The Supreme Court’s Return to Personal Jurisdiction

By David J. Weiner, Washington D.C.

In Goodyear Dunlop Tires Operations, S.A. v. Brown and J. McIntyre Machinery, Ltd. v. Nicastro, both handed down on the final day of the Supreme Court’s 2010 term, the Court clarified the tests used to determine when a state may exercise personal jurisdiction over a nonresident defendant. In Goodyear, Justice Ruth Bader Ginsburg wrote for a unanimous Court and held that a state cannot exercise general personal jurisdiction over a foreign company whose products travelling through the stream of commerce and winding up in the forum state. In J. McIntyre, a four-justice plurality, helmed by Justice Anthony Kennedy and joined by Justices Stephen Breyer and Samuel Alito in a narrow concurring opinion, held that a foreign company that markets a product only to the United States generally, but does not purposefully direct its product to an individual state, is not subject to specific jurisdiction with the state stem from the company’s products travelling through the stream of commerce and winding up in the forum state. In J. McIntyre, a four-justice plurality, helmed by Justice Anthony Kennedy and joined by Justices Stephen Breyer and Samuel Alito in a narrow concurring opinion, held that a foreign company that markets a product only to the United States generally, but does not purposefully direct its product to an individual state, is not subject to specific jurisdiction.

Teaching Arbitration in Ukraine

By Roy B. Gonas, Miami

Let us start at the beginning. Even when speaking with people in the United States having advanced academic degrees, including lawyers, it needs to be said Ukraine is not Russia. It is not even in Russia. Adopting words from a Ukrainian jurist, “Ukraine is a new country starting in 1991.” Those few words reveal pride and independence. Ukraine is a beautiful country in Eastern Europe with a difficult past, growing intelligentsia, fascinating culture, agricultural and manufacturing industries and is a signatory to the New York Convention. The country’s importance, in large part, is due to its geographic location and natural resources. Strong, opposing political factions leave its future uncertain.

My wife and I visited Ukraine, Poland and Denmark in 2010. I returned this year as an invited lecturer at two Ukrainian universities. What was intended as a holiday trip in April 2010, continued, next page
UKRAINE  
from page 1

turned out to be more and led to much more. Our plans included visiting Kyiv and Lviv in the Ukraine and Krakow, Poland, concluding with a few days in Copenhagen hosted by a Danish lawyer and his wife. Two days before our departure, I received an invitation to give a lecture in the Department of Private International Law, Institute of International Relations, Taras Shevchenko National University of Kyiv, a 177-year-old university named for a person of renown in Ukrainian cultural history. I declined due to insufficient time to prepare, but plans to visit the Institute remained, along with the goal of conveying the interest of Florida International University’s College of Law in possible collaboration between students and faculty of both institutions. I was happy to carry the message.

See “Ukraine,” page 53

SECTION CALENDAR

Mark your calendars for these important dates.
For more information contact: Angela Froelich: 850-561-5633 / afroelic@flabar.org

2011

Sept. 16 The ICDR’s 9th Annual Miami International Arbitration Conference  
Biltmore Hotel, Coral Gables (www.internationallawsection.org)

Sept. 21-24 NYSBA International Section 2011 Meeting  
Panama (www.nysba.org/PanamaMeeting2011)

Oct. 27 International Income Tax and Estate Planning 2011 (#1299R)  
The Conrad, Miami, Group Rate: $229 (www.floridabar.org/CLE)

Oct. 31 – Nov. 4 The 55th Congress of the Union Internationale des Avocats  
Loews Miami Beach Hotel (http://congres.uianet.org/en/miami2011/)

Nov. The 5th Annual International Business Transactions Conference  
Brazil (Date: TBD)

2012

Feb. 24 The 10th Annual International Litigation and Arbitration Conference (#1387R)  
The Conrad, Miami

Feb. 25 Pre-Vis Moot  
Miami

June 22 Annual Seminar at The Florida Bar Convention (#1367R)  
Gaylord Palms Resort & Convention Center, Orlando
Florida is fast becoming a leading center of international law, both in terms of dispute resolution and international business transactions.

This edition of *The International Law Quarterly*, with its range of world-class articles on issues of significance to the entire international law community, confirms the emergence of The Florida Bar, especially through its International Law Section, as a significant player in this field.

