

Libeling Lawnmowers

The Surprising Tort of Commercial Disparagement As Applied to 'Hard' Assets

By **Brian H. Corcoran**

Is it possible to defame an inanimate object such as a plane, or a house, or a painting? Surprisingly, the answer to this question is "yes." This sort of claim, which is generically captured by the designation "commercial disparagement," has, on occasion, been pursued successfully at trial involving "hard" assets and can even be employed when the damages are more prospective than actual. The tort falls generally within the penumbra of libel and slander-related claims, but has been overshadowed by the more commonly recognized types of claims asserted against individuals or corporate entities rather than tangible objects. Commercial disparagement claims, when understood, are a useful line of defense to an asset owner — as well as a hazard for those unaware of the claim's contours.

THE RESTATEMENT OF TORTS ON COMMERCIAL DISPARAGEMENT

Section 624 of the Restatement of Torts offers an outline that many jurisdictions have embraced as determinative on the topic of injurious falsehood. It states that liability arises for the (a) publication of a false statement disparaging another's property rights in land, chattels or intangible things,

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Dismantling the 'Great Wall' of Risk

Experiences of a Joint Venture Partnership and a WFOE in China

Part Two of a Two-Part Series

By **Jonathan Fales**

Like any new market, China presents a number of formidable — sometimes daunting — challenges for lessors. Overcoming these challenges as the country moves toward a market-based economy makes the job that much more compelling. Careful planning and execution, however, are leading to success for early entrants.

This two-part article (based on a 2005 white paper issued by ELA's Equipment Leasing Foundation, "Knocking Down (Great) Walls") looks at the key legal and regulatory issues surrounding investing in the Chinese leasing market. Last month's installment provided a market history and analysis of the current legal and regulatory climate. This month's conclusion examines the experiences of lessors currently operating in China.

What's the best way to structure a Chinese leasing venture? Several options exist: opening a representative office for referral business; establishing a branch office; joint venture programs; and creating a Wholly Foreign-Owned Enterprise ("WFOE"). Most international lessors with operations in China today have Chinese joint venture partners, due in part to the fact that a local partner was required to obtain a leasing license. With the recent availability of the WFOE option and a new leasing law being considered, however, many large lessors are seeking to establish operations on their own. Smaller lessors, on the other hand, may continue to seek out partners, primarily due to the regulatory capital requirements.

As part of the research conducted by The Alta Group on behalf of the Equipment Leasing Foundation for its study, Alta principals interviewed a number of lessors currently operating in China. This article summarizes the experiences of:

- a captive lessor whose parent is a large, U.S.-based manufacturer of industrial equipment; and
- an international technology company whose China leasing activities are conducted by a joint venture leasing company with a Chinese lessor partner.

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'ANYTHING IS POSSIBLE, BUT NOTHING IS EASY': AN INDUSTRIAL EQUIPMENT MANUFACTURER'S WFOE

The parent company is a large, worldwide manufacturer of industrial equipment with operations in approximately 40 countries. The parent established onshore operations in China in the early 1970s and today has numerous wholly owned subsidiaries and joint ventures in China. It currently has more than 4000 employees in that country.

The parent faces significant competition from other major international manufacturers in China and believes that customer financing can be a meaningful differentiator in the marketplace. By getting a head start on the competition, the parent believes it may gain first-mover's advantage in the market.

The parent's wholly owned captive's WFOE obtained its leasing license in early 2004 and opened for business in December 2004. Prior to this time, the parent's China-based distributors handled the customer financing on an ad hoc basis (when it was provided at all).

Unlike some other multinational companies, the WFOE does not have a matrix reporting structure with "dotted lines" into the parent company. It

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is part of the worldwide captive financing organization and ultimately reports to the president of the captive in the United States. In practice, the WFOE works closely with both the parent and its dealers to drive its business volumes and support the parent.

As with most captives, the WFOE exists to help drive sales of its parent's equipment as well as to generate an acceptable return to the financing business. The WFOE is licensed to provide finance leases to its parent's customers and intends to drive business volumes through WFOE sales representatives that work closely with parent and dealer sales teams throughout China. Promotional offerings are likely to be tailored to specific dealer needs — perhaps including skip payments up front. But at the time of the interview, there were no plans to offer low-rate or similar financing programs. In its first year of operations, the WFOE will focus on developing awareness of its financing capabilities and developing working relationships with the dealer network.

