

Introduction to Symposium on International Company and Securities Law

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Technology has made the world smaller. Documents can be sent around the world in seconds through the use of the Internet. People can conduct business in faraway places without ever leaving their home or office. To be competitive in the world marketplace, a business must think beyond the borders of the county in which it is incorporated.

This International Securities symposium issue of *The International Lawyer* marks the third anniversary of the crash of the dot-com era. Three years ago, the NASDAQ,¹ loaded with ephemeral tech and telecom stocks, vaporized \$4.8 billion in paper wealth.² “Boom and bust” cycles are not a new phenomenon. One of the most vivid examples of the boom and bust cycle occurred in The Netherlands in 1636–1637 concerning the prices of tulips.³ More recently, investors endured three major financial panics in a single twenty-year period. The three financial panics were in 1969 (the Paperwork Crisis), 1987 (Black Monday of October 19), and 1989 (Bloody Friday of October 13).⁴

What makes the recent crash of the technology-driven financial market different from earlier financial panics is its global breadth. International financial markets have a symbiotic relationship with globalization. Globalization, driven by technology, has created a financial system that is no longer reliant upon a single country or currency. In emerging markets, international bonds are still denominated in dollars, yen and euro; while equity emerging markets are exposed to local currency fluctuations. Now, improvements in macroeconomic management in many emerging economies, combined with an influx of technology, has allowed countries from Poland to Brazil to become more responsible when it comes to fiscal spending and foreign exchange reserves. Besides the proliferation of technology, the glob-

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1. The NASDAQ stands for the National Association of Securities Dealers Automated Quotations.

2. Allan Sloan, *Bull? Bear?* NEWSWEEK, Mar. 17, 2003, at 44.

3. Peter Franks, *Stockmarkets: Boom & Bust Cycle*, at <http://www.maf.govt.nz/mafnet/publications/archive/rural-bulletin/2000/may-00/rbmay00-20.htm> (last visited Mar. 13, 2003).

4. Lee Applebaum, *A Look at the History of Investor Confidence in the Face of Disaster*, BUS. L. TODAY, Mar./Apr. 2003, at 13.

alization of financial markets has been heightened by the gradual shift from a fixed exchange rate to a floating regime in most markets.⁵

Floating exchange rates and the technology proliferation on a global scale are simply the tools of the economic globalization that is progressing. As the recent mega-bankruptcies of WorldCom and ENRON show, financial ethics is an important ingredient in long-term success. The recent trend among governments has been to require that companies incorporated within its borders adhere to a code of ethical standards.⁶ This code of ethics is the cornerstone of corporate governance. Corporate governance is about the process of the direction of a company, the relationship between the board of directors and management. It is ultimately about regimes of accountability.⁷

The goals of *The International Lawyer's* Symposium on International Company and Securities Law were two-fold. First, we wanted to explore the issues that relate directly to the globalization of the world's financial systems. And second, we examined the way in which countries are implementing steps to avoid another financial panic like the one we experienced three short years ago. In the end, we have produced a symposium issue that goes beyond our goals by addressing some of the new trends in the globalization of today's financial markets.

Our first article, entitled "Liability of Members of the Board of Directors and the Managing Director—A Scandinavian Perspective," was written by Rolf Dotevall. In Professor Dotevall's article, he reviews the recent changes in Scandinavian laws concerning board member liability in light of the recent, highly-publicized financial scandals. Professor Dotevall's article is focused primarily on Sweden and its recently passed Swedish Companies Act. Professor Dotevall completes his article with a review of the issues of liability pertaining to company management, especially the liability of managing directors.

Barbara Jones, Matthew Hurlock, and Pamela Henry collaborated to write their article entitled "Structuring PIPE Transactions in Key European Jurisdictions." The authors note that Private Investments in Public Equities (PIPEs) represent a relatively inexpensive and efficient means for a publicly-traded company to obtain additional capital funding. However, different strategies must be used in each European jurisdiction to complete a PIPE transaction, depending on the local regulatory framework.

Joseph Norton's article "A Perceived Trend in Modern International Financial Regulation: Increasing Reliance on a Public-Private Partnership" explores what he perceives to be an evolving "public-private partnership" among governments, banking authorities, and large and complex banking organizations (LCBO), referred to as "elite banks," with respect to fundamental dimensions of modern international financial regulation. Professor Norton's article focuses on this trend in the context of the international regulation and supervision of the modern genre of financial institution risks.

In his article "Conflicts between American & Foreign Law: Does the "Balance of the Interests" Test Always Equal America's Interests?" Professor Frank Razzano explores the reality of American law and foreign law as viewed by an American court. Professor Razzano

5. Arkady Ostrovsky, *Giant Leap for Emerging Markets*, FIN. TIMES, Feb. 22, 2003.

6. See SEC Proposes Rules to Implement Sarbanes-Oxley Act: Provisions Concerning Standards of Professional Conduct for Attorneys, SEC PRESS RELEASE 2002-158, NOV. 6, 2002, at <http://www.sec.gov/news/press/2002-158.htm>.

