



Law firms  
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# The Journal

Legal news


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Issue 8



ESPAÑA  
FRANCE  
ITALIA  
PORTUGAL  
UNITED KINGDOM  
POLSKA  
BRASIL  
CHILE  
SWITZERLAND  
DEUTSCHLAND  
MEXICO  
USA  
CHINA  
MONGOLIA  
ARGENTINA  
ISRAEL

## Who we are



 Pragma is an E.E.I.G. (European Economic Interest Grouping) with its head office in Brussels (Belgium).

Pragma is a European based network of law firms with members worldwide.

With 350 lawyers and *dottori commercialisti*, 45 law offices in 15 countries, Pragma is the first group of Latin philosophy and culture which is renowned for its ability to solve complex economic juridical problems.

It was set up in 2001 as the result of a common will shared by a group of four European firms of lawyers and law advisers who, after having

worked together for over ten years, decided to unite all their resources at the service of companies with new demands brought about by the developing new Europe and the increasing globalisation of business relations.

In Pragma, we aim to deliver high quality services and to offer a comprehensive service to companies through small coordinated teams.

## News from our network

### Meeting of the Board of Directors

The Board of Directors met in February 2008 in Barcelona, Spain, in the office of *Manubens y Asociados*.

Members of Pragma's Board with Wojciech Celichowski and Pragma's coordinator



COORDINATOR Nathalie FACON	VICE CHAIRMAN Carlos MANUBENS	MEMBER Wojciech CELICHOWSKI	DIRECTOR Cecilia CARIA MENDES	CHAIRMAN Michel LACROIX	DIRECTOR Greg WOLTON	SECRETARY/ TREASURER Gilberto GELOSA
						



Gustavo Cuevas, member of the Board and manager of *Cuevas Abogados* in Chile, attended part of the meeting via webcam.

Gustavo Cuevas  
Member of the Board

Wojciech Celichowski, manager of *Celichowski-Szyndler-Wieckowska i Partnerzy* in Poland, was invited to talk about the organisation of the annual conference in Poznań in October.



Pragma's annual conference will take place in Poznań, Poland from 10<sup>th</sup> to 12<sup>th</sup> October 2008

## In brief

### POLAND

The office *Celichowski-Szyndler-Wieckowska i Partnerzy* opened a new office in Warsaw. From now on, Wojciech Celichowski's office is located both in Poznań and the Polish capital.

Address in Warsaw:  
Al. Jerozolimskie 53/212  
00-697 WARSZAWA  
Tel: +48 (0) 22 356 34 81  
Fax: +48 (0) 22 356 24 8  
[www.kancelaria-csw.pl](http://www.kancelaria-csw.pl)

### SOUTH AMERICA

Carlos Manubens, manager of *Manubens y Asociados* in Barcelona and Vice-Chairman of Pragma, went to South America last November to visit Pragma's members and contacts in Argentina, Uruguay, Chile and Brazil.

One of the most important benefits of this trip is the project to set up a collective office in Madrid that would be the bridge between the Latin American members of Pragma and Europe. This office would be financed by *Manubens y Asociados* in Spain and by Latin American Pragma's members (*Del Carril, Colombres, Vayo & Zavalía Lagos* in Argentina, *GrowAssociates* in Brazil, *Cuevas Abogados* in Chile and *Alvarez Valenzuela Abogados* in Mexico).

### ITALY

The office *Interconsulting Studio Associato* in Milan has moved to Via Victor Hugo, 4. Its fax and phone numbers remain unchanged.

## Founders' anniversaries

The French network of law offices *Jean-Claude Coulon & Partenaires*, located in 18 offices all over France and founder of Pragma will celebrate its 40<sup>th</sup> birthday in September 2008.

Both the Italian office *Interconsulting Studio Associato* in Milan and the Spanish office *Manubens y Asociados* in Barcelona, also Pragma's founders along with *Cecilia Caria Mendes Advogados* in Portugal, will turn 10 year in July of this year.

## BRAZIL



**GROWASSOCIATES**  
Alameda Santos nº2441 – 2º andar  
01419-002 SAO PAULO SP  
Tel: +55 11 3088 2717  
Fax: +55 11 3088 23 10  
[grow@growassociates.com](mailto:grow@growassociates.com)  
[www.growassociates.com](http://www.growassociates.com)

## Brazilian software's legislation

Although software in Brazil has specific rules (Law 9.609 of 02/19/98), it is also protected by copyright and, for this reason, patrimonial rights can be totally or partially transferred to third parties through licensing, concession or cession.

The registration of the transfer document at the *Instituto Nacional da Propriedade Industrial – INPI* (the Brazilian Patent and Trademark Office) is not compulsory but strongly recommended as it brings guarantees against third parties in case of litigation.

The Law assigns to the software the nature of a service (LC 106/2003) but the Supreme Court of Justice in Brazil decided that the software can have two different natures: the first one called standard or "off the shell" is the nature of merchandise; the second one called customized is the nature of service. This difference is important because products and services have different taxations.

### Software Licensing

Software Licensing can be used with three different purposes: (i) to the buyer's own use, (ii) for sale and (iii) to technical knowledge transfer. In both (i) and (ii) cases, the registration of the document at INPI is not required. However, in (iii) case, the registration is required (article 11, Federal Law no.9.609) to make the licence effective against third parties and to validate the deduction of the royalties paid to foreign companies.