The managing director noted during the interview that the availability of reliable credit information in China is extremely limited. Banks won't provide information, there are no personal credit bureaus yet, credit rating agencies have limited capabilities and are expensive, and the reliability of credit information from most other sources is of questionable value.

However, the WFOE has an advantage in that the captive's dealer network has accumulated useful knowledge about many of its customers over the years. Many dealers have provided financing to their customers and are able to give information such as payment history, strength of the customer's business, and personal knowledge of the customer executives to the WFOE. This allows the WFOE to make more informed credit decisions than many other foreign-owned lessors in China.

One issue the WFOE found challenging was locating Chinese/English speakers with leasing experience. The WFOE conducted "mass interviews," according to the managing

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Lease of Aging Planes Leading to Lawsuits

By Tresa Baldas

A growing number of lawsuits are alleging that aviation companies are dumping old and unsafe airplanes on Third World countries.

Some of the suits charge the companies with leasing planes to startup airlines that lack proper training to operate them safely.

In Chicago, a lawsuit is set to go to trial against an Illinois aviation company alleging that it knowingly leased an old and defective plane to a company in the Philippines, where the 22-year-old plane crashed in 2000, killing 131 people. *Layug v. AAR Parts Trading*, No. 00 L 9599, et al. (Cook Co., Ill., Cir. Ct.).

Also in Chicago, on Jan. 19, the families of 26 people killed in a 2004 plane crash in Indonesia filed a lawsuit against Chicago-based plane manufacturer Boeing Co., alleging that the 20-year-old plane, on lease from the United States to an Indonesian budget carrier, was defective by design. *Hilmar v. Boeing*, No. 06 L 630 (Cook Co. Ill., Cir. Ct.).

In Arkansas, a lawsuit was filed in October 2005 over the deaths of 141 people killed when an Egyptian airliner — also on lease from the United States to a startup airline company — crashed into the Red Sea. The suit alleges that the leasing company knowingly sold a plane to a Third World startup carrier that had little training or experience in aviation matters. *Siddi v. Ozark Aircraft Systems LLC*, No. 05-5170 (W.D. Ark.).

“We see this as a growing problem,” said Gerald C. Sterns, who is handling the Philippines crash lawsuit in Chicago. “What they’re doing is putting aging aircraft that are maintenance-intensive into the hands of Third World airlines that do not have the capabilities to take care of them. This is a formula for disaster.”

Tresa Baldas is a staff reporter for *The National Law Journal*.

CALLS FOR IMPROVEMENT

Jim Hall, former chairman of the National Transportation Safety Board and now principal at Hall & Associates, a Washington, DC, consulting firm, recognized the problem of old U.S. air-

Some of the suits charge the companies with leasing planes to startup airlines that lack proper training to operate them safely.

planes winding up in Third World countries. Hall is calling on the Federal Aviation Administration (“FAA”) to work with the International Civil Aviation Organization (“ICAO”), a regulatory body, to address the problem.

“As we see the increased use of U.S.-manufactured aircraft in Third World countries, it is incumbent upon the FAA to work closely with ICAO to raise system safety and standards in these nations,” said Hall, also of counsel to the Nolan Law Group in Chicago, a plaintiffs’ firm that concentrates on aviation litigation.

In the case of the Philippines airplane crash, Sterns, of Sterns & Walker in Oakland, CA, spent nearly 3 years fighting over jurisdiction before recently winning his fight to try the case in Chicago.

The suit alleges that that AAR Parts Trading Inc., a Chicago aviation company, is responsible for the crash because it allegedly knowingly leased an old and unsafe Boeing jet to a Philippines airliner.

“This is an airplane that never should have been taken from the Arizona desert graveyard and ... put back into service, anywhere,” said Sterns, noting that the defense tried several times to get the case moved to the Philippines. “We got the Illinois Supreme Court to say, ‘No way. This case is going to trial in Chicago, not Manila.’” *Layug v. AAR Parts Trading*, 216 Ill. 2d 690 (Ill. Sept. 29, 2005).

AAR’s attorney, Gary Westerberg of Lord, Bissell & Brook in Chicago, denied any wrongdoing by AAR,

maintaining: “There was nothing wrong with the aircraft and the crash was caused by pilot error.” Westerberg also denied allegations that the commercial jet — a 22-year-old former Southwest Airlines plane — was “dumped” in the Philippines.

