

Inside this edition:

New Privacy Laws in India and China.
Foreign Direct Investment in Venezuela
The Future of Islamic Finance
International Arbitration in Colombia

More Complimentary
Resources on the Web from
Diaz Reus.

What are the hottest issues and investment areas in the Middle East region today? How are business opportunities in Latin America changing the global landscape from China, to Dubai, and the United States? We're closely watching, reporting, and keeping readers up to date on the business and legal developments between these dynamic global regions.

EmiratesBusinessLaw.com, our blog covering business and legal developments in trade, business and government.

ChinaLat.com, now in it's fifth year, blogging about opportunities between China, Latin America, and the United States.

MichaelDiazJr.com, covering SEC compliance, international fraud, Ponzi schemes, and anti money laundering.

Diaz Reus on Facebook. Become a Fan at Facebook.com/ Diaz Reus International Law Firm

On Twitter at
@EmiratesLaw
@ChinaLat
@MichaelDiazJr
@DiazReusTarg

Visit www.diazreus.com for more information about our services or to contact any of our attorneys, solicitors and foreign legal consultants directly.

The Royal Wedding and IP In The Fashion Industry



By: Carol Incarnação-Schirm, Miami Office

On July 13, 2011, the Innovative Design Protection and Piracy Prevention Act, ("IDPPPA"), was yet again introduced in the United States House of Representatives. It was previously introduced in 2006, 2007, 2009, and 2010. The IDPPA, if enacted, will impact designers, manufacturers, and retailers alike.

Background

The IDPPPA, also known as Fashion Copyright Law, aims to protect the creations of fashion designers, not just their name brands or fabric patterns (already protected under U.S. trademark and copyright laws, respectively). Historically, fashion designs,

including clothing and accessories, have been deemed "useful articles" and thus not subject to legal protection by themselves. Such articles can be protected under the Copyright Act if they possess elements of pictorial, graphic, or sculptural work, which are separately identifiable and exist apart from the work's utilitarian aspects.

Although the IDPPPA will restrain the currently prevalent practice of copying designs and thus place curbs on the manufacturing industry, it is important to note that the bipartisan bill has widespread support from both sides of the fashion industry. Significantly, the IDPPPA has been supported by designers and manufacturers

The fashion industry has never been able to rely on U.S. copyright law to completely protect their unique and novel designs.

alike from the beginning, through the Council of Fashion Designers of America and the American Apparel and Footwear Association.

Current Levels of Protection

The fashion industry has never been able to rely on U.S. copyright law to completely protect their unique and novel designs. Knockoffs are exceedingly common throughout the U.S. and original designers currently have no legal recourse. Unlike their European, Japanese, and Indian counterparts where the protection of fashion designs is a part of the legal and cultural fabric, the U.S. has failed to provide a clear and comprehensive framework for protecting fashion designs against infringement.

Design patent and trade dress law have provided fashion companies trading in the U.S. only limited protections. Trademark law currently protects the product's name brand and requires the mark to have high levels of consumer association. For example, the public must associate a certain product with a certain brand. However, such association is difficult to achieve in the fashion industry, which is seasonal, and the time frame to acquire sufficient consumer association is insufficient in the vast majority of cases.

Unfair competition is another route that some designers choose in protecting their marks and creations. Again, the seasonal nature of designs renders the success of such claims highly unlikely because the claimant must show that the public is confused by the presence of copies in the market due to the original's acquisition of a "secondary meaning" in the public consciousness.

Additionally, although fabric patterns are protected under copyright law, it is of little value to designers because they rarely

create their own original fabric patterns.

Protection under the IDPPPA

The IDPPPA dramatically increases the level of protection given to fashion designs. It directly protects them by including the term "fashion design" and defines it broadly to include the appearance as a whole of the apparel item, including original elements and their arrangement on the garments. "Apparel," for purposes of the proposed law, includes the whole lot: from clothing articles, to gloves, and even eyewear.