The registration of the contract means that the owner must provide for the source code, a memorial describing the program, its internal specifications, diagrams, flowchart and all the technical information necessary to transfer the know-how of the technology. If a foreign company owns the Software Licensing, the company must determine who will be

## Calendar of events in 2008



-  Monday 28<sup>th</sup> April 2008 afternoon:  
Annual General Meeting in Paris, France
-  From 10<sup>th</sup> to 12<sup>th</sup> October 2008:  
Annual conference in Poznań, Poland
-  From 8<sup>th</sup> to 16<sup>th</sup> November 2008:  
Mission in China (Shanghai and Beijing)

responsible for the payment of the taxes and the royalties.

If the software is customized - that is to say if it can be adapted to the specific needs and requests of the customer and if its functionality can be compromised if its installation and adaptation are not made properly - the software will be considered and taxed as a service - ISS (service tax). It is important to point out that the importation of software incurs also the taxation on the supporting media, which is considered as a product and will be taxed as so (II, IPI, ICMS, PIS/COFINS importation).

### Payment of Royalties

The payment for the operation of the copyrights (or the use of intellectual rights in general) is called royalty as well as the amounts paid for the services of technical assistance to the effective use of the software and related to the knowledge necessary to its use.

The amounts paid and considered as royalties are not freely used as operational expenses of the company. To do so, some rules must be applied, even if the payment occurs between the subsidiary and the main office. In this last situation, rules of transfer pricing will not apply. The rules applicable to the royalties are essentially the following:

- Expenses of royalties will be admitted only if they are necessary to the maintenance of the possession, use or fruition of the goods or rights that generate the incomes;
- The maximum admitted as operational expense is 5% of the sales net revenue of the product manufactured or sold;
- The amount that exceeds this maximum percentage will be considered as payment of dividends.

Expenses of royalties are deductible only when it is strictly mentioned in Law. They can be renewed for five years only once.

Royalties are not deductible in the following situations:

- If they are paid to partners (natural persons or legal entities) or directors, their family or dependants;
- If they are paid to third parties to get the rights for the use of a certain good and paid to extend or amend the capital eligible to be amortized during the term of the contract;

Royalties will also be taxed in the following cases:

- Brazilian subsidiaries pay royalties to their main office;
- A Brazilian company pays royalties to a beneficiary not resident in Brazil who maintains, directly or indirectly, control of the company capital and does not have the contract registered at *Banco Central do Brasil*, unless the contract has been registered at INPI at any time since 1<sup>st</sup> January 1992.
- Royalties exceed the maximum limit allowed by the Law (5% of the sales net revenue), although it is worth remembering that INPI is the one who decides the deductibility rate.

The above rules also apply to the royalties paid for technical, scientific or administrative assistance but they can be deductible only after the registration of the contract at INPI and during the first five years of the company's operation.

Sara SANCHEZ  
GrowAssociates,  
Sao Paulo, Brazil  
[sara.sanchez@growassociates.com](mailto:sara.sanchez@growassociates.com)



## Transfer pricing and valuation of intangibles

Current transfer pricing issues concern the terms and conditions of sale of a product or supply of a service. However, more and more often, they also concern the licensing of a trademark or a patent.

In case of transfer of intangible assets, the main difficulty is to value these assets properly. Even though the OECD transfer pricing guidelines are nowadays internationally respected, tax administration no longer hesitate to dispute the amount of royalties between companies of a multinational group.

With regard to the valuation of intangibles, the most appropriate transfer pricing methods recommended by the OECD are the following two methods:

- The Comparable Uncontrolled Price ("CUP") is to be preferred where a comparable transaction exists on the market;
- The Profit Split Method is recommended in other cases. It is based on the idea that consolidated profit breaks down into two components: routine and residual profit.

Source: IFA

## Germany: Taxation of transfers of functions

The amended German Finance Act for 2008 issued a specific regulation providing for the systematic taxation of cross border transfers of functions between companies of the same group.

This regulation does not concern only cases already defined by the German Act on the sale of ongoing business assets but applies to a broader notion of "business opportunities", such as, for example, the transfer of a risk to a foreign company or the delegation of provision of a service to such an entity.

Consequently, when the transfer is made by a German company, it leads to a taxable capital gain being recognized. It is moreover the taxpayer's responsibility to document and evaluate such a transfer on the basis of an estimate of the loss of future profit. The tax authorities will then have the possibility to update this estimate on the basis of current data.

This new provision is a real innovation in Europe and the question can legitimately be raised as to whether other countries might not be tempted to implement a comparable system on the basis of the German model.

Source: IFA

## PORTUGAL



**CECILIA CARIA MENDES  
ADVOGADOS**  
Avenida da República, nº74 - 1º Esquerdo  
1600-205 LISBOA  
Tel: +35 1 217 803 450 / 1 / 2  
Fax: +35 1 217803 453  
[ccmendes.pragma@netcabo.pt](mailto:ccmendes.pragma@netcabo.pt)

## Investment funds in Portugal

Investment funds are an autonomous capital withheld by a depository (trustee) resulting from the investment of individual or collective savings in primary or secondary stock markets.

Each fund share is represented by units of participation which are withheld by several investors.

The investment is managed by a company that has to calculate and

publish the net value of the assets. As they are an autonomous capital, funds can be owned by several individuals or by a collective entity fiscally "transparent" with no legal personality.

As these investment funds are located in a certain country and managed by a company or a depository, they are not allowed to invoke the application of the conventions applicable to that country. As holders of the fund are not considered "residents", treaties should be applied to whom the income or the capital gains are directly attributed, no matter where the entity is located.