“I would disagree that something was dumped on anyone,” Westerberg said. “Obviously this was an older aircraft that was less expensive to lease than a new one. But aircraft of this vintage are being operated through the world safely.”

But they’re also ending up in the hands of untrained pilots and novice mechanics in poor countries, alleged Tom Ellis, spokesman for the Nolan Law Group. The firm is handling the two lawsuits in Chicago and the Arkansas suit.

Ellis noted that a key issue in the Egyptian air crash was that the pilots encountered a flight-control problem that they weren’t trained to deal with when the plane crashed into the Red Sea.

“That’s really the crux of it,” Ellis said. “What are these American lessors doing to ensure that the people they are entrusting their aircraft to know how to operate them safely?”

Boeing officials in Chicago and Seattle declined to comment.



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which (b) the publisher should recognize as likely to result in pecuniary harm to the other through the conduct of third persons in respect to the other's interests in the property. Any kind of legally protected interest in land, chattels, or intangible things may be disparaged, so long as the interest is transferable and therefore salable or otherwise capable of profitable disposal. The form of publication may be as a statement of fact; a statement in the form of an opinion is not actionable as defamation unless it is held to imply the existence of undisclosed defamatory facts that justify the derogatory opinion. Finally, the statement must be published under such circumstances as would lead a reasonable person to expect that the third person who has acted or refrained from acting in reliance upon the statement would do so or that its publication might deter some third person from buying or leasing the property that is disparaged.

Having developed from the torts of libel and slander and even taking one of its various names therefrom, the tort of commercial disparagement suffers from confusion with traditional defamation torts even though higher burdens of proof set it apart. Each type of tort requires a similar kind of proof with respect to the actionable statements, which must refer to the plaintiff or his or her goods, must have been communicated to a third party, and must be of a defamatory or disparaging nature. But plaintiffs in disparagement actions lack the presumption of damages characterizing certain varieties of personal defamation claims.

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In disparagement cases, a plaintiff ordinarily must demonstrate "special damages," meaning specific pecuniary loss and/or lost sales flowing from the disparaging statements. One exception to this requirement is the demonstration of "loss of market," where in the past, courts required plaintiffs to show specific lost sales. While there is a trend toward reducing the stringency of this requirement, many jurisdictions retain the requirement of specific lost sales and enforce it accordingly when evaluating a disparagement claim.

Another notable difference between the two torts is whether the pleader must show fault. The plaintiff in an injurious falsehood action also must show that the defendant recognized or should have recognized that the statement would cause harm, although no similar proof of fault is required for a personal defamation claim to succeed.

HOW THE COMMERCIAL DISPARAGEMENT CLAIM PLAYS OUT IN CASE LAW

A recent lawsuit in Delaware state court, *Barron Aircraft LLC v. Dassault Aviation, et al.*, demonstrates how all of the above factors can come into play.

In *Barron*, a European individual purchased a Dassault Falcon 200 — a business jet manufactured by Dassault's French parent. This particular Falcon 200 had been involved in an accident in 1994, at which time a small commercial airline company was operating it. According to the National Transportation Safety Board ("NTSB") reports, the aircraft overran the end of the runway in an aborted takeoff, rolled into Lake Ponchartrain, LA, and remained partially submerged in the water for 39 hours before being removed. There were no reported injuries to the crew or the passengers, and the aircraft itself sustained only minor structural damage. Nevertheless, Dassault's representatives and the aircraft's insurers inspected the aircraft and declared it a "total loss."

The aircraft was sold to a salvage company in Kansas shortly after the accident. That company maintained the aircraft, in parts, for several years. Thereafter, in 1999, an expert aircraft restoration company based in Springfield, IL, Jet Investment Group

("JIG"), purchased the aircraft from the Kansas salvage company and entered into a contract with Barron whereby JIG agreed to restore the aircraft to "like new" condition and to obtain all the necessary regulatory approvals from the Federal Aviation Administration ("FAA") required for the operation of the aircraft in normal service.

