subsidy was thereafter granted to another foundation with the same objective (Sofie Redmond Stichting);
- the lease of restaurants and bars in a discotheque was terminated and a new lessee continued the business and employed the employees who had been dismissed by the former lessee (Daddy's Dance Hall).

An economic entity is an organised grouping of resources (persons and assets) which has the objective of pursuing an economic activity. The economic activity does not need to be profit-oriented and the economic activity does not need to be the central activity of the entity.

Whether an economic entity retains its identity must be judged on the basis of all facts characterising the transaction, including the type of business; whether or not its tangible assets are transferred; the value of its intangible assets; whether or not the majority of its employees are taken over; whether or not the customers are transferred; the degree of similarity between the activities carried on before and after the transfer; and the duration of the interruption (if any) of the business (Sodexho). Examples of retention of identity are:

- a cleaning woman employed by the bank, who was dismissed, after which the bank entrusted the cleaning to a cleaning firm without any assets being transferred (Schmidt);
- catering services for a hospital, which were initially outsourced to a catering company and were thereafter outsourced to another catering company. In this case no assets were transferred, but the premises, the kitchen equipment and other equipment and supplies were provided for by the hospital (Sodexho).

In case of a capital intensive business, the transfer of assets will be of more importance in judging whether the economic entity retains its identity. The transfer of a licence for a local bus service to another bus company did not constitute the transfer of a business because the major assets (the buses) had not been transferred.

The rights and obligations that are transferred to the transferee include all employment conditions, rights associated with length of service, other accrued rights, the right to salary in arrears, claims resulting from an industrial accident (prior to the transfer), non-competition clauses and the rights and obligations under labour related agreements, such as loan agreements to employees.
Under Dutch law, the Directive has caused major problems in respect of transactions that involve the transfer of disabled employees. Those employees may not be dismissed during the first two years of their disability and, during this period, the employer must continue to pay (part of) their salary. The employment of those employees and their right to sickness pay passes to the transferee as well.

EU member states may provide that, after the transfer, the transferor will remain jointly liable with the transferee for obligations which arose before the transfer date. Under Dutch law, the transferor will remain jointly liable for those obligations for one year after the transfer. The transferor has no liability for obligations arising after the transfer. This implies that the rights of employees can be jeopardised by the transfer of a business from a healthy company to a company that is less financially secure.

Special rules apply in respect of collective labour agreements. The Directive provides that the transferee must continue to observe the collective labour agreement that applied to the transferor, until the date of termination or expiry thereof or the entry into force of another collective labour agreement. Provisions have been included in Dutch law that give force to this part of the Directive. Such provisions will apply despite any collective agreement that may already be in place in the transferee's business at the time of the transfer, unless the pre-existing agreement is imposed compulsorily.

The Directive does not apply to employees' rights to old age, invalidity or survivors' benefits. Dutch law contains a special provision in respect of pension arrangements. The rights and obligations of the transferor arising from a pension arrangement pass to the transferee, unless the transferee already has a pension arrangement in place and allows the transferred employees access to its pension arrangement or unless the transferee is obliged to participate in a mandatory pension arrangement.

In a recent case (Albron) the employee in question had originally been employed by a central personnel company of a group of companies. He had been permanently assigned to another group company, without the group company becoming his formal employer. The group company was transferred to an entirely separate entity, giving rise to the question of whether the Directive applies to employees in these circumstances. The ECJ decided that it is possible to regard as a "transferor" within the meaning of the Directive any group company to which an employee has been assigned on a permanent basis, without the employee being formally employed by that group company. In such situations, the employment agreements of those employees will pass to the transferee.

In the Netherlands, the UK and many other EU member states the domestic legislation that implements the Directive excludes from its scope transfers by means of share sale because in such circumstances the identity of the employer does not change.

Finally it must be noted that the Directive does not apply to the transfer of a business or a part of a business when the transferor is declared bankrupt. The member states may provide otherwise. Under Dutch law, the transfer of a business as a part of bankruptcy proceedings is exempted from the protective measures in the Directive. Consequently, buying a business from a bankrupt estate has huge advantages. The receiver may dismiss the employees and the purchaser can thereafter make a selection among the dismissed employees and engage the selected employees under employment conditions of its own choosing and without the transfer of any accrued rights.

Kees Mijs
Schipper Noordam advocaten

Trends in international business

The Role of Portuguese Law on the economical growth of Angola - By João P. Alves Pereira

They are two faces of the same coin. Although sharing the same language and a certain cultural identity, they are on opposite sides in terms of growth potential. We are of course referring to Portugal and Angola. The former with an aged population, scarce resources and in need of EU financial aid. On the other side, the latter is one of the most exciting African economies of the new millennium, albeit too dependant on the oil industry. It registers significant annual growth rates and it has vast natural resources, but it still does not have medium class people in relevant numbers.

In any case, the aforementioned cultural and linguistic identity drives both nations to complement and understand each other, and to work well in an integrated and peaceful fashion. Angola values the Portuguese contribution and investment in different sectors of its economy, whereas Portugal gets enthusiastic with the entry of Angolan equity in the main Portuguese group of companies.

One of the most important foundations of such identity is the Law which is common to both nations. This is one of the most relevant Portuguese legacies in Angola and it has been contributing significantly to the narrowing of the commercial relationships between the two countries. Although there are some significant differences in the legislation ruling oil and diamonds, customs matters, transfer of funds abroad and foreign investment, amongst other particular cases, both countries adopt very similar codices in areas such as civil and commercial laws, registries, etc. and follow the same legal doctrine.

The similarities in the system of laws are a natural consequence of the maintenance of the Portuguese codices and statutes in full force and effect after the date of independence of Angola. This is the case of the Civil Code of 1966 (and its general and contractual chapters), the Criminal Code, the Criminal Procedure Code, the Tax General Code and a considerable part of the tax legislation in force in Portugal in 1975 (and until the entry in force, in 1989, of the personal income tax Code, the corporate income tax Code and the municipality tax Code). As a consequence, Portuguese tax on capital applications and gains, the inheritance and gifts tax, the property transfer tax (SISA), the building tax, the tax on employment income, the industrial tax, the tax on consumption and the stamp duty are applicable in Angola.

There are also some recent cases of Portuguese-based laws adopted by and/or adapted to Angola with success, due to the cultural and linguistic identity mentioned above. It is the case, amongst other relevant statutes, of the Commercial Companies Law, the General Law on Labour (Law nr. 2/00 dated 11th February, 2000), the Arbitration Law (Law nr. 16/03, dated 25th of July) and the Law on Commercial Contracts in association, including partnerships and joint ventures (Law nr. 19/03, dated 12th of August).

In respect of its state institutions, Angola follows a judicial and registry system very similar to the Portuguese one, as a consequence also of similar administrative and court practices.

As a matter of fact, considering the demands of a global market an economy in clear growth in the African context has everything to gain by taking advantage of the legal and judicial solutions of a brotherly country located within the borders of the European Union, in the same way as it has benefited so far from the contribution and experience of Portuguese lawyers in transnational matters.

Let us wait for the next challenges facing joint ventures between Portuguese and Angolan law firms and lawyers, which may even include more ambitious projects in the continents to which they belong (and whose idiosyncrasies are known to them).

Alves Pereira & Teixeira de Sousa

Comments and suggestions

If you would like to make any comments or suggestions on this edition of the IBTG Bulletin or if you would like to become a contributor, please contact Nick Burnett or Larry Crowther.