The Portuguese tax legislation quotes the tax regime for funds in the articles 22º and 22º-A of the Statute of the Tax Benefits. However, as there is no specific tax regime for funds, the taxation applicable is the one

### Definitions

#### Transfer pricing

The price that is assumed to have been charged by one part of a company for products and services it provides to another part of the same company, in order to calculate each division's profit and loss separately.

#### Arm's length price

The price at which two unrelated parties would agree to a transaction, most often in the case of companies with international operations whose international subsidiaries trade with each other. For such companies, there is often an incentive to reduce overall tax burden by manipulation of inter-company prices.

Tax authorities want to insure that the inter-company price is equivalent to an arm's length price, to prevent the loss of tax revenue.

applicable to the entities foreseen in the Corporate Income Tax.

If the holders of real state investment funds are residents in Portuguese Territory and are an individual, funds are tax-free if they are obtained from activities that are not commercial, industrial or agricultural (since funds have already been taxed). Apart from these situations, the taxation takes place when the investor receives the income, at a rate calculated according to the holding period of the investment.

Concerning mutual funds in Portugal, *Bank Best* is the leader in distribution of foreign investments funds, according to the report of administration of assets of the mutual stock market commission. In the second quarter of 2007, the volume of assets under administration of *Bank Best* was 341 million Euros, representing 29.5% of the total market of this segment.

In conclusion, although they incorporate tax benefits, investments funds in Portugal are valuable special regimes thanks to the constant norms of the *CIRC* (Corporate Income Tax) concerning the taxation of the companies.

Catarina DE SOUSA MATOS  
Cecilia Caria Mendes Advogados,  
Lisboa, Portugal  
[ccmendes.pragma@netcabo.pt](mailto:ccmendes.pragma@netcabo.pt)



## In the spotlight

# Celichowski-Szyndler-Wieckowska i Partnerzy, Poland

### Partners



Wojciech  
Celichowski  
Lawyer



Dariusz  
Szyndler  
Lawyer



Mariola  
Więckowska  
Legal Adviser



Elżbieta  
Celichowska  
Legal Adviser



Tomasz  
Buczak  
Legal Adviser



Julita  
Ludwiniak  
Legal Adviser



Marek  
Matyjaszczyk  
Lawyer



Karolina  
Służewska-  
Woźnicka  
Lawyer

### About us

- July 2004: merger of two Poznań law firms established in 1990.
- January 2006: four lawyers who had long cooperated with the founding partners joined the partnership.

### Our team

4 lawyers, 18 legal practitioners, including 7 legal advisers, 5 legal trainees and administrative staff.

### Our services

Our office is composed of three

- departments:
1. Capital and Privatisation Management Department;
  2. Court Department;
  3. Labour and Administrative Law Department.

We are specialised in the following areas:

#### Capital and Privatisation Management Department

- Analysis and diagnosis of the legal standing of enterprises;
- Financial and administrative restructuring (debt write-offs, negotiations with banks, Social Security Service and other creditors, settlements);
- Support for issues of new shares, preparing information memoranda and prospectuses for public issues, proceedings with the Stock Exchange Commission;
- Building and managing arrangement proceedings, including those held as part of bankruptcy proceedings;
- Transformations of legal or economic forms of companies;
- Mergers and acquisitions;
- Preparing deeds of company formation and other internal economic deeds (contracts, regulations, statutes);
- Negotiations regarding the entry of a strategic investor, other business agreements and contracts;

#### Court Department

Commercial law, Civil law, Family law, Criminal and Penal revenue law.

#### Labour and Administrative Law Department

- Support for investment proceedings and other proceedings related to construction or administrative laws;
- Services for local governments and local government associations;
- Consultation related to labour law, preparing draft regulations and collective agreements, evaluation of employees' rights and claims, representation at labour courts.

### CELICHOWSKI, SZYNDLER, WIECKOWSKA I PARTNERZY KANCELARIA ADWOKATÓW I RADCÓW PRAWNYCH

#### POZNAŃ:

Ul. Szkolna 5/15  
61-832 POZNAŃ  
Tel: +48 (0) 61 852 32 61  
Fax: +48 (0) 61 852 32 62



#### WARSZAWA:

Al. Jerozolimskie 53/212  
00-697 WARSZAWA  
Tel: +48 (0) 22 356 34 81  
Fax: +48 (0) 22 356 24 82

[www.kancelaria-csw.pl](http://www.kancelaria-csw.pl)  
[kancelaria@kancelaria-csw.pl](mailto:kancelaria@kancelaria-csw.pl)

#### Foreign languages:

We speak English, French, German and Russian



## New website of Les Juristes Associés Midi Pyrénées, Toulouse, France



Partners of *Les Juristes Associés Midi Pyrénées*.

From left to right:  
Nathalie Eychenne Arnaud,  
Laurent Diatta,  
Isabelle Richard-Monti and  
Briotte Marchal

The office of Toulouse, France, *Les Juristes Associés Midi Pyrénées (JAMP)* has updated its website [www.lesjuristesassociesmidipyrenees.fr](http://www.lesjuristesassociesmidipyrenees.fr).

Specialised in business law and tax law, *JAMP* was founded more than 10 years ago. In the updated version of its website, you can find a description of this office and its services and read the CVs of its department heads.

*JAMP* is member of the French network *Jean-Claude Coulon Partenaires* ([www.pragma-fr.com](http://www.pragma-fr.com)).

#### *JAMP* are:

Nathalie Eychenne Arnaud, Laurent Diatta, Isabelle Richard Monti, Brigitte Marchal, Sylvain Favier, Daniel Capeller Arnaud and Fabien Gay-Bellile.