The restoration process took approximately 1 year, during which the aircraft was rebuilt to fully comply with the FAA approved "Type Certificate" for the aircraft. Throughout the restoration, individuals from JIG and FAA-appointed and certificated airworthiness and engineering representatives rigorously inspected the aircraft for signs of corrosion that may have resulted from the aircraft's brief exposure to the salinated, or "brackish," waters of Lake Ponchartrain, but found absolutely nothing of concern. Thus, in October 2000, the aircraft was issued a "Certificate of Airworthiness" by the FAA — an official designation certifying that the aircraft could be safely flown, that it fully complies with the FAA Type Certificate as on the date of original production, and that the aircraft was otherwise free of any and all structural problems that could have made it unsafe to operate.

At the outset of the restoration process, JIG contacted Dassault regarding its intentions to return the aircraft to service. Dassault, however, displayed an attitude that suggested it did not believe that the restoration should occur and hence wanted no part in it. So the restoration process mostly went forward without Dassault's involvement.

'REBIRTH OF A WRECK'

In the spring of 2001, Dassault's general counsel and vice president, Matthew Boyle, gave a presentation to a large audience of aviation professionals at a Florida conference hosted by the Flight Safety Foundation. Boyle's speech, titled "Rebirth of a Wreck," was largely presented as a critical assessment of the deficiencies he perceived in the FAA regulations governing aircraft that have been restored after an accident. He was particularly troubled by fact that the current regulations did not require the direct involvement of aircraft

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manufacturers, such as Dassault, in the restoration process. In this sense, the presentation was really intended to convey Dassault's policy views about aircraft restoration in light of existing FAA regulations. Except for one thing: The "wreck" that Boyle alluded to in the title of his speech and which served as the focal point of his speech was the aircraft owned by Barron.

In the course of his remarks about the aircraft (punctuated by actual pictures of it), Boyle made a number of statements about the extent of Dassault's involvement in the aircraft's restoration and its flightworthiness thereafter, including claims that 1) Dassault had not assisted with restoration of the aircraft (when it had so assisted by supplying parts); 2) Dassault would not service the aircraft (when in fact for several continuous weeks before, during, and after his speech, the aircraft was being serviced at a Dassault facility in France); 3) Dassault would not sell spare parts to the owner of the aircraft; and 4) Dassault was especially concerned about corrosion in the structure of the aircraft and the rivets, even when every individual associated with the restoration, including the FAA representatives, had emphatically stated that this was not an issue. As discovery in the case later revealed, these statements were made without any investigation by Dassault and in the complete absence of any inspection of the aircraft during and at the conclusion of the restoration.

A reporter in attendance at Boyle's speech later republished these damaging untrue statements in the July 2001 issue of a well-respected aviation magazine with worldwide circulation, *Aviation International News*, in an article titled "Buyer Beware."

THE LAWSUIT

In September 2001, Barron brought a claim against Dassault in Delaware state court for injurious falsehood on the grounds that Boyle's false statements about the aircraft were made with reckless disregard of their falsity and caused Barron to suffer harm.

In particular, Barron alleged that the statements in Boyle's speech, including his misrepresentations about the extent of Dassault's support for the aircraft, had "poisoned the well" for the aircraft in the marketplace and destroyed its resale value.

The matter was initially tried

***Clearly, the issue of
damages in the context
of an injurious falsehood
claim was a significant
stumbling block to the jury.***

before a Delaware jury for 3 weeks in October 2003. After fully considering the evidence, which included expert testimony from both parties on the effect of Dassault's public statements on the market value of the aircraft, the jury was unable to reach a unanimous verdict, and the judge declared a mistrial. During an exit interview of the jury panel, it was learned that 10 out of 12 jurors had agreed that Barron should prevail on its injurious falsehood claim against Dassault because of the false and reckless statements by Dassault's general counsel. These 10 jurors also determined that Barron was therefore entitled to an actual damage award for this claim ranging from \$300,000 to more than \$1 million. (The remaining two jurors had struggled to impose liability on Dassault for Barron's claims of loss of the resale market for the aircraft.)

Clearly, the issue of damages in the context of an injurious falsehood claim was a significant stumbling block to the jury. During trial, Barron proffered sufficient evidence to convince 10 out of 12 jurors that Boyle's widely disseminated statements about the aircraft were false and recklessly made (*ie*, without regard for whether they were true or not). Barron also successfully convinced those same 10 jurors that Boyle's statements "poisoned" the market for the aircraft. In reaching this latter conclusion, the jurors weighed the competing testimony of the parties' expert aircraft appraisers regarding the effect of Boyle's statements and

soundly rejected that of Dassault's expert. In effect, the majority of jurors accepted the opinion of Dassault's expert, who opined that the Boyle's statements so affected the aircraft's resale potential that it had been reduced to "salvage value."