The IDPPPA standard for infringement of a fashion design is "substantially identical," and is a slightly stricter standard than other items protected under U.S. copyright law. For example, infringement may be found if an article of apparel is "so similar in appearance as to be likely to be mistaken for the protected design, and contains only those differences in construction or design which are merely trivial."

Everything that is already in the public domain, i.e. all the fashion designs created up until the time the bill becomes law, will continue to be in the public domain. Thereafter, new fashion designs will acquire a term of protection of three years, and registration will not be required.

As the bill is currently written, plaintiffs must meet a heightened pleading standard to bring a claim under the proposed law. The complaint must establish that the protected design or its image was available in a location, manner, and for a certain period during which it can be reasonably inferred from a totality of the circumstances that the defendant saw it or could have had knowledge of the protected design. Those who make, have made, import, sell, offer for sale, advertise, or distribute an otherwise infringing article are not liable under the IDPPPA if the articles were made without knowledge. In addition, there is a home-

sewn exception for a single copy made for personal use and without any intent to be offered for sale.

If enacted, the United States would join other countries that already have similar laws specifically protecting fashion design, including France, the European Union, Japan, and India. In any case, the IDPPPA is still a lighter version of its much stricter French counterpart.

How The Market Is Affected

To illustrate how the bill would affect the market, one need look no further than the recent U.K. royal wedding of Prince William to Kate Middleton. A mere 12 hours after the bride became Her Royal Highness the Duchess of Cambridge, Los Angeles-based dress maker A.B.S. by Allan B. Schwartz had already created a copy of the wedding gown which was projected to hit stores within weeks. If the IDPPPA were in effect at that time, A.B.S. would have been required to create a dress not substantially identical to the original Sarah Burton creation. **You be the judge:**

On the left, design by A.B.S. by Allan B. Shwartz. On the right: The Duchess of Cambridge in Sarah Burton's design.

Conclusion: Those in the apparel business should pay close attention to the impending enactment of IDPPPA. If it does become law, even retailers will need to carefully monitor the apparel they purchase from their manufacturers because it is almost certain that designers will be keeping a close eye on retailers' storefront windows!



Photo: peoplestylewatch.com



New Privacy Laws in India and China | A Barrier to Outsourcing

By Sumeet Chugani, Miami Office

Recent developments in the regulatory environments in both India and China may spell the end to outsourcing in these nations. On April 13, 2011, the Indian Central Government issued final regulations implementing the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules. This new regulatory scheme will apply to all organizations that collect and use personal data in India.

Based on India's new rules, no organization doing business in India can transfer sensitive personal data to a third party outside of India unless the transferee guarantees the same level of protection as required under Indian law. However, many of the new consent requirements are more restrictive than privacy protections afforded under U.S. or E.U. law. As a result, organizations from the West that currently rely on Indian-based outsourcing companies to handle sales (or technical support) must improve their current data collection practices to be on par with Indian law. For example, India's new

rules require that organizations notify individuals when their personal information is collected via letter, fax, or email. Individuals then have the ability to "opt out" of the data collection at any time. The new regulations also stipulate that individuals now have the ability to review their collected data and correct or amend personal information.

The Indian IT Ministry takes the position that these new rules will boost offshore outsourcing by demonstrating India's progress towards a safer informational landscape. However, foreign companies may find adhering to these new rules to be cost intensive, and search elsewhere for back-office support. Although India has inked and published its new rules, a similarly strict set of laws in China is awaiting final approval. The proposed rules in China create similar hurdles for the outsourcing community. China's proposed rules also require firms holding personal data to obtain explicit consent before they can divulge data to third parties. The rules also includespecificrestrictionsduring the "collection, processing, use,

transfer, and maintenance of personal information."