#### LES JURISTES ASSOCIES MIDI PYRENEES

78, Chemin des Sept Deniers - BP 2095  
31019 TOULOUSE Cedex 02 - FRANCE  
Tel: +33 (0) 5 61 57 00 29  
Fax: +33 (0) 5 61 57 03 38  
[jamp@pragma-fr.com](mailto:jamp@pragma-fr.com)  
[www.lesjuristesassociesmidipyrenees.fr](http://www.lesjuristesassociesmidipyrenees.fr)

## FRANCE

### French outlaw sell at a loss amended

The *Chatel law* of 3<sup>rd</sup> January 2008 for the development of competition for the service of consumers lowered the limit of minimal prices allowed.

From now on, selling prices to consumers can include all the rebates granted by the suppliers, particularly the so-called "*marges arrière*" (refund rebates), introducing the concept of "*triple net*": selling prices to consumers can be deducted from all reductions, handing-over and rebates, even those concerning commercial cooperation.

The main objectives of this new law are to support competition to lower prices and to develop consumption. In the long term, the law could also lead to the free negotiation of prices and, for instance, the removal of the concept of sales - the only time when one can sell at a loss in France. Shops could therefore have permanent sales sections.

However, the most probable consequence of this new law will be the reduction of suppliers' margins, which will oblige them to adopt common pricing policies against the distributors.

The new *Chatel law* will probably enter in force in June 2008.

## CHILE

### Relevant amendments to tax legislation

Law No. 20,190 has introduced several amendments to the Chilean Income Tax Law and other regulations that benefit potential investors in Chile. Most notably, the Law creates a new type of company known as a "*Joint Stock Company*", which enjoys the same tax treatment as an Open Stock Corporation, but has a less rigid structure, since only one stockholder is needed for such a company to exist.

## PRESS RELEASE

### FRANCE - CHINA

#### A Chinese trading company has bought a Bordeaux chateau

A Chinese trading company has bought a little known Bordeaux chateau, Chateau Latour-Laguens - the first Chinese purchase in Bordeaux. The experts said that this purchase could be a foothold of China in one of the best known wine-growing areas in the world and confirm the Chinese demand for grands crus. The Chinese buyers - a real estate group called the *Longhai International Trading Company Ltd* - who spent the last few months looking for a property in the region, seem to have picked up not only a charming chateau, but a bargain as well. The purchase was completed on 24 January 2008. The 60ha property has 30ha under vine.

"This is essentially a prestige purchase, a marketing tool in the portfolio of this major group" said Thomas Jullien, director of marketing for Asia at the Bordeaux Wine Board. The *Longhai* group, which is currently building a "Wine Palace" in China, which will include a teaching museum that will demonstrate all aspects of winemaking, has its headquarters in Qingdao, between Beijing and Shanghai.

China, which experienced double digit economic growth over the last five years, is drinking increasing amounts of Bordeaux wine. Exports to China from the region have increased by 100 percent and the country currently consumes 1.8 percent of all exported Bordeaux, with a particular demand for top brands.

Source: [www.ladepeche.fr](http://www.ladepeche.fr)

## EU

#### Cyprus and Malta join eurozone

**New coins and banknotes for the people of Cyprus and Malta as the two countries become the newest members of the eurozone.**

Cyprus and Malta are next up to reap the benefits of the euro – smoother business operations and easier travel to name just two. On 1 January, the Cypriot pound was converted at a rate of 0.585 to one euro and the Maltese lira at 0.429.

To allay fears of price rises during the changeover period, a number of initiatives have been launched to empower consumers and prevent retailers from opportunistic exploitation. Under the FAIR (Fair-pricing Agreements in Retailing) initiative, 5 000 Maltese businesses have so far pledged not to increase their prices and to correctly display dual prices. And one price-watch exercise will entail anonymous "mystery shopping" to root out cases of malpractice, with results presented by sector of activity.

These two new arrivals bring the number of eurozone members to 15. The only one of the other countries that joined the EU in 2004 to have adopted the euro is Slovenia. Next up is most likely to be Slovakia in 2009.

Source: [www.ec.europa.eu](http://www.ec.europa.eu)

#### International references

##### BELGIQUE

##### A.D.I.E.

Rue de la Source, 46 - 1060 BRUXELLES  
Tel : +32 2 644 58 21 - Fax : +32 2 644 58 22  
[euroadie@skynet.be](mailto:euroadie@skynet.be)

##### AVV. CARLO FORTE

Rue Souveraine, 95 - 1050 BRUXELLES  
Tel: +32 2 514 12 08 - Fax: +32 2 514 26 32  
[studio-forte@libero.it](mailto:studio-forte@libero.it)

##### URUGUAY

##### CAPUTI & VENTURA

La Cumparsita, 1373, 9<sup>o</sup>pl. 11200 MONTEVIDEO  
Tel: +59 82 900 83 88  
Contact: Gustavo Ventura  
[ventura@caputiventura.com](mailto:ventura@caputiventura.com) [www.caputiventura.com](http://www.caputiventura.com)

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## CHINA



### Chinese Tax Law reform: Implications for Foreign Investors

After almost thirty years of preferential tax treatment for foreign invested companies, the Chinese government decided to apply the same fiscal rules to both foreign and domestic companies. In December 2007, the Decree of Corporate Income Tax containing the first implementation rules for the new law was issued.

#### Modification in tax rates

The new law introduced a unique tax rate of 25% both for foreign and domestic companies. Reduced tax rates of 15% and 20% can be applied only to high-tech companies and selected small companies respectively. Concerning high-tech companies, the new law stresses the concept of "core proprietary intellectual property". However, the rules to determine the eligibility of high-tech companies to the reduced tax rate have not been promulgated yet.

