

ProfileOn:

Schröder, Kieback, Högelein – Hamburg, Kiel, Sylt.

The law firm of Schröder, Kieback, Högelein (SKH) was founded in 1998 (then named Schröder & Partner) by Wolfgang Schröder, the senior partner of both firms. Before launching Schröder & Partner he gained valuable experience in a mid-sized law and accountancy firm. Working with accountants and tax advisers gave him a solid business grounding in economics and business law.

SKH has offices in Hamburg, Kiel and Westerland (Sylt). The Hamburg office is located in the city's old Hanseatic business centre, next to Hapag Lloyd and most of Hamburg's private banks (and close, coincidentally, to the head office of the import/export business founded by Wolfgang Schröder's grandfather). Kiel is capital of the northern German province of Schleswig-Holstein, and the island of Sylt is an exclusive tourist destination for Europe's jet-setting rich and famous.

Schröder, Kieback, Högelein are civil law specialists dealing principally with litigation, commercial law and private building and architectural law, family law, law of tenancy, arbitration, yachting and sea traffic law as well as intellectual property law.

Each partner contributes their own specialist skills and competence to the firm and its clients. In developing the best strategy to ensure success of clients' claims we aim, through careful investigation and consideration of all the facts and analysis of the legal situation, to accurately and quickly quantify the risks involved and clients' chances of success. We endeavour to avoid, or minimise, unnecessary disputes which cost clients energy and money or cause long-term damage, such as the effects of divorce on children. In our experience an open and positive approach at the appropriate moment frequently achieves much.

The partners' collective experience in specialised branches of the law has been brought together into an efficient unit which benefits from membership of the established network of international law firms represented in the Euro-American Lawyers Group. Our senior partner Wolfgang Schröder is currently Chairman of the Group.

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legalinterview

The Newsletter of the Euro-American Lawyers Group

Issue 20

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Unyielding French economic redundancy legislation

As the current world economic crisis deepens it is useful to consider France's strict bureaucratic redundancy legislation, for in this country firms cannot make workers redundant in order merely to make savings or increase profits. In this France is something of an exception compared with other European countries and the United States.

Making workers redundant in France (i.e. dismissal not based on misconduct or reasons related to the individuals concerned) is a real assault course requiring forward planning on questions of substance and form. A wrong step can result in the company being ordered to re-hire the employee or to pay damages based on the loss incurred, length of service and the size of the workforce. Whether the redundancy is individual or collective it must follow a strict procedure covering such matters as period of notice, means of notification, consultation of employee representatives and grounds for redundancy.

The reasons for redundancy must be based on one of the limited causes laid down by statute and French case law – namely, evidence of economic difficulties, technological changes, or reorganization of the business where this is necessary to safeguard (but not improve) its competitiveness, or winding-up of the business. When claiming *economic difficulties*, the employer has to prove that profits have suffered, turnover has fallen significantly, or that losses have increased.

The *Cour de Cassation* (Supreme Court of Appeal) will rigorously examine the economic grounds claimed by the company and will overturn redundancies based on the company's or the group's intention to increase profits, to cut the wages bill or welfare charges, or to give precedence to, or improve, the firm's profitability. The French courts have made clear that merely a small downturn in trading activity, positive financial results or the general good health of a company or group will be indicators that there are no economic difficulties. If the company is part of a national or international group the economic grounds are assessed at group level, and more especially in that *sector of activity* of the group in which the company is engaged, and not by comparison with the group's overall situation. Employers have a duty of *necessity to safeguard competitiveness*, i.e. it is the competitiveness of the sector of activity of the group to which the French company belongs that is examined, and not just that of the company itself.

Furthermore, employers are under a duty to offer alternative work to employees threatened with redundancy, and must be able to prove that before making employees redundant they have made every effort to find alternative positions for them, either within the company or within the group in France, or abroad within its subsidiaries. Attempts to find alternative work must be for identical, similar or even inferior positions to those lost. Failure to comply with this obligation means employees may win claims for compensation without the courts even examining the specific economic evidence.

Before commencing redundancy action, French law obliges employers, under threat of penalty, to offer affected employees assistance under an "accompaniment" measure, (*Convention de Reclassement Personnalisé or Congé de Reclassement*) which if accepted by the employee will help him to find new employment. The cost is recoverable by the employer from the French Unemployment Administration as part of the redundancy notice indemnity normally owed to the employee.