Once again, the section has a full calendar of events planned for the upcoming year. These events include the twin pillars of the section’s programming: the 5th Annual International Business Transactions Conference to be held this November in São Paulo, Brazil; and the 10th Annual International Litigation and Arbitration Conference (“ILAC”) to be held in February 2012 in Miami. Of course, the section also takes great pride in the Pre-Vis Moot that will immediately follow the ILAC. There, section members will act as arbitrators and prepare teams of law school students for the annual Willem C. Vis International Commercial Arbitration Moot in Vienna, Austria, through a preliminary statewide competition that continues to grow in importance every year for Florida law schools.

In addition, this year will bring several important international conferences sponsored by other organizations. These include the International Centre for Dispute Resolution, which will again hold its annual arbitration conference in Miami in September, and the *Union International des Advocates*, which will convene its 55th Congress in Miami Beach at the end of October.

Of course, the big news for Miami, and indeed the entire U.S. international legal community, is the recent selection of Miami to host the 2014 Congress of the prestigious International Council for Commercial Arbitration (“ICCA”). ICCA was founded in 1961 and is the leading global organization focused on the practice of international commercial arbitration. The Congress, considered the “Olympics” of international commercial arbitration, will be attended by lawyers from around the world, giving us and Florida another chance to shine. The selection of Miami came as a result of countless hours of hard work by many section leaders, former leaders, members and friends who—through the Miami International Arbitration Society and a special-purpose organization they created called ICCA 2014—lobbied for the selection. Their first-rate written submission and subsequent presentation were head-and-shoulders above the competition and clinched the deal. In fact, Miami is only the second U.S. city (after New York in 1986) ever to be selected—and is proof positive of the importance of the region to the field of international commercial arbitration.

Finally, we owe a debt of gratitude to past leaders and members of the International Law Section for what they have done to build and strengthen our section. I’d especially like to acknowledge my predecessor, Ed Mullins, whose leadership contributed greatly to the section’s success as well as to the success of Florida as a center of international law. We look forward to building off that success this year, starting with this edition of *The International Law Quarterly*.

Nicolas Swerdloff
Hughes Hubbard & Reed, LLP
In this Issue

On the last day of its recent term, the Supreme Court of the United States reversed two state supreme court decisions that otherwise would have nearly guaranteed U.S. jurisdiction over manufacturers in any country for products that find their way to the United States, and even U.S. affiliates of foreign manufacturers for products that injure U.S. citizens abroad. In this issue, David Weiner, a former editor-in-chief of the Stanford Law Review, analyzes the Court’s recent pronouncements that dial back the U.S. jurisdictional reach, something that will be critical for all lawyers representing non-U.S. companies to understand.

Another area of concern to many international businesses is the burgeoning growth of class, or “collective,” actions in the European Union. Until recently collective redress simply did not exist in Europe and, in fact, was one of the many criticisms European commentators regularly leveled at the “litigious” U.S. system. But EU member states are now shifting perspective. In this issue, Francesca Rolla explains the new Italian collective action law. Grzegorz Barszcz and Agnieszka Majka write on Poland’s new Group Proceedings Act. And Karen Jelsma and Manon Cordewener analyze the Dutch Act on Collective Settlement of Mass Damage Claims, including a comprehensive analysis of its track record since enactment in 2005. Together, these articles provide an insightful tableau of the various approaches currently being undertaken in this important and expanding area.

We are also pleased to publish the thoughts and impressions of Roy Gonas, one of the founding officers of the International Law Section, on his experience teaching international arbitration to students in Ukraine, a country that became independent after the dissolution of the Soviet Union in 1991. This sort of international academic collaboration would seem vital to emerging nations as they struggle to compete internationally.

On the substantive international arbitration front, we have two articles on recent U.S. decisions that may not take the law where it should go. DLA Piper lawyer and section leader Gustavo Lamelas discusses the potential conflict between state and federal courts over control of arbitration proceedings after the recent Southern District of Florida opinion in Ingaseosas International Corp. v. Aconcagua Investing, Ltd. Mr. Lamelas’ DLA Piper colleague, Harout Jack Samra, then addresses the Second Circuit’s decision in Bergesen v. Joseph Muller Corporation and the resulting potential that an arbitral award could be subject to both the New York Convention and the Federal Arbitration Act, thereby creating conflicting bases for challenge as well as a possible incentive to forum shop.