A withholding tax rate of 20% was adopted to tax passive Chinese incomes (dividends, royalties, interests, etc.) transferred to companies non fiscally resident in China.

#### New fiscal incentives policies

Whereas in the past fiscal incentives were based on geographical matters, the new law incentives are determined mainly on industrial bases. The aim is to promote high-tech businesses, environmental protection and energy-saving industries, as well as companies belonging to public sectors.

#### Transitory regime

For foreign invested enterprises established before the introduction of the new law (16 March 2007) transitory rules were introduced.

#### Fiscal residence

Following international practices, the new laws introduced the concept of "management or control" to determine the fiscal residence. A company fiscally resident in China is defined as a company under Chinese law or whose effective management is located in China. If a non Chinese company is managed and controlled in China (the elements to be considered are the location of operations, staff, treasury, financial functions and properties), it is considered fiscally resident in China and subject to the Chinese tax law as for international practices.

#### Mergers and acquisitions

The implementation rules of the new law are not comprehensive: many rules are missing, such as those concerning corporate reorganizations, for example mergers and acquisitions, amongst others. However, it is expected that the tax holidays for intra-group reorganizations will be limited to share transfers when the transferee is a Chinese company.

Although the impact of the new law on foreign investors depends on the industry typology and geographic location of companies, the new reform will reduce considerably the privileges and the competitive advantages that foreign investors in China used to have during the last thirty years. This matter should be taken seriously by foreign companies planning to invest in China since the tax burden may have increased by the time they have made their investment decisions.

As the new law has considerably reduced the possibilities of tax exemption, it could be more attractive for foreign investors to acquire existing foreign companies on the Chinese market than setting up a foreign invested company from zero. During the transition period, foreign investors could inherit the favourable fiscal treatment through the acquisition of existing foreign invested companies by the mean of shares.

Saro CAPOZZOLI  
Jesa Consulting,  
Shanghai, China  
[saro@jesa.com.cn](mailto:saro@jesa.com.cn)



Pragma's coordinator for China  
Maurizio BOTTONI  
[m.bottoni@interconsulting.mi.it](mailto:m.bottoni@interconsulting.mi.it)



## Contents

- Who we are page 1
- News from our network: page 1  
Meeting of the Board of Directors  
Members' anniversaries
- In brief:  
Poland, Latin America, Italy
- Calendar of events in 2008 page 2
- BRAZIL: Brazilian software's legislation  
by Sara Sanchez, page 2
- Transfer pricing and valuation of intangibles page 3
- Germany: taxation of transfers of functions page 3
- Definitions: page 3  
Transfer pricing  
Arm's length price
- PORTUGAL: Investment funds in Portugal by Catarina de Sousa Matos, page 3
- In the spotlight: Celichowski-Szyndler-Wieckowska i Partnerzy, Poland page 4
- New website of Les Juristes Associés Midi Pyrénées page 4
- FRANCE: French outlaw sell at a loss amended page 5
- CHILE: Relevant amendments to tax legislation page 5
- Press release page 5  
A Chinese trading company has bought a Bordeaux chateau  
Cyprus and Malta join Euro zone
- CHINA: Chinese Tax Law reform: Implications for Foreign Investors,  
by Saro Capozzoli, page 6

## Cover picture



Donghai Bridge ("East Sea Grand Bridge") is the longest cross-sea bridge in the world. It was completed on December 2005. It has a total length of 32.5 kilometres (20.2 miles) and connects Shanghai and the offshore Yangshan deep-water port in China.

The Journal is available on line in English and in French at  
[www.pragma-eu.com](http://www.pragma-eu.com)  
contact: [info@pragma-eu.com](mailto:info@pragma-eu.com)

PRAGMA is a EEIG with its head office in Brussels, Belgium  
Rue d'Ecosse, 44



**COORDINATION PRAGMA**  
BP 249 - 59002 LILLE Cedex - FRANCE  
Tel: +33 (0) 3 20 55 62 55  
Fax: +33 (0) 3 20 55 62 60  
Contact : Nathalie Facon  
[info@pragma-eu.com](mailto:info@pragma-eu.com)

[www.pragma-eu.com](http://www.pragma-eu.com)

## Members

Should you have any question, please do not hesitate to contact our members directly.

### FRANCE

18 offices  
[www.pragma-fr.com](http://www.pragma-fr.com)  
**Coordination:** Aurelia Ben Shlush  
[a.benshlush@pragma-fr.com](mailto:a.benshlush@pragma-fr.com)

**PARIS:**  
**JEAN-CLAUDE COULON & ASSOCIES**  
217, rue du Faubourg Saint Honoré  
75008 PARIS  
Tel: +33 (0) 1 45 63 16 00  
Fax: +33 (0) 1 45 63 21 02  
Contact: Claude Martin  
[c.martin@pragma-fr.com](mailto:c.martin@pragma-fr.com)

**SOCOJUR** 2 offices  
**AVIGNON**  
6 bis rue Saint Thomas d'Aquin BP 2020  
84023 AVIGNON  
Tel: +33 (0) 4 90 14 17 00  
Fax: +33 (0) 4 90 85 69 41  
Contact : Jean-François Hirtz  
[jf.hirtz.socojur@pragma-fr.com](mailto:jf.hirtz.socojur@pragma-fr.com)

**LYON**  
325, rue André Philip  
69421 LYON Cedex 3  
Tel: +33 (0) 4 78 60 10 87  
Fax: +33 (0) 4 78 60 25 57  
Contact: Jean-Paul Bourden  
[jp.bourden.socojur@pragma-fr.com](mailto:jp.bourden.socojur@pragma-fr.com)