Nor are employers free to make the employee of their choice redundant if several employees do the same job. Employers must determine an order of redundancy based on various statutory criteria (seniority, family commitments, disability, etc.) none of which relate to merit or ability.

In these unsettled times, when redundancy is widespread, it would be desirable in the absence of more statutory flexibility, for the courts to be more benevolent in their interpretation of the law. It is too early to say whether they will be, but any company looking to lay off employees in France is strongly advised to be meticulous in their implementation of the procedures.

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The “Buy American” Provisions of the United States Economic Stimulus Legislation: Laying the Groundwork for Economic Protectionism or Business As Usual?

As the global economy continues to be mired in the worst recession since the end of World War II, many countries have sought to offset the decline of private investment with the use of government stimulus funds. Since government stimulus represents the use of citizen tax revenues, many government stimulus plans involving public works or purchases have sought to place national origin conditions on how and when public funds will be used. The purpose of such restrictions is to ensure, so far as possible, that the citizens whose taxes are being spent are the primary beneficiaries of the government's actions.

The Group's last half-yearly conference was held in the historic university town of Leuven, near Brussels. Meetings took place in the House of Chièvres, in the Grand Beguinage of Leuven, part of the university campus.



Members meet in Business Session.

In an era of global investment, outsourcing and supply chains, placing national origin restrictions upon when and where government procurement funds can be used, may raise significant obstacles for businesses involved in international trade. This is especially so when such businesses want access to the opportunities presented by government stimulus plans to counter the decline their own businesses have experienced in private sector demand. It includes not only foreign companies that are dependent upon export trade, but also domestic businesses that source from abroad. National origin restrictions in government funded projects also raise the specter of the protectionist trade policies that arose during the 1930s Depression. Domestic businesses actively engaged in overseas markets fear that trading partner countries will impose their own, perhaps retaliatory, restrictive policies in fashioning their own stimulus plans. It is for these reasons that the G-20 recently reaffirmed its commitment to open markets and globalization, and agreed that each member would 'minimize any negative impact on trade and investment of our domestic policy actions.'

The “Buy American” provision of the American Recovery and Reinvestment Act (ARRA), also referred to as the United States federal stimulus law, is one of the best known – and initially controversial – sovereign fiscal stimulus efforts containing provisions mandating national origin requirements on the spending of citizen taxes as fiscal stimulus. While the new law will provide challenges to US and non-US businesses seeking to benefit from the projects using US stimulus dollars, contrary to some media reports the new law does not automatically prevent non-US companies from participating in projects funded or guaranteed by US stimulus dollars. In many ways, the new law is a variation of US laws that have been in effect for over 70 years. Significantly, while the new law contains a number of ambiguities whose resolution may widen or limit the scope of its application, it also provides that it should be applied ‘in a manner consistent with US obligations under international agreements.’

Section 1605 of the ARRA (the Buy American provisions) provides, in part, that: “[n] one of the funds appropriated or otherwise made available by [the ARRA] may be used for a project for the construction, alteration, maintenance, or repair of a public building or public work unless all of the iron, steel, and manufactured goods used in the project are produced in the United States.”

Section 1605 is not unique - a number of US domestic content laws impose Buy American requirements on US government procurements. These include the Buy American Act and the Buy America Act. The former enactment, which became law in 1933, applies only to purchases by the US federal government and requires that the cost of domestic components be more than 50% of the cost of all components in the project. For government purchases above certain thresholds a more recent law, the Trade Agreements Act, may govern. For more than a quarter century the Buy America law, which applies mostly to highway and mass transit projects, requires that 100% of the components used in federally funded projects be made in the United States. A number of other domestic source restrictions may also apply to US government procurements.

Thus, while the 2009 Buy American provisions impose a requirement of a higher domestic content than the Buy American law that has existed for over seventy years, the new requirements do not differ in principle from the 100% domestic content that the US government has required for highway and mass transit projects for decades. It should also be noted that the new restrictions do not change these other laws, although under some circumstances questions may arise as to which law applies.

Importantly, the new Buy American provisions do not stipulate the nationality of the company producing the goods. Manufactured goods produced wholly in the United States by a foreign company should be eligible for use in a US stimulus-funded project. By comparison, manufactured goods wholly produced in a foreign country by a US company may not be. Except, as discussed below, there are a number of different circumstances under which manufactured goods made in a foreign country may be eligible for use in a US-funded stimulus project, regardless of the nationality of the company producing the foreign made goods.