Our readers who represent people or entities that do business in China will want to read Miami tax lawyer Margarita P. Muina’s explanation of the nuances of China’s 2009 tax Circular No. 698. The law taxes gains on direct and indirect transfers of equity (shares of stock) of foreign holding companies. As the law does not require that these enterprises be formed or managed in China, or that they even receive a benefit from the transfer, the law is surely essential for investors seeking a presence in China to understand.

With regard to an important European development, French lawyers Thomas Rouhette and Christelle Coslin examine the Brussels I Regulation on the recognition and enforcement of judgments in civil and commercial matters. The European Commission is considering changes to this nine-year-old law that is Europe’s foundation for cross-border litigation and judicial cooperation. The authors address these changes and how they could significantly reshape cross-border litigation between the European Union and the United States.


The last time Mark Weiner was published in the International Law Quarterly was in 1993. Mr. Weiner is a Past President of the American Immigration Lawyers Association as well as a current member of The Florida Bar Ethics Committee. Thus, we are pleased to have him back eighteen years later with an important article on the ethical management of immigration cases in this struggling economic market.

Finally, Giselle Carson, a shareholder at Jacksonville’s Marks Gray, P.A., rounds out this issue with something all North American international lawyers can use. Ms. Carson provides the ins and outs of the myriad trusted traveler programs and how they can save countless airport hours and provide a much improved experience for the low-risk international traveler.

Coming Attractions

This will be the last purely general issue of the International Law Quarterly until summer of 2012, when we will celebrate our thirtieth year of continuous publication. The next issue, to be published this fall, will be...
Introduction

Class actions have only been possible in Italy since 1 January 2010, and only with respect to conduct that occurred after 15 August 2009. Yet, in spite of expectations that the new law would impact the world of litigation significantly, only few class actions have been filed since the law entered into force and even fewer decisions have been issued by Italian courts.

The reasons for such a slow start are manifold—from the lack of litigation funding provisions and the ensuing potential financial burden for plaintiffs, to uncertainties about judicial interpretations of the new law likely to impact significantly its operation in practice. The law states that “individual homogenous rights of consumers and users” may (also) be enforced through class action, for claims involving: (1) contractual rights of a group of consumers/users in identical circumstances vis-à-vis the same company, including rights relating to standard term agreements; (2) identical rights of end consumers and final users of a product vis-à-vis the manufacturer, irrespective of whether there is a direct contractual relationship between them; or (3) identical rights of consumers to compensation for prejudice suffered as a result of unfair business practices or anti-competitive conduct.

The law does not specify when “individual” rights of consumers and users may be considered “homogeneous”; nor are there guidelines regarding the concept of “identity” in the individual rights—an element which, as noted below, is of crucial importance in the assessment of the admissibility (similar to class certification in the United States) of the class action.

Two decisions recently issued (one by the Court of Rome, in Codacons v. British American Tobacco Italia S.p.A.; one by the Court of Appeal of Milan, in Codacons v. Voden Medical Instruments S.p.A.) have shed light on some of the most controversial provisions of the new law. This article reviews these decisions and their possible impact on future trends in Italian class action litigation.

Background

The Consumer Code, in point 6 of Article 140-bis (the article containing the provisions on class actions), provides that a court can declare a class action non-admissible in any of the following cases: if the claim is manifestly groundless; if there is a conflict of interest; if the rights infringed are not identical; or if the lead plaintiff is not able to represent the interest of the class adequately.

The decisions under review both revolved around the admissibility requirements of class actions. In Codacons v. British American Tobacco Italia S.p.A., the Court of Rome denied admissibility. The Court of Milan, in Codacons v. Voden Medical Instruments S.p.A., found the class admissible, which ruling was then confirmed on appeal.


By decision of 11 April 2011, the Civil Court of Rome dismissed as non-admissible a class action filed by Codacons (one of Italy’s major consumer associations) and three smokers against British American Tobacco Italia S.p.A. (“BAT”), for alleged damages incurred through active (as opposed to passive) smoking.