**BORDEAUX:**  
**JURISTES ASSOCIES DU SUD- OUEST**  
29-31 rue Ferrere  
33000 BORDEAUX  
Tel: +33 (0) 5 56 81 33 18  
Fax: +33 (0) 5 56 44 97 59  
Contact : Olivier Richard  
[o.richard@pragma-fr.com](mailto:o.richard@pragma-fr.com)

**CLERMOND-FERRAND:**  
**JURISTES ASSOCIES DU CENTRE**  
Résidence des Parcs - 39, rue Amadéo  
63057 CLERMOND-FERRAND Cedex 01  
Tel: +33 (0) 4 73 31 75 40  
Fax: +33 (0) 4 73 31 75 49  
Contact: Michel Lacroix  
[m.lacroix@pragma-fr.com](mailto:m.lacroix@pragma-fr.com)

**DIJON:**  
**JURISTES ASSOCIES B. F. C.**  
10, rue Jean Giono - Immeuble Neptune  
21000 DIJON  
Tel: +33 (0) 3 80 74 22 24  
Fax: +33 (0) 3 80 74 87 59  
Contact: Eric Doumerg  
[e.doumerg@pragma-fr.com](mailto:e.doumerg@pragma-fr.com)

**LE MANS:**  
**JURISTES ASSOCIES DU MAINE**  
1 bis, place Lionel Lecouteux  
72000 LE MANS  
Tel: +33 (0) 2 43 82 02 17  
Fax: +33 (0) 2 43 76 18 41  
Contact: Gilles Fombonne  
[g.fombonne.ja.maine@pragma-fr.com](mailto:g.fombonne.ja.maine@pragma-fr.com)

**JURISTES ASSOCIES DE LORRAINE** 2 offices  
**METZ:**  
14, rue Gambetta  
57000 METZ  
Tel: +33 (0) 3 87 63 03 17  
Fax: +33 (0) 3 87 63 05 16  
Contact : Jacques Bauler  
[j.bauler@pragma-fr.com](mailto:j.bauler@pragma-fr.com)

**STRASBOURG:**  
17, boulevard Tauler  
67000 STRASBOURG  
Tel: +33 (0) 3 88 25 07 08  
Fax: +33 (0) 3 88 25 19 34  
Contact: Josiane Piot  
[j.bohler@pragma-fr.com](mailto:j.bohler@pragma-fr.com)

**NICE:**  
**UNIJURIS**  
46, boulevard Victor Hugo - BP 1443  
06008 NICE Cedex 1  
Tel: +33 (0) 4 93 87 12 66  
Fax: +33 (0) 4 93 88 58 12  
Contact: Charles Schlub  
[c.schlub.unijuris@pragma-fr.com](mailto:c.schlub.unijuris@pragma-fr.com)

**NÎMES:**  
**SOGINIM - JURISTES ASSOCIES**  
47, boulevard Gambetta - BP 81277  
30015 NÎMES Cedex 1  
Tel: +33 (0) 4 66 68 77 00  
Fax: +33 (0) 4 66 68 77 01  
Contact: Jean-Louis Giallombardo  
[j.giallombardo.soginim@pragma-fr.com](mailto:j.giallombardo.soginim@pragma-fr.com)

**PARIS:**  
**JURISTES ASSOCIES D'ILE DE FRANCE**  
29, rue Vernet  
75008 PARIS  
Tel: +33 (0) 1 56 89 32 40  
Fax: +33 (0) 1 47 23 02 50  
Contact : Yves Morrier  
[y.morrier@pragma-fr.com](mailto:y.morrier@pragma-fr.com)

**JURISTES ASSOCIES DU NORD** 2 offices  
**PONTOISE:**  
Immeuble Le Beloise - 2 bd de l'Oise  
95300 PONTOISE  
Tel: +33 (0) 1 30 30 69 66  
Fax: +33 (0) 1 30 30 60 56  
Contact : Florence Tellier  
[f.tellier@pragma-fr.com](mailto:f.tellier@pragma-fr.com)

**LILLE:**  
25, rue Faidherbe - BP 249  
59002 LILLE Cedex  
Tel: +33 (0) 3 20 55 62 55  
Fax: +33 (0) 3 20 55 62 60  
Contact : Bruno Vince  
[b.vince@pragma-fr.com](mailto:b.vince@pragma-fr.com)

**JURISTES ASSOCIES DE L'OUEST** 3 offices  
**RENNES:**  
6, rue du Louis d'Or - CS 50825  
35108 RENNES Cedex  
Tel: +33 (0) 2 99 31 46 46  
Fax: +33 (0) 2 99 31 10 46  
Contact: Yann Jubault  
[y.jubault.jao@pragma-fr.com](mailto:y.jubault.jao@pragma-fr.com)

**NANTES:**  
Les Espaces Jules Verne, Bât.B  
12, avenue Jules Verne  
44230 ST SEBASTIEN SUR LOIRE  
Tel: +33 (0) 2 40 89 11 92  
Fax: +33 (0) 2 40 89 09 13  
Contact: Patrice Servel  
[p.servel@pragma-fr.com](mailto:p.servel@pragma-fr.com)

**ST BRIEUC:**  
ZAC des Longs Réages  
22190 PLERIN  
Tel: +33 (0) 2 96 58 06 40  
Fax: +33 (0) 2 96 58 06 33  
Contact: Jacques Le Caer  
[j.lecaer.jao@pragma-fr.com](mailto:j.lecaer.jao@pragma-fr.com)

