

Editorial

Dear Members & Dear Friends,

Sydney was the centre of the sporting world for two weeks in September 2000. It was also the most security conscious city in the world outside Washington DC.

Australia is a federation of individual states. It became a federation in 1901, with the seat of power being Canberra, midway between Sydney and Melbourne (to avoid interstate rivalry). The Australian Constitution sets out the powers of the Federal Government allocating exclusivity in some national matters including inter alia defence and foreign affairs to the Federal Government. Those powers not given exclusively to the Federal Government remain with the State to its own police force. The Commonwealth for many years did not have its own police force but has now set up its own force to deal with crimes arising from Commonwealth responsibilities and legislation.

There were many international visitors in Australia during the Olympics, their safety was the joint responsibility of the State of New South Wales and the Federal Government. Other issues such as drugs and terrorism required joint policing. Up to and during the Olympics both police authorities worked smoothly together. However, the Federal Government had their "concern" about the ability of both police forces to carry out their security duties during the Olympics.

Before adjourning the Parliament for the Olympic Games break, the Liberal Party controlled Parliament introduced legislation to allow the Federal Government at the request of a State Government to use the Australian Armed Forces to assist in an emergency or civil disturbances and to allow for the use of the Armed Forces to assist the police.

The legislation was not confined to New South Wales and did not end with the Olympics but continues as part of the law of Australia. There has been an outcry especially from civil rights groups and minority political parties about the legislation. An attempt to erode citizen's civil liberties has been forced upon the Australian people the excuse being the Olympic Games security.

However, there are academics that believe the legislation will be struck down in the High Court of Australia, the ultimate arbiter in such matters. There are constitutional problems with the legislation as the power of the Commonwealth has attempted to exercise may not be permitted by the Australian Constitution. So Parliament may not have the power to enforce the legislation it has passed. There is already an interesting political battle and the legal battle will commence shortly. There is considerable anger in the community and the Americans would say "stay tuned".

Chers Membres et chers Amis,

En septembre 2000 durant deux semaines, Sydney fut le centre du monde sportif. Outre Washington DC, ce fut également pendant cette période la ville la plus sûre dans le monde.

L'Australie est une fédération d'Etats indépendants. Elle est devenue une fédération en 1901, avec un pouvoir représentatif situé à Canberra, à mi chemin entre Sydney et Melbourne (et ceci dans le but de résoudre le problème d'éventuelle concurrence). La Constitution australienne définit les pouvoirs du gouvernement fédéral, en donnant l'exclusivité à ce dernier, dans certaines affaires nationales comprenant la défense "interalia" et les affaires étrangères. Par ailleurs, les pouvoirs qui n'ont pas été confiés de manière exclusive au gouvernement fédéral, sont attribués aux gouvernements de chaque Etat tel que le droit de chaque Etat fédéral d'avoir sa propre force de police. Pendant des années le Commonwealth n'a pas eu sa propre force de police, mais il se voit aujourd'hui le droit de réglementer les crimes relevant de la responsabilité du Commonwealth et de sa législation.

Il y a eu beaucoup de visiteurs internationaux en Australie durant les jeux olympiques et leur sécurité fut assurée grâce au partage de responsabilités entre l'Etat de la Nouvelle Gales du Sud et le gouvernement fédéral. Les autres questions telles que la drogue et le terrorisme ont exigé une politique commune. Avant et pendant les jeux olympiques les autorités policières ont travaillé ensemble sans heurt. Cependant le gouvernement fédéral fut aussi concerné par les compétences de l'ensemble des forces de police pour mettre à exécution leur devoir de sécurité durant les jeux Olympiques.

Avant d'avoir été ajourné lors de la clôture des jeux olympiques, le parlement composé d'une majorité de libéraux a introduit une législation afin de permettre au gouvernement fédéral (à la demande du gouvernement d'état) d'utiliser les forces armées australiennes en cas d'urgence ou de troubles de l'ordre public.

Cette législation ne concernait pas la Nouvelle Gales du Sud mais elle fut maintenue malgré la fin des jeux olympiques, continuant de faire partie intégrante de la loi australienne. Ainsi certains partis politiques minoritaires, et surtout des groupements de citoyens ont protesté violemment concernant ladite législation introduite par le parti libéral.

Invoquant l'excuse d'une sécurité renforcée durant les jeux olympiques, une atteinte a été portée aux libertés publiques des citoyens.

Ainsi, beaucoup d'intellectuels pensent que cette législation devrait être contestée devant la Haute Cour australienne de justice, l'arbitre ultime dans de nombreux conflits.

Cette législation soulève donc un certain nombre de problèmes constitutionnels. Ce pouvoir que le Commonwealth a essayé de mettre en place ne peut être autorisé par la Constitution australienne. Il se peut que le parlement n'ait pas le droit de passer en force de chose jugée la législation et de plus une intéressante bataille politique et légale va bientôt commencer. Par conséquent la colère gronde dans la communauté et comme les américains le disent : "restons en contact".