The ARRA contains a number of undefined provisions which, once defined, may limit the application and impact of the Buy American provisions on both US and non-US companies. For example, ARRA does not define “manufactured goods” or the meaning of “produced in the United States”. There is also a question of whether the restrictions of the Buy American provisions apply only to construction projects or whether they can be expanded to other situations involving federal stimulus funds. Determination of these issues will be made through a public comment rulemaking procedure and individual agency actions during 2009 and 2010.

The law also provides three exceptions that allow the heads of US federal agencies to waive the requirements of the Buy American provisions. These are when the agency head finds that applying the provisions would be (1) inconsistent with the public interest; (2) the required iron, steel, or relevant manufactured goods are not produced in “sufficient and reasonably available quantities and of a satisfactory quality” in the US; or (3) inclusion of US-produced iron, steel, or manufactured goods would increase the cost of the “overall project” by more than 25%. Any waiver of the Buy American provision requires official government publication with a “detailed written justification” of the reasons.

The requirement to apply the Buy American provisions “in a manner consistent with United States obligations under international agreements” has already been noted. When coupled with the authorization to waive the Buy American requirements when they are “inconsistent with the public interest”, it is possible that a large number of projects funded by the recent US stimulus package will be allowed to utilize manufactured goods made outside of the United States.

The United States is party to a number of international trade agreements, including the World Trade Organization (WTO) and the Government Procurement Agreement (GPA); the North American Free Trade Agreement (NAFTA); CAFTA, the Central American Free Trade Agreement; and a number of other bilateral and regional trade agreements. Under the WTO Government Procurement Agreement (GPA), when purchased under specified circumstances, US government agencies must provide the same treatment to end products from GPA signatory countries as is provided to competing US-made end products. The European Union and its member states, as well as a number of other countries, are signatories to the GPA. Under specified circumstances, products from these countries should be entitled to a waiver from the requirements of the ARRA Buy American requirements. However, goods made in non-GPA countries may still be subject to the Buy American provisions.

The current US Trade Agreements Act threshold for construction projects, which is the primary scope of the ARRA Buy American restrictions, is \$7,443,000 for signatories to the WTO GPA, which include member states of the European Union. Assuming that the Obama Administration interprets the requirement to apply the new law consistent with US obligations under international agreements, application of the Buy American restrictions to the ARRA to goods made in the European Union should generally be limited to only smaller projects. Even then, other exemptions may apply which will allow the use of foreign made goods.

Thus, while the adoption of Buy American provisions in the US fiscal stimulus legislation has raised protectionist concerns and the possibility of trade wars, in essence the new law is similar to those that have been in effect for a number of years in both the United States and its trading partners. The United States has reaffirmed its commitment to adhere to treaty obligations and the general principles of free trade that the US has helped to negotiate and implement both within the World Trade Organization as well as with individual trading partners. Assuming that ARRA is implemented in a clear and timely fashion, the new law may not significantly change the current landscape for both US and non-US businesses.

However, as with any new law, the devil is in the detail. As of May 1, 2009 the Obama Administration has not yet adopted final regulations implementing the new law. Nor has it given clear indication how it will interpret the waiver authority. There will be

substantial political pressure on the Administration to ensure that most US stimulus dollars benefit US taxpayers. The requirement that the Administration publicly explains, in writing, why it is waiving the Buy American requirements will add to this pressure. Because of the dual nature of the US and State federal system, and distinctions made in US law between projects involving direct federal procurement as opposed to funding grants, the application of United States' international obligations in the area of public procurement is especially complicated. For example, 37 of the 50 US states have voluntarily signed the GPA agreement. This raises the potential issue of the Buy American restrictions being applicable in State projects where the State is not a voluntary participant of the GPA, but not in those States where the State has voluntarily signed onto the GPA.

Accordingly, businesses wanting to participate in ARRA stimulus-funded projects should maintain a careful watch on how the new law is implemented and, if participating in such projects, ensure that their sourcing of manufactured goods complies with the law's requirements.

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A visit to the early Gothic basilica Sint Jan de Doperkerk (St John the Baptist Church) founded in 1234.



Barend Blondé addresses members on “Marketing for International Networks”.