7. Maria Chetcuti Cauchi, THE EUROPEAN COMPANY STATUTE: CORPORATE GOVERNANCE UNDER THE PROPOSED EUROPEAN COMPANY STATUTE 1, at <http://www.chetcuticauchi.com/mcc/research/corporate-governance.htm> (last visited Mar. 13, 2003).

uses the international narcotics trafficking laws and the recent anti-money laundering laws to illustrate his point that the United States has consistently taken the position that where its laws conflict with those of other nations, America's laws will prevail. Professor Razzano does, however, provide two narrowly-focused cases where foreign laws were held to be valid over conflicting American laws.

Professor Paul Redmond's article "Transnational Enterprise and Human Rights: Options for Standard Setting and Compliance" examines the principal mechanisms that have emerged to bolster state responsibility for the enforcement of human rights norms against transnational corporations. Because of limitations inherent in the other principal mechanisms, what is presently required is a new or strengthened international coordinating mechanism to secure broad agreement as to the desirable content of norms of TNC responsibility and provide a modality for their implementation.

In Professor Hal Scott's article "A Bankruptcy Procedure for Sovereign Debtors?" Professor Scott explores whether a more formal bankruptcy procedure, the Sovereign Debt Restructuring Mechanism, as proposed by the IMF, is needed to handle the various sovereign debt issues. Professor Scott begins his article with an examination of the trends in sovereign debt problems from the 1970s, and then he discusses the major concerns about the existing process of dealing with sovereign debt. Professor Scott concludes his article with his own proposed solution to the problem of sovereign debt.

In Giora Shapira's article "Shareholder Personal Action in Respect of a Loss Suffered by the Company: The Problem of Overlapping Claims and "Reflective Loss" in English Company Law," Lecturer Shapira explores the question *Can a shareholder sue to recover a personal loss resulting from a loss suffered to the company?* The elements of causation, foreseeability, and proximity of damages may well exist. Such an action spans a number of legal areas, giving rise to a complex matrix of fact and law. Policy wise, it requires a careful consideration of individual property rights balanced against the function of companies. Lecturer Shapira carefully explores the recent debate concerning shareholder recovery and its resolution in English law.

Professor Marc Steinberg's article "Insider Trading Regulation – A Comparative Analysis" explores the insider trading laws in the United States with those of foreign jurisdictions. Professor Steinberg concludes that the insider trading laws in the United States have problems, but its underlying methods of stopping insider trading remain pre-eminent throughout the world because of the strong enforcement of its statutes. Professor Steinberg acknowledges that market integrity is based upon the enforcement of its regulations and other countries must increase their funding, personnel, and surveillance to stop insider trading in order to create a market where people will invest money.

Eric Cafritz and Omer Tene co-wrote the article entitled "Securities Regulation v. Consumer Protection: French Financial Market Legislation." Despite recent regulatory reforms, French securities laws are intertwined with antique consumer protection laws that remain applicable, apparently by historical accident, to financial transactions where there is no fragile consumer to protect. Such rules often outrightly contradict permissive exemptions created by modern securities law statutes. In their article, Messieurs Cafritz and Tene examine specific inefficiencies, such as usury and other protectionist laws, in French securities laws caused by historical rules aimed at protecting consumers.

In their article "Germany's Fourth Financial Markets Promotion Act" Dr. Jürgen Tielmann and Research Fellow Hansjörg Heppel explore the Act's goals to modernize the legal framework of the German financial markets and to make this new framework adaptable to the rapid structural changes in the global setting. This article provides a brief overview of

the changes created by the Act and focuses on the corporate law issues addressed specifically by the Act.

In his article “The Harmonization of European Securities Law” Professor Manning Gilbert Warren III traces the history of the various attempts to harmonize the many European securities laws. Professor Warren uses the European Union’s recent harmonization attempt through mandating results versus procedures as a recent example. Professor Warren examines the significant achievements of the 1999 Financial Services Action Plan. He concludes his article with an examination of recent harmonization developments in Europe, including the recently convened Committee of Wise Men.

The final article in this symposium issue was written by Peter Thomas Muchlinski. Professor Muchlinski’s article doesn’t immediately address the globalization of the world’s financial markets; instead, his article examines what globalization really means today. To Professor Muchlinski, today’s world involves cross-border interactions that are occurring greater and faster than ever before. His article concludes with an examination of the effect of globalization on the evolution of legal thought and legal research.

The Editorial Staff of *The International Lawyer* would like to thank each of the authors for their contributions to this symposium issue on International Company and Securities Law. We would also like to thank you, our subscribers, for making *The International Lawyer* the most widely circulated international law journal in the world. The reason that our journal has such a wide subscription base is simple—we have great authors who contribute outstanding articles. If you are interested in having your article published in a future volume, please follow the Article Submission policy printed in the front of every issue.

As this issue goes to print my class is passing the torch to another class of editors. It has been a great year working on *The International Lawyer*, and we all hope to meet many of you in the years to come. Thank you for your support.