M. Rosenblum, Solicitor, Sydney, Australia.

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The Netherlands : Limitation periods and art. 6 of the European Convention of Human Rights

Due to exposure to asbestos during his employment from 1959 to 1963, an employee suffered the consequences hereof. In 1996 an incurable form of cancer (mesothelioma) was diagnosed, of which he died. His successors initiated a legal procedure against the employer.

The employer stated that the limitation period of 30 years for the claim was surpassed according to Article 3 : 310 of the Dutch civil Code. This led to a remarkable judgement by the Dutch Court of Cassation on the 28 April 2000.

Although the 30 years were within the member states given "margin of appreciation", the Court of Cassation judged that – appealing a.o. to a "fair trial" of article 6 of the European Convention on Human Rights – the limitation period could be inapplicable, if the application would lead to unacceptable results according to the standards of equity.

If article 6 of the Convention will indeed overrule the national law in this case, is still in dispute. Still, the given judgement is a good example of the direct application of the Convention in a national jurisdiction!

A. de Vlieger-Mandour, Advocaten, Quarles & Jurgens, Dordrecht, The Netherlands.

Anti-dumping actions : "agreement on the implementation of Article VI of the General Agreement on tariffs and trade 1994"

If a company exports a product at a price lower than the price it normally charges on its own home market, it is said to be "dumping" the product. Is this unfair competition ? Opinions differ, but many governments take action against dumping in order to defend their domestic industries. The World Trade Organisation (WTO) agreement does not pass judgement. It is on how governments can or cannot react to dumping- it disciplines anti-dumping actions, and it is often called the " Anti-Dumping Agreement"...

The legal definitions are more precise, but broadly speaking the WTO agreement allows governments to act against dumping where there is genuine ("material") injury to the competing domestic industry. In order to do that the government has to be able to show that dumping is taking place, calculate the extent of dumping (how much lower the export price is compared to the exporter's home market price), and show that the dumping is causing injury...

The WTO Anti-Dumping Agreement introduced these modifications :

- more detailed rules for calculating the amount of dumping,
- more detailed procedures for initiating and conducting anti-dumping investigations,
- rules on the implementation and duration (normally five years) of anti-dumping measures,
- particular standards for dispute settlement panels to apply in anti-dumping disputes.

The agreement says member countries must inform the Committee on Anti-Dumping practices about all preliminary and final anti-dumping actions, promptly and in detail. They must also report on all investigations twice a year. When differences arise, members are encouraged to consult each other. They can also use the WTO's dispute settlement procedure.

World Trade Organisation, Anti-Dumping, subsidies, safeguards : contingencies. Report page 1 to 9 published October 2000, Geneva, Switzerland.

Community Law on the release of GMOs takes full account of the precautionary principle

The Court of Justice decides that Member States which have forwarded a dossier to the Commission with a favourable opinion for placing a GMO

on the market are bound by their opinion and must apply the Commission's decisions. However, new information indicating that a GMO constitutes a risk for human health and the environment allows the procedure for placing a GMO on the market to be stopped pending a fresh Commission decision.

The Court of Justice analyses the various stages of the machinery set up by the Community directive, having regard to the precautionary principle. If the competent national authorities which receive an application to place a GMO on the market do not reject the application, they must forward the dossier to the Commission after issuing a favourable opinion. In the Court's view, at that stage, the national authorities which so forward a matter to the Commission have every possibility of assessing the risks. The applicant undertaking must provide all information regarding the risks which the product constitutes for human health or the environment.

Once the application has been put before the Commission, Community law provides for a period during which the competent national authorities of the other Member States are consulted. The Commission adopts a position only in the case of an objection raised by one of the competent national authorities.

The Court considers that, here again, observance of the precautionary principle is assured at that Community stage.

Nevertheless, the Court considers that the system of protection set up by the directive means that Member States concerned may not give their consent to the placing of a product on the market if new information reveals a risk after the Commission has adopted its decision. In case, it must inform the Commission which must then adopt a fresh decision in the light of that new information.

Press Release , Court of Justice EC no 18/00 , 21 March 2000, Luxembourg.

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Electronic Proof : France comes on-line

Following closely on the heels of the December 13, 1999 European Directive, France adopted a law on March 13, 2000 that brings its rules of evidence up-to-date by including proof using information technology and electronic signature (official journal, March 14, 2000, p. 3968). By permitting evidence in electronic form, the law of March 13, 2000 substantially changed the rules of evidence in contracts matters. The legislation reflects the dramatic changes in commercial practice over the past five years ; most businesses have already recognized the importance of the electronic signatures and are currently exploring different formats for validating them, including digital imprint, dynamic signature and recognition by iris.

France is among the leading group of European countries working toward the recognition of electronic evidence. The international environment is particularly receptive to such developments at the moment : besides the European Directive mentioned above, a new Directive concerning electronic commerce, dated May 4, 2000, requires Member States to recognize the validity of electronic contracts. The pressures on European governments to enact legislation which gives effect to the new forms of doing business are obviously strong indeed.