The new privacy laws in India and China will have a profound effect on multinational businesses that outsource industry functions or maintain their operations in these nations. As currently drafted, both India's and China's new rules may prohibit an outsourcing company from transferring data received (whether from a third party or through internal investigation) to that company's affiliate. Whether an outsourcing firm can return data to the company that hired it for support is also questionable. Companies that operate in these nations, or simply rely on offshore service providers to collect personal information on their behalf, must re-assess their current privacy practices to ensure compliance with these new rules. Outsourcing companies must also be certain that their employers are in compliance with their nation's laws, or they too will feel the wrath of these new, stringent regulations.

International Arbitration In Colombia

By: Marcela Blanco, Bogota, D.C. Office

Arbitration is an agreement between two or more parties to resolve a dispute outside of the court system. The parties agree upon a third party as an arbitrator who will essentially act as a judge. Arbitration can be quick and easy, whereas a lawsuit commenced in the courts can drag on for many years. This is especially true in Colombia, where litigating a dispute from start to finish in the courts takes a substantial amount of time and expense.

In Colombia, arbitration is voluntary. The decision of the arbitrator will be binding on the parties involved. In Colombia, arbitration is customarily used to resolve commercial disputes, particularly those related to international business transactions.

Arbitration in Colombia is based on Article 116 of the Constitution. Specifically, Law 315/96 governs international arbitration. Under Colombian law, international arbitration applies if: (i) the parties have their domicile in different states at the time of agreeing to the arbitration clause; (ii) the place of performance of the substantial part of the obligations relating directly to the subject matter of the litigation is outside the state or states where the parties are domiciled; (iii) the place of arbitration is outside the state in which the parties are domiciled, provided this is agreed to in the arbitration agreement; (iv) the subject matter of the arbitration clearly involves the interests of more than one state; and (v) the dispute referred to arbitration directly and unequivocally affects

See "Arbitration" on page 6

Foreign Direct Investment in Venezuela

By: Adriana Clamens, Miami Office

Foreign direct investment (“FDI”) in Venezuela has been lower in recent years in comparison to a majority of Latin American nations. This decline is attributed to Venezuela’s economic and political instability, nationalizations, increased government intervention in the economy, and restrictive legal framework. The Central Bank of Venezuela has reported that FDI in Venezuela decreased by 1.5 billion dollars from January to September, 2010, following a decrease of approximately 3.1 billion dollars in 2009.

The declining investment climate began in 2009 given the increased political uncertainty and decrease in oil prices. However, foreign investors maintained their investments in the country hoping that the economic environment would recover. Important developments in 2010 and 2011, including the devaluation of Venezuela’s official exchange rate, continued banking interventions, and the nationalization of assets in the petroleum, alternative energy, and banking sectors have led economists to forecast a long-lasting recession for Venezuela.

In theory, Venezuela’s legal framework for foreign investment is a “liberal” one. Under Venezuelan law, both foreign and domestic companies receive equal treatment. However, in sectors such as hydrocarbons or media entertainment, the law requires that either the Venezuelan state or nationals be majority owners. For example, in 2010, Venezuela enacted the “2010 Insurance Activity Law” requiring half of the board of directors of any Venezuelan company to be Venezuelan nationals or residents.

Foreign investors must also be aware that the judiciary is highly politicized and is often influenced by the executive branch.

Even though Venezuela’s legal system is open to foreign investors seeking to resolve investment disputes, the system can be corrupt and manipulated by the executive branch. For this reason, foreign investors regularly select arbitration to govern their disputes. Pursuant to Decree 2095, arbitration of disputes is allowed under Venezuelan law. The Commercial Arbitration Law of 1998 eliminated the past requirement for judicial approval of arbitration. Thus, arbitration agreements are automatically binding. Venezuelan law also permits state-based companies to be subject to arbitration in contracts with foreign parties. Notably, Article 22 of Venezuela’s Foreign Investment Law may provide Venezuela’s consent to the International Centre for the Settlement of Investment Disputes (“ICSID”). However, the Venezuelan Supreme Court, while acknowledging that there is a fundamental right to arbitration, has held that any state-based companies must still formally consent to ICSID jurisdiction.