In establishing this point, Barron explicitly relied on a somewhat hidden exception to the "special damages" rule under the Restatement that permitted it to prove damages by showing loss of the market — even if such a showing did not ultimately meet the otherwise stringent test that numeric damages be demonstrated. The court certainly did not limit Barron in this regard or instruct the jury that it must only consider actual proof that the aircraft had lost value. Yet not all jurors were convinced; thus, demonstrating the hold over the jurors that the "special damages" requirement had, simply as a matter of common sense and certainly as encouraged by the defense. In effect, the holdout jurors seemed to feel that if the plaintiff could not actually show (perhaps, as the defense argued, through evidence of an actual lost sale) that the aircraft's value had in fact dropped, then proving the more nebulous concept of "loss of the market" would be insufficient evidence to support the claim — even if, as the plaintiff conclusively demonstrated, the statements were false and made with the requisite level of scienter.

Barron's handling of this dilemma in preparation for the second trial shines some light on how a claimant might ultimately prevail on an injurious falsehood claim with only indirect evidence of damages. Instead of relying solely on an aircraft appraiser (who ultimately only could opine as to the literal value of the aircraft itself), Barron propounded an expert report from an economist with an expertise in market research protocols and analyses. That expert designed and conducted a broad survey of business jet professionals to assess the impact of Boyle's statements in the business jet market.

That survey provided clearer proof of just what "loss of the market"

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director, and used recruiters to identify prospective candidates. It targeted university graduates with working experience, but the pool of qualified candidates turned out to be smaller than anticipated. However, the new hires generally spoke good English, so no translation of the U.S. training materials was required. The availability of equipment financing training materials and classes in China, in either Chinese or English language, was minimal.

According to the managing director, the used equipment market in China "is fragmented and not well coordinated." Part of the reason for this may be that, in the past, similar equipment made by Chinese manufacturers was not durable and often failed to last much beyond 2 years. Users became accustomed to using the equipment until "the wheels fell off," and the concept of leasing equipment for 3 to 4 years made no sense. Nonetheless, there will be a future requirement to develop a used equipment market in China, particularly when operating leases become more popular. The managing director believes this may need to be done through a "push" strategy by manufacturers, rather than relying on demand to develop naturally.

One surprise was the lack of understanding by prospective customers about the concept of leasing. Many of the state-owned enterprises ("SOEs") were heavy borrowers from banks in the past, but do not yet understand the concept of making monthly payments and then not necessarily having ownership of the asset at the end of the financing term. The managing director believes a large-scale series of training seminars, promotional literature, and marketing campaigns will need to be developed and promoted to increase the concept and advantages of equipment leasing to prospective lessees.

Another surprise was that many things that appeared simple (or were taken for granted) in the early stages of the WFOE have proven to be more complex and time-consuming

than anticipated. "There are a huge number of tax, accounting, and legal issues that remain unclear," the managing director said. "We generally go to the government for clarification, but in some cases they don't know the answer and, many times, it's

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impossible to get an opinion in writing. It can be frustratingly difficult to get a concrete yes-or-no answer to a very basic question."

The managing director added, "There's a saying in China: 'Anything is possible, but nothing is easy.' That has been our experience."

TRAINING IS CRITICAL TO SUCCESS OF GLOBAL TECH GIANT'S JV

Let's look at the joint venture experience of an international provider of technological products and services. Its annual sales are in the tens of billions of dollars, and it employs in excess of 100,000 people in more than 50 countries worldwide. The parent established operations in China in the early 1980s, and its annual sales there are estimated to be more \$250 million.

The parent has a strong, well-established captive leasing company with a long track record of successful worldwide operations. It was an early entrant to the Chinese equipment leasing market and established a joint venture leasing company ("JV") with a Chinese partner in the late 1990s.

Aside from supporting its parent's growth plans in China, an important driver was the need for the parent to demonstrate its ability to support its customers in China. China was, and remains, a critical long-term growth

market for many of the parent's largest clients, and the parent believed that the ability to provide on-shore customer financing there demonstrated tangible market leadership to its customers.

At the time, no WFOE licenses were available to lessors in China, so a significant amount of time was spent identifying the appropriate Chinese partner and negotiating the terms and conditions of the partnership agreement.