The class action was initiated on 31 May 2010 by Codacons on its own behalf and on behalf of the three smokers. The plaintiffs sought compensation for alleged health damage (nicotine addiction and psychological stress) and for reimbursement of the amount spent daily on cigarettes. The plaintiffs argued that the tobacco manufacturer was liable for alleged tobacco manipulation and failure to warn, which led to the plaintiffs’ alleged addiction and fear of developing serious diseases. The alleged addiction in turn allegedly caused the plaintiffs to continue purchasing cigarettes and, thus, to suffer economic loss. The plaintiffs also argued that addiction, psychological stress and economic loss ensuing from the daily expenditures on cigarettes would be common to all smokers; hence their claims could be brought through a class action under article 140-bis of the Consumer Code.

BAT appeared in the proceedings requesting that the court declare the class action non-admissible because, inter alia, of the prima facie manifest groundlessness of the claim and of the lack of identity of rights.

The Court of Rome upheld BAT’s defences and declared the class action non-admissible.

As a preliminary matter, the court found that Codacons lacked standing to sue on its own behalf, although it was entitled to sue on behalf of the three smokers. The decision then focused on the two previously mentioned issues: (1) the assessment of the prima facie groundlessness of the claim; and (2) the non-homogeneous nature of the individual rights of the consumers involved, the alleged violation of which formed the basis of the claim.

The prima facie groundlessness of the claim

In order to assess whether the action was well grounded at the preliminary phase, the court examined the strictly legal elements of the claim, such as causation, on a prima facie basis. In this regard, the court held that since any smoker is aware of the health risks and addiction issues associated with smoking, and since nicotine addiction does not annihilate a smoker’s free will, the smoker’s vol...
Voluntary conduct interrupts the direct chain of causation between cigarette manufacturing and the alleged event and damage. Moreover, courts that already have considered the question of alleged tobacco manipulation, have held that additives in cigarettes were not included to increase the addictive effect of nicotine. Hence, the claim was prima facie groundless, and the defendant could not be considered liable for failure to warn and tobacco manipulation, as alleged.

Non-homogeneous nature of the individual rights of the consumers

The Court of Rome seems to have adopted a strict interpretation of “individual rights,” excluding “homogeneity” when the facts underlying the claim require the assessment of different individual circumstances. Indeed, in ruling on the non-homogeneous nature of the individual rights of the consumers involved, the court pointed to the very diverse situations of individual smokers. The court clarified that the new class action law does not cover collective interests of consumers, but in product liability cases it allows class claims for identical rights of consumers of a given product against the manufacturer; i.e., rights either that arise from the same originating event or those where assessment and protection involve the same legal and factual issues.

Specifically, in this case, the court found that the claims involved very diverse situations, as evidenced by the typically distinct smoking histories and the different behavioural, psychological and social contexts relevant to each of the three plaintiffs represented by Codacons. In the court’s view, these features were incompatible with the class action joint assessment of absolutely identical, individual rights belonging to each consumer. Instead, the claim brought by Codacons and the three plaintiffs would have required the analysis of various scenarios, such as: when each consumer started smoking and why; the brand and number of cigarettes smoked daily; the level of addiction; the individual choice to quit or continue smoking; the consequences of the above on the life of each smoker; and other typically individual matters.

The ruling of the Court of Rome on the issue of admissibility of the class action has been challenged by the plaintiffs before the Appeals Court of Rome. At the time of this writing, the appeal has not yet been decided.

Codacons v. Voden Medical Instruments S.p.A.

In early 2010, Codacons filed a class action against Voden Medical Instruments S.p.A. (“Voden Medical”) before the Court of Milan, regarding Voden Medical’s Ego-test-Flu, a do-it-yourself detection test of the A and B flu viruses, including the virus for swine flu and avian flu. Ego-test-Flu was widely marketed in Italy at the outbreak of swine flu. Millions of tests were sold at a price of €14.20 per test. The test was presented as being “practical, simple and sure” and having “sensitivity at 99.1%.”

Codacons alleged that the product was not capable of satisfying the con-
sumers’ needs and claimed product-related damage in this regard. By briefs filed during the admissibility phase, Codacons also argued that the product information was misleading as the product did not possess the characteristics advertised; damage related to unfair commercial practices was therefore claimed.