In a notable ruling rendered on June 10, 2010, the ICSID issued a jurisdictional decision in *Mobil Corporation and Others v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/07/27, See “Investment” on page 5

The Future of Islamic Financing

By: Arti Sangar, Dubai Office

While conventional financial markets in Western Europe and North America are in turmoil, there is a refreshing burst of optimism in the world of Islamic finance. Largely shielded from the financial crisis, although not entirely immune, there is a significant opportunity for the Islamic financial system to provide an attractive alternative to conventional financing.

The continued potential for growth of Islamic finance means that investors are increasingly looking to tap into the various opportunities it offers. Nevertheless, Islamic finance has its challenges as well. This article provides an overview of the key principles that underlie Islamic finance and highlights issues that need to be addressed to bring it to greater heights.

Key Principles of Islamic Finance

There is no formally accepted definition of Islamic finance. Islamic finance transactions are based on Islamic principles and jurisprudence (together, the “Shari’ah”), which are derived from the primary sources of the Qu’ran and the Sunna. A fundamental principle of Shari’ah is that a physical asset or tradable commodity should underpin each transaction. As a result, Islamic finance transactions are either asset-based or asset-backed. In contrast, conventional banking generally relies on a contractual liability to recover monies exchanged as loans and deposits, together with an interest margin for the lender.

While Islamic and conventional financing may initially appear incompatible, the structural issues involved are not insurmountable. One of the major differences between conventional and Islamic finance sys-

tems is the notion of interest, which is prohibited under the principles of Shari’ah law. This, however, does not suggest that an Islamic bank acts as a charity institution. In Islamic finance, financing of industries deemed unlawful by Shari’ah law such as alcohol, tobacco, weapons, pork and gambling are also prohibited.

Contracts in which one party is regarded as having gained unjustly at the expense of another are also considered invalid. Contracts which contain uncertainty, particularly in regard to one of the fundamental terms of the contract such as the subject matter, price or time for delivery, are also considered invalid. The test is whether something has been gained by chance rather than by productive effort. To ensure adherence to these underlying Islamic principles, most Islamic institutions are governed by a supervisory board of Muslim scholars who analyze the institution’s methods and operations.

Islamic Finance Challenges

A significant challenge affecting Islamic finance is the diversity of opinion as to whether particular practices or products are Shari’ah compliant. This means that some products and services may be approved as being Shari’ah compliant by some Shari’ah scholars but not by others. On a global

See “Islamic Finance” on page 5

“Investment in Venezuela” from page 4

June 10, 2010). The ICSID rejected the investors’ argument that Article 22 can be used to establish ICSID jurisdiction. However, the ICSID ruled that it did have jurisdiction to arbitrate the case under the Dutch-Venezuelan Bilateral Investment Treaty.

In 2007, Mobil submitted a request for arbitration to the ICSID against Venezuela claiming that the compensation offered by the Venezuelan government for the nationalization of Mobil’s petroleum investments was inadequate. Venezuela argued that the ICSID lacked jurisdiction over the case. First, Venezuela argued that Article 22 did not provide a clear consent to arbitrate the dispute, as required by the ICSID Convention. Second, Venezuela argued that the Netherlands-Venezuela Bilateral Investment Treaty did not provide a basis for jurisdiction because the treaty did not apply to the non-Dutch subsidiary, and even if it did, Mobil’s corporate restructuring in anticipation of litigation was improper since the subsidiary was created for the purpose of obtaining access to the ICSID.

The ICSID found that there

was insufficient evidence to hold that Article 22 consents to ICSID arbitration in the absence of a bilateral treaty. However, the ICSID rejected Venezuela’s second argument that the Bilateral Investment Treaty did not apply to non-Dutch subsidiaries by relying on the text of the Netherlands-Venezuela Bilateral Investment Treaty. The ICSID also held that Mobil’s restructuring was legitimate because Mobil notified Venezuela of the restructuring and Mobil’s goal of protecting its investment by gaining access to the ICSID arbitration was a legitimate goal. However, the ICSID’s jurisdiction over the case was limited to the disputes arising after the corporate reorganization took place.