The new law is quite simple in its approach : from an evidentiary point of view, it treats the electronic medium as if it were hard copy, written on paper or some other tangible medium. To do this, the French law redefines "written evidence", which may now consist of a series of letters, characters, numbers or any other signs or symbol having an intelligible meaning, whatever their medium or mode of transmission (new Article 1316 of Civil Code). The law (new Articles 1316-1 and 1316-3) then explicitly gives the electronic document the same probative value as hard copy, provided that :

- the author of the document is identified ;
- the document is prepared and stored in conditions ensuring its integrity.

Finally, the law admits that electronic writing constitutes, under conditions which remain to be defined, a means of proving "authentic" acts, i.e. documents signed before a notaire or prepared by other special categories of court officers (e.g. process servers (huissiers)). Existing evidentiary rules dealing with electronic proof (e.g. credit cards and ATM cards) remain unchanged.

Of course, recognizing an electronic document as admissible evidence requires that the electronic "signature" can be established to the satisfaction of the court. A new Article 1316-4 provides in this connection : "the signature required to evidence the conclusion a contract must identify the person signing and demonstrate that he consented to the obligations which flow from such a contract". The new text also indicates that electronic signature "must involve the use of a reliable identification process ensuring its connection to the contract to which it is affixed". This process will be defined in accordance with conditions to be implemented by decree of the Conseil d'Etat. A number of large, private-sector groups (including France Télécom) have already launched the development of "certification and authentication" services founded on the latest technologies. These initiatives are being encouraged by many companies which see "secure" electronic communications as essential to their development.

Since the issue of whether a writing that appears in electronic form constitutes evidence has now been settled, it is no longer necessary to debate the relative probative values of an electronic writing versus a hard copy. From now on, the most important issue will be the content of the document and the information it contains on the intent of the parties and the terms agreed. Problems can be expected, however, where electronic proof and hard copy differ. The new Article 1316-2 leaves to the courts the job of determining on a case by case basis which form of evidence will be deemed the most persuasive.

Despite the significant boost that the Law of March 13, 2000 has given to the development of e-business, it does have its shortcomings. Because the new legislation approaches the problem from an evidentiary perspective, it does not address the question of contracts that under French law require a handwritten acknowledgement, without that the contract is considered null and void. Contracts in this category include leases and various consumer contracts. The new law does, however, remedy this problem with respect to unilateral contracts such as guarantees ; the new Article 1326 of the Civil Code provides that these may entered into electronically. This problem may, in any event, resolve itself over time without the need for further legislation. The Supreme Court of France (la Cour de Cassation) has shown itself very open to admitting electronic proof in a high-profile opinion dating as far back as 1997 (Descamps decision of December 2, 1997). The new law will certainly encourage the courts to continue in this direction.

James Lightburn, Avocat à la cour, Associé, Hughes Hubbard & Reed, Paris, France.

Communautés européennes, méthode comptable de la " juste valeur " d'instruments financiers

La Commission Européenne propose de modifier la quatrième directive du 25 juillet 1978 et la septième directive du 13 juin 1983 en ce qui concerne les règles d'évaluation applicables aux comptes annuels et aux comptes consolidés de certaines formes de sociétés. Il s'agirait d'accorder aux Etats membres le droit d'autoriser ou d'obliger les entreprises à comptabiliser à leur juste valeur certains actifs et passifs financiers, à savoir les instruments financiers dérivés. La notion de juste valeur correspond à la valeur actuelle sur le marché, par opposition au coût d'acquisition initial. Les Etats membres auraient la possibilité de limiter le champ d'application des dispositions nouvelles, par exemple en ne les appliquant qu'aux comptes consolidés. De même, ils pourraient restreindre l'application aux instruments financiers détenus à des fins de négociation et exclure du système de la juste valeur les prêts et d'avances accordés par l'entreprise elle-même.

Proposition de directive, Février 2000, Commission CE, Bruxelles, Belgium.

Libération par apports en espèces en monnaie étrangère

Dans une affaire il s'est posé la question de savoir s'il était possible, dans le cadre d'une fondation ou d'une augmentation de capital d'une S.A., de libérer le capital correspondant en monnaie étrangère, pour autant qu'il s'agisse d'une monnaie convertible. Contrairement à ce que l'on pourrait penser, c'est effectivement possible.

Il suffit que la banque dépositaire indique la valeur de conversion selon le cours du change au jour du versement. En revanche, toutes les pièces justificatives ainsi que le texte de la réquisition d'inscription au registre du commerce devront évidemment libeller le montant du capital et des titres d'actions en francs suisses (cf Peter Böckli, Schweizer Aktienrecht, 1996, N 41, p37 ; Fritz de Steiger, le droit des sociétés anonymes en Suisse).

Office Fédéral du Registre du Commerce, Bern, Suisse.

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