**TOULOUSE:**  
**JURISTES ASSOCIES MIDI PYRENEES**  
78, Chemin des Sept Deniers - BP 2095  
31019 TOULOUSE Cedex 02  
Tel: +33 (0) 5 61 57 00 29  
Fax: +33 (0) 5 61 57 03 38  
Contact : Laurent Diatta  
[l.diatta.jamp@pragma-fr.com](mailto:l.diatta.jamp@pragma-fr.com)  
[www.lesjuristesassociesmidipyrenees.fr](http://www.lesjuristesassociesmidipyrenees.fr)

### ESPAÑA

**MANUBENS Y ASOCIADOS, ABOGADOS**  
Avda Diagonal, 682, 3ª planta  
08034 BARCELONA  
Tel: +34 93 206 35 90  
Fax: +34 93 204 29 61  
Contact: Carlos Manubens  
[abogados@manubens.com](mailto:abogados@manubens.com)  
[www.manubensasoc.com](http://www.manubensasoc.com)

### PORTUGAL

2 offices  
**CECILIA CARIA MENDES ADVOGADOS**  
Contact: Cecilia Caria Mendes  
[cmendes.pragma@netcabo.pt](mailto:cmendes.pragma@netcabo.pt)

**LISBOA:**  
Avenida da República, nº74 - 1º Esquerdo  
1600-205 LISBOA  
Tel: +35 1 217 803 450 /1 /2  
Fax: +35 1 217803 453

**PORTO:**  
Rua Antero de Quental, Edifício Europa,  
Sala 213 - Freixiêiro  
4455-586 PERAFITA-PORTO  
Tel: +35 1 229 967 128  
Fax: +35 1 229 967 134

### UNITED KINGDOM

**GERSTEN & NIXON SOLICITORS**  
National House, 60-66 Wardour Street  
LONDON W1F 0TA  
Tel: +44 20 74 39 39 61  
Fax: +44 20 77 34 24 79  
Contact : Greg Wolton  
[law@gernix.co.uk](mailto:law@gernix.co.uk)  
[www.gerstenandnixon.com](http://www.gerstenandnixon.com)

### ITALIA

10 offices  
**MILANO:**  
**INTERCONSULTING** New address!  
Via Victor Hugo, 4  
20123 MILANO  
Tel: +39 02 863 31 11  
Fax: +39 02 890 135 55  
Contact : Gilberto Gelosa  
[intercon@tin.it](mailto:intercon@tin.it)  
[www.interconsulting.mi.it](http://www.interconsulting.mi.it)

**ARQUATA SCRIVIA:**  
**STUDIO FEDRIANI**  
Via Libarna, 235 - 15061 ARQUATA SCRIVIA  
Tel: +39 0143 63 61 65  
Fax: +39 0143 66 64 45  
Contact: Mario Fedriani  
[studio@fedriani.it](mailto:studio@fedriani.it)

**ASTI:**  
**STUDIO ROSSO**  
Via Milliavacca, 16 - 14100 ASTI  
Tel: +39 0141 598701  
Fax: +39 0141 599 598  
Contact: Giorgio Rosso  
[giorosso@tin.it](mailto:giorosso@tin.it)

**BOLOGNA:**  
**STUDIO AVV. CORNIA**  
Via Corte de'Galluzzi,4 - 40124 BOLOGNA  
Tel: +39 051 232 008  
Fax: +39 051 232 668  
Contact: Federico Cornia  
[cornialex@libero.it](mailto:cornialex@libero.it)

**BOLOGNA:**  
**STUDIO SPECA-INGENITO**  
Viale Panzacchi, 15 - 40136 BOLOGNA  
Tel: +39 051 644 94 49  
Fax: +39 051 644 06 55  
Contact: Paolo Specca  
[studio@speing.it](mailto:studio@speing.it)

**LECCO:**  
**STUDIO ROSSI-GEROSA**  
Via Roma, 6 - 23900 LECCO  
Tel: +39 0341 36 31 69 / 36 25 41  
Fax: +39 0341 28 51 72  
Contact: Enrico Rossi  
[enrico.rossi@rg-studio.com](mailto:enrico.rossi@rg-studio.com)  
[www.rg-studio.com](http://www.rg-studio.com)

**LECCO:**  
**MARIA VENTURINI**  
Piazza G. Mazzini, 13 - 23900 LECCO  
Tel: +39 0341 36 42 65  
Fax: +39 0341 28 35 11  
Contact: Maria Venturini  
[mventurini@studicolombo.com](mailto:mventurini@studicolombo.com)

**PALERMO:**  
**STUDIO GALANTE**  
Trib. Legale Aziendale - Via Siracusa, 10  
90141 PALERMO  
Tel: +39 09 161 18 059  
Fax: +39 09 166 22 063  
Contacto: Giovanni Galante  
[studiogalante@virgilio.it](mailto:studiogalante@virgilio.it)

**SEREGNO:**  
**STUDIO NOVARA**  
Via s.Pietro, 28 - 20038 SEREGNO  
Tel: +39 0362 231 411  
Fax: +39 0362 325 513  
Contact: Mario Carlo Novara  
[mariocarlo@studionovara.it](mailto:mariocarlo@studionovara.it)

**TORINO:**  
**STUDIO IRRERA AVVOCATI ASSOCIATI**  
Corso Marconi, 7 - 10125 TORINO  
Tel: +39 011 66 99 513  
Fax: +39 011 65 08 053  
Contact: Maurizio Irrera  
[info@studioirrerait](mailto:info@studioirrerait)  
[www.studioirrerait](http://www.studioirrerait)