The Mobil decision is of great importance to foreign investors in Venezuela. This decision allows investors a means of securing their rights during Venezuela’s current economic and political unrest and the recent waves of expropriations. The decision also serves as protection against a sudden expropriation of assets without fair compensation, by providing an opportunity for impartial and efficient arbitration proceedings. ■

.....

12th Annual
FIBA Anti Money Laundering Compliance Conference
 FEBRUARY 23-24, 2012 Intercontinental Hotel, Miami
Global Trade: Risks and Rewards - A Case Study
 -Clark Abrams, Chief, Money Laundering and Financial Investigations Unit
 Office of the Special Narcotics Prosecutor for the City of New York
 -Hector X. Colon, Unit Chief, U.S. Immigration and Customs Enforcement
 -Robert Targ, Partner, Diaz Reus & Targ, LLP
 -Sean O'Malley, Vice President and Deputy Chief Investigator, Federal Reserve Bank of New York

“Islamic Finance” from page 4

level, the approval of an Islamic firm’s products and services may also depend on the jurisdiction in which they are to be offered. This can add another layer of complication for regulators.

A second obstacle for Islamic finance has been the risks associated with the shortage of qualified Shari’ah scholars in the Islamic financial industry. Currently, financial advisors, Islamic financial institutions and their Shari’ah committees are grappling with how to structure Islamic finance to properly integrate with conventional finance. The end result has been the development of a cumbersome and document-heavy structure that in many respects mimics conventional financing. There is clearly opportunity for more education and training and some positive steps are now being taken, including university degrees and professional training courses in Islamic financing.

There is a lack of a legal and regulatory framework for dispute resolution, especially in cross-border transactions. In contracts for Islamic transactions, the enforceability of terms and conditions depends on the governing law. In the case of a dispute, it is unlikely that a court located in a commonwealth country will determine a verdict based on Shari’ah law. To mitigate this risk, contracts have to be written carefully to minimize potential disputes.

Another challenge is the lack of tax framework for Islamic products leading to uncertain tax outcomes and sometimes even double taxation, as well as

the prohibition of certain Islamic products. A number of countries are revising their tax, legal, and regulatory frameworks to attract Islamic finance. For example, several countries that are encouraging an Islamic financial market are working to address issues in the taxation of Islamic products.

Lastly, Islamic finance also presents an unusual problem because there is neither any specific legislation regulating it, nor is there sufficient relevant case law to address these issues. Shari’ah law is not a codified body of law, but rather a set of practices based on various interpretations. Furthermore, Islamic finance in some countries and their various business models have not yet been tested in a severe economic or market downturn.

The Future of Islamic Finance

Notwithstanding these challenges, many Islamic institutions are expected to undergo a positive transformation in their approach and strategy towards Islamic finance, and more importantly in their business models. With the development of Islamic financing techniques, it is clear that there are increasing opportunities for its use. Increased product sophistication and market awareness-building would also need to go hand-in-hand with the advancement of the financial and legal infrastructure in Islamic finance. Indeed, Islamic banking can incorporate lessons from the global financial crisis and emerge as a role model in the future. ■

“Arbitration” continued from page 3

the interests of international commerce.

Colombian law does not permit an arbitral tribunal to assume jurisdiction over disputes unless all parties are signatories to a written agreement. The arbitration agreement may be incorporated in a contract governing the parties’ relationship or it may come in the form of a separate agreement used to settle a specific dispute.