The JV markets primarily to its parent's enterprise customers and does not target the Chinese small and medium business ("SMB") segment. Although it will finance third-party products and services to support the sale of parent products, it does not pursue financing opportunities in China for stand-alone transactions with no parent product content. The JV considers these transactions on an exception basis only, in support of important clients of the parent. Most leases tend to be custom structured to meet the needs of these larger customers, and, as a result, the JV rarely offers promotional programs such as low-rate financing in China (although the captive does offer these programs in several other Asian countries).

The JV has a credit analyst, with a modest delegated approval level, located in China. Since most JV leasing transactions tend to be large in size, the majority of credit decisions are reviewed and approved by the captive's credit operations group in its Asia Pacific headquarters. The JV executive we interviewed noted that the availability of credit information in China is marginally better than it was at the JV's inception, but it is still nowhere near as plentiful or reliable as it is in the captive's more mature Asian country operations. The JV has experienced a high level of repeat business among its Chinese customers, so the availability of information via personal experience is good. Some information generally can be gathered on new, larger customers, but for its few new SMB customers it remains very difficult to get useful credit data.

Business volumes for the first full year of operations were quite modest.

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Second-year volumes picked up significantly, due in large part to a series of sizeable transactions with a large customer of the parent. This relationship continued to drive new business volumes in subsequent years, while business from other new clients evolved more slowly but at a steady pace. As the JV has matured, it is now measured by lease penetration rates, new business volumes, and net income, similar to most of the captive's other country operations.

Due to the preponderance of large enterprise customers as their lessees, the JV's bad debt levels are "not terribly high." Many of these companies are also repeat clients of the parent, so there is an incentive for both the client and the parent to ensure that lease payments are made on a timely basis. The JV has had the opportunity to use the Chinese court system to attempt to collect outstanding receivables. Although its effort proved successful in the end, "it is not something we would enjoy repeating unless absolutely necessary," the executive said. He encouraged lessors to get to know their customers and work diligently through the parent, the reseller, and directly with the customer before resorting to legal action.

As with the WFOE, the JV management found recruitment challenging. The equipment leasing community in most places in the world is a pretty small group, but it is very small in Asia and exceptionally small in China. "Everyone knows everyone else, and it is hard to look to this community to find prospective employees," the executive said. The JV often recruits from the Chinese banks, although there are challenges there as well. "Most banking employees know little or nothing about leasing, so we have to teach them that," he said. "They do come with a background in finance, which is helpful, but it does not obviate the need for training."

Also, there is a significant cultural transition for an employee coming from a large Chinese bank — particu-

larly if it is state owned — to a smaller, foreign-controlled leasing company. "The concept of selling generally, and of selling a value-add proposition to a customer in particular, is some-

Many of the JV sales representatives assumed that since most of their clients were enterprise customers, they had the financial sophistication and exposure to leasing, but they were mistaken.

thing most of these people have never done and do not understand at all. We need to manage that transition very closely or risk poor performance or a disgruntled employee. Effective training is very important," he said.

A surprise for the JV was the lack of understanding about the concept of leasing among customers. Many of the JV sales representatives assumed that since most of their clients were enterprise customers, they had the financial sophistication and exposure to leasing, but they were mistaken. "Most of these people and their companies — the Chinese companies, anyway — have come from a cash economy; the concepts of credit and leasing are brand new to far more people than we had anticipated," the executive said.

The executive lamented that the JV sales force is not yet fully integrated into the parent and reseller sales force, despite several years of trying. This appears to be related to the lack of knowledge about the leasing product among both customers and the parent/reseller sales representatives.

The initial license the JV obtained significantly limited the scope of its leasing activities to certain cities in China. This meant that the JV could not provide leases for some of the parent's largest customers unless they happened to install the equipment in cities where the JV was licensed to do business. "In retrospect, I wish we

had been able to remove this restriction to our license, but at the time we weren't sure what the demand would be, and it did not seem worth ruffling the feathers of the Chinese authorities over," the executive said. Although licensing restrictions have eased in the ensuing years, prospective market entrants should consider whether other types of restrictions, such as currency or funding limitations, might cause similar operational restrictions.