### POLSKA

2 offices  
**CELICHOWSKI, SZYNDLER, WIECKOWSKA I PARTNERZY**  
**KANCELARIA ADWOKATÓW I RADCÓW PRAWNYCH**  
Contact: Wojciech Celichowski  
[wcelichowski@kancelaria-csw.pl](mailto:wcelichowski@kancelaria-csw.pl)  
[www.kancelaria-csw.pl](http://www.kancelaria-csw.pl)

**POZNAŃ:**  
Ul. Szkolna 5/15  
61-832 POZNAŃ  
Tel: +48 (0) 61 852 32 61  
Fax: +48 (0) 61 852 32 62

**WARZAWA:**  
Al. Jerozolimskie 53/212  
00-697 WARSZAWA  
Tel: +48 (0) 22 356 34 81  
Fax: +48 (0) 22 356 24 82

### DEUTSCHLAND

**ASP ANWALTSKANZLEI**  
Königsstraße 22/23 - 48143 MÜNSTER  
Tel: +49 (0) 251 55 0 65  
Fax: +49 (0) 251 484 23 90  
Contact: Stephan Pahl  
[pahl@asp-anwaelte.de](mailto:pahl@asp-anwaelte.de)  
[www.asp-anwaelte.de](http://www.asp-anwaelte.de)

### SWITZERLAND

**LUGANO - ZURICH - GENEVE**  
**ORIENTA Sagl**  
Palazzo Gargantini  
Riva Albertolli, 1  
CP 3464 6910 LUGANO  
Tel: +41 (0) 91 912 50 50  
Fax: +41 (0) 91 912 50 60  
Contact: Gilberto Gelosa  
[g.gelosa@interconsulting.mi.it](mailto:g.gelosa@interconsulting.mi.it)  
Contact: Stefano Graidi  
[stefano.graidi@tstax.net](mailto:stefano.graidi@tstax.net)

### ARGENTINA

**DEL CARRIL, COLOMBRES, VAYO & ZAVALIA LAGOS**  
Sarmiento 944  
C1041AAT BUENOS AIRES  
Tel: +54 11 4327 2100  
Fax: +54 11 4327 0011  
Contact: Enrique del Carril  
[edc@ccvz.com.ar](mailto:edc@ccvz.com.ar)  
[www.ccvz.com.ar](http://www.ccvz.com.ar)

### BRASIL

**GROWASSOCIATES**  
Alameda Santos nº2.441 - 2º andar  
01419-002 SAO PAULO SP  
Tel: +55 11 3088 2717  
Fax: +55 11 3088 23 10  
Contact: Angelica Blanco  
[angelica.blanco@growassociates.com](mailto:angelica.blanco@growassociates.com)  
[www.growassociates.com](http://www.growassociates.com)

### CHILE

**CUEVAS ABOGADOS**  
Av. Isidora Goyenechea 2939 Of.902  
Las Condes - SANTIAGO  
Tel: +56 2 374 2072  
Fax: +56 2 378 9349  
Contact: Gustavo Cuevas  
[GCUEVAS@cuevasabogados.cl](mailto:GCUEVAS@cuevasabogados.cl)  
[www.cuevasabogados.cl](http://www.cuevasabogados.cl)

### MEXICO

2 offices in Mexico  
**ALVAREZ VALENZUELA ABOGADOS**  
Contact: Herman Alvarez  
[herman.A@alvarezvalenzuela.com](mailto:herman.A@alvarezvalenzuela.com)  
[www.alvarezvalenzuela.com](http://www.alvarezvalenzuela.com)

**MEXICO:**  
Mariano Escobedo 362-4, Col. Polanco  
C.P.11590, MEXICO D.F.  
Tel / Fax: +52 (55) 24 53 28 28

**MONTERREY:**  
Calzada San Pedro, 250 Nte, Desp.328  
Col.Miravalle  
C.P.64660, MONTERREY N.L.  
Tel / Fax: +52 (81) 81 24 01 25

### USA

**G.C. CONSULTANTS INC.**  
444, Madison Avenue, Suite 1206  
**NEW YORK**  
NY 10022  
Tel: +1 212 310 93 11  
Fax: +1 212 310 93 16  
Contact: Giuseppe Brusa  
[gbrusa@gcconsultants.com](mailto:gbrusa@gcconsultants.com)

**MARIO GAZZOLA**  
600, Madison Avenue,  
New York,  
**NEW YORK NY** 10022  
Tel: +1 212 508 23 30  
Fax: +1 212 980 31 85  
Contact: Mario Gazzola  
[mgazzola@pavialaw.com](mailto:mgazzola@pavialaw.com)

### CHINA

3 offices  
**SHANGHAI - SHENZHEN - CHONGQING**  
**JESA CONSULTING**  
Unit 3005, Jing'an Zhonghua Building  
1701, Beijing Road (W) - 200040 SHANGHAI  
Tel: +86 21 6288 0073 / 75 / 76  
Fax: +86 21 6288 0072  
Contact: Saro Capozzoli  
[info@jesa.com.cn](mailto:info@jesa.com.cn)  
[www.jesa.com.cn](http://www.jesa.com.cn)

### MONGOLIA

**JESA CONSULTING**  
UB-11, Chingeltei Duureg, MUE Building  
Rm 206  
**ULAN BATOR**  
Tel: +86 21 6288 0073  
Fax: +86 21 6288 0072  
Contact: Saro Capozzoli  
[info@jesa.com.cn](mailto:info@jesa.com.cn)

## International references

Please see page 5