Only disputes that may be directly settled by the parties can be submitted to arbitration in Colombia. Claims related to family civil status and criminal matters are not subject to arbitration. Generally, a settlement is permitted for economic damages. Additionally, arbitration is not permitted for: (i) obligations arising from provisions involving public policy and good usages; (ii) rights of incapable persons; (iii) the rights that cannot be freely disposed of by law; (iv) workers’ minimum rights; (v) matters involving public policy, sovereignty, and the constitutional system; and (vi) contracts for the exploration and exploitation of hydrocarbons entered into with the Colombian Hydrocarbons Agency.

Moreover, Colombian law does not permit arbitration to determine the legality of administrative acts or the application of “exceptional powers” of the government (i.e., unilateral interpretation, unilateral modification).

One controversial issue in Colombian arbitration revolves around the possibility of resolving an international arbitration dispute under foreign law, when the underlying transaction deals with a commercial agency in Colombia. On one hand, Colombian law

states that all agency contracts performed within the country are subject to the laws of Colombia. On the other hand, international arbitration allows the parties to apply foreign law to their respective contract. Questions still linger as to whether the Supreme Court will uphold an international arbitration award in this type of case.

If an international conflict arises, companies should hire an experienced law firm with a proven ability to meet the legal, linguistic, and logistical demands of resolving international disputes. Additionally, companies should seek expert legal advice at the outset of the contractual negotiations.

Diaz, Reus & Targ, LLP’s international dispute resolution team resolves complex transnational business, contractual and commercial disputes throughout Latin America, Asia, the Middle East, Europe and the United States. Our team has successfully handled complex, multi-jurisdictional cases and parallel proceedings for noted multinational corporations, including Tyco International and Canon Latin America, as well as governments such as China, Brazil, Venezuela, and Honduras. ■

Bogota, Colombia
T +57-1-282-8934

Buenos Aires, Argentina
T +(54) 11 4334-0033

Caracas, Venezuela
T +58 412 328-6057

Dubai, UAE
T +971 (0) 4 4019809

Frankfurt, Germany
T +49 (69) 3085-5048

Mexico City, Mexico
T +1 305-375-9220

Miami, Florida, USA
T +1 (305) 375-9220

Orlando, Florida, USA
T +1 (407) 550-0368

Panama, Republic of Panama
T +(305) 375-9220

Santiago, Chile
T +1 (305) 375-9220

Shanghai, China
T +86-21-61037435

São Paulo, Brazil
T +55 (31) 3264-2400

Offices Worldwide

MEET THE AUTHORS



Arti Sangar, Partner
asangar@diazreus.com

Enrolled as a legal practitioner in Australia, India, and Dubai International Financial Center. Advises on commercial disputes, arbitration, and transactional matters.



Carol Incarnação-Schirm, Associate
cincschirm@diazreus.com

Speaks Portuguese, French, Spanish, English. Advises on contracts, intellectual property and regulatory matters in international transactions and trade.



Adriana Clamens, Associate
aclamens@diazreus.com

Bilingual (Spanish/English). Advises on U.S., Venezuelan, and European Union law. Advises on customs, business transactions and family law.



Sumeet Chugani, Associate
schugani@diazreus.com

Bilingual. Advises on international dispute resolution, cross-border transactions, and regulatory compliance and support. Expertise in the cultural dynamics of doing business in Asia.



Marcela Cristina Blanco, Associate
mblanco@diazreus.com

Bogotá-based bilingual attorney licensed to practice in the U.S. and Colombia. Advises on international commercial litigation and transactions, shareholder matters, ERISA, and customs.



Diaz Reus & Targ, LLP
Miami Tower at International Place
100 S.E. Second Street, Suite 2600
Miami, Florida 33131 USA
T +1 877-247-9277 info@diazreus.com
Managing Partner: Michael Diaz Jr.



Diaz Reus & Targ, LLP
Miami Tower at International Place
100 S.E. Second Street, Suite 2600
Miami, Florida 33131 USA
T +1 877-247-9277 info@diazreus.com
Managing Partner: Michael Diaz Jr.
www.diazreus.com