Scope of operations also may have been an issue for the JV managing director. Like many other multinationals, the parent company groups China, Hong Kong, and Taiwan into a "Greater China Group" within its Asia Pacific operations, and in an effort to mirror this organization, the JV gave operational responsibility of these three countries to its initial managing director. "In retrospect, we probably shouldn't have done that," the executive said. "As expats, we tend to lump these three countries together but they pose different challenges for a lessor. The business and leasing volumes in Hong Kong are relatively small, and Taiwan has some challenges that are unique to that country," he said. "A startup operation in China requires someone focused on it full time, and I think we probably should have let our MD do that ... and let someone else worry about the other two markets."

As a final note, lessors should plan on everything taking longer than anticipated in China. Both Chinese and foreign lessors have found, through painful experience, that tasks requiring government approval simply take a long time. Interviewees recounted stories of waiting several months just to get a simple document signed and approved. Equally frustrating is the lack of willingness of many government officials to commit their opinions or rulings to writing. There is an old adage regarding vacations that suggests to "always bring twice the money you think you need." The same concept applies to lessors entering the China market — "always plan for twice the time you think you need."



IN THE MARKETPLACE

Leaseurope of Brussels has released the annual survey of its 30 member leasing associations, which shows that the European leasing business broke several records in 2005. Leaseurope, the European Federation of Leasing Company Associations, estimates that new leasing contracts worth just above 270 billion euros were concluded during 2005, making the European leasing market the largest in the world. This figure exceeds forecasts made by the Federation and represents an increase of almost 14% compared with 2004, revealing that the leasing sector has outperformed the rest of the European economy on average. In comparison, investment levels in the EU25 increased by only 5.1% compared with 2004.

Several factors are supporting Europe's double-digit leasing growth. First, the statistics include real estate leasing, and the European market has seen substantial increases in the real estate leasing sector over the past year, with Italy being the largest market in this fast-developing business. On the

equipment leasing side, growth is expected to average above 16%. The financing of road transport vehicles in particular is set to contribute to its success, with growth forecasted at 18%.

Another factor is the ongoing development of Central and Eastern European ("CEE") markets, which are beginning to display characteristics traditionally associated with more developed markets, such as the switch from car- and truck-focused leasing to the leasing of varied asset types. The result is that business prospects appear to be extremely promising in CEE countries, with many opportunities for further expansion.

The most important difference compared with the previous year's figures lies with the mature European markets. According to Leaseurope's Chairman, Jean-Marc Mignerey "Not only have the larger markets such as France, Germany and, to a somewhat lesser extent, the UK, progressed a great deal compared to 2004, a number of the smaller developed markets

are also back to levels that have not been seen for some years." The last time the European leasing business witnessed such levels of performance was in 1998, when growth rates reached around 14.5%.

Leaseurope, the European Federation of Leasing Company Associations, is the entity that represents the leasing industry in Europe. Its membership consists of 30 National Associations. The countries represented are: Austria, Belgium, Bosnia-Herzegovina, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Luxembourg, Morocco, the Netherlands, Norway, Poland, Portugal, Romania, Russia, Serbia-Montenegro, Slovakia, Slovenia, Spain, Sweden, Switzerland, and the United Kingdom. Mignerey is currently Chief Executive Officer of SG Equipment Finance.



Disparagement

continued from page 5

might look like. Through a series of carefully worded questions, the survey results (which were statistically significant) corroborated Barron's assertions that Boyle's negative statements had effectively foreclosed the "vast majority" of the market for the resale of the aircraft and caused the aircraft to suffer significant economic damages as a result. Barron and Dassault subsequently entered into a confidential settlement.

The proceedings in the Barron case underscore just how potent a com-

mercial disparagement claim can be. Even if actual proof of diminished value is unavailable, proof of "loss of a market" is equally a compensable loss; if an owner will be unable to sell his asset, its value has surely dropped. This loss of market form of damages is a "squishy" exception to the usual rule, suggesting that if the evidence is persuasive enough, loss of market can be used in the right context to demonstrate damages.

CONCLUSION

The tort of commercial disparagement exists as a little-known danger to those who might make damaging statements about an asset — even if

those statements were mostly self-interested and not necessarily intended to denigrate the holder's interest in the asset. For an asset owner that has been on the receiving end of negative comments, on the other hand, a commercial disparagement claim provides a legitimate vehicle for redress worth considering. A toaster or lawnmower's reputation can be as worthy of protection, in the appropriate context, as the reputation of a Hollywood movie star.



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