Voden Medical asked the class claim to be declared non-admissible on various grounds.

By decision of 20 December 2010, the Court of Milan, besides ruling on certain procedural issues, declared non-admissible the class claim for product-related damage, on grounds that Voden Medical was not the manufacturer of the product. The court, however, admitted the class claim for unfair commercial practices, on grounds that the product information and advertising material were prima facie misleading, particularly because they did not warn of the risk that the test could produce false-negative results.

Voden Medical challenged the decision on admissibility before the Court of Appeal, arguing inter alia that the court of first instance had wrongly assumed that the lead plaintiff was a consumer and therefore had standing to sue (Voden Medical had objected that the plaintiff had not adequately supported his position as consumer) and that it had ruled on a count (unfair commercial practices for misleading information) that did not form the object of the claim as originally filed.

On 3 May 2011, the Milan Court of Appeal issued its decision, dismissing Voden Medical’s appeal.

The Court of Appeal’s opinion begins by giving an overview of the principles set out in Article 140-bis n. 6 on the conditions of admissibility and then examines all the challenges made by Voden Medical to the admissibility decision.

For purposes of this review, we will focus on the Court of Appeal’s assessment of “consumer” and on the ability of the lower court to decide on claims better specified in subsequent briefs filed during the admissibility phase.

The position of “consumer” and its assessment

As noted above, Voden Medical had argued that the lead plaintiff had not adequately proven that he was a “consumer” of the products involved and therefore had no standing to sue. The Court of Appeal did not consider “standing to sue”—a preliminary condition for any claim, including class claims, proof of which rests on the plaintiff—to be the issue. Rather, the issue is whether the complaints made are in fact referable to the plaintiff; i.e., in the case decided by the court, whether the plaintiff had actually been misled by the information on the product. This being a question pertaining to the merits of the case, the Court of Appeal observed that the lower court was not bound to rule thereon in the preliminary admissibility phase. Therefore, the first instance decision correctly concluded that “in light of the non-equivocal wording of the claim by the plaintiff . . . that he was in fact misled, the presumptive elements presented by the defendant to challenge the position of the plaintiff as ‘consumer’ are not such to prevent the full debate on the merits.”

In short, the Court of Appeal ruled that, in the preliminary phase, the position of the plaintiff as “consumer” shall be evaluated on a prima facie basis only, and unless the defendant is at that point able to challenge such position adequately, the relevant assessment is to be made in the stage of proceedings where the merits of the case are discussed.

Claims contained in briefs filed in the preliminary phase

As mentioned, one of the grounds of the appeal filed by Voden Medical was that the new law does not allow the filing of briefs in the admissibility phase and that, in any event, the Court of Milan wrongly ruled on the admissibility of the damage claim for unfair commercial practices, which claim was not included in the writ of summons that initiated the class action.

In this regard, the Court of Appeal first clarified that although the new law contains provisions aimed at ensuring swift management of the proceedings and at avoiding non-essential formalities, it does not prohibit the submission of additional written briefs after the initial pleadings are filed. The court then observed that the first instance decision correctly ruled—on the basis of the allegations made in the writ of summons and better specified in the subsequent briefs—on the admissibility of the claim for unfair commercial practices, in light of the general principle that the judge is entitled, on own motion, to give the proper legal qualification of the claims by reference to facts timely presented by the plaintiff.

Conclusions

The decisions by the Court of Rome and by the Court of Appeal of Milan, although leading to opposite results, have shed light on some of the features of the new legislation on class actions. By providing guidelines on the issue of the “identity” of the rights involved and on the scope of the assessment to be carried out in the admissibility phase, these decisions might instil more confidence in consumer associations and prompt more filings.

Still, there are many issues that remain outstanding. To take just one example, there is no statutory limitation to legal costs to be borne by the plaintiff, and there is no “ceiling” to the damages that can be awarded, which would help keep the class action system within the boundaries of its main objective (namely, to allow access to justice for so-called “small claims”) and to avoid the development of U.S.-style class actions. These and other issues continue to be debated and seen by stakeholders as obstacles to the effective functioning of the new system.

Francesca Rolla has twenty years experience as a litigator, focussing on product liability litigation and torts (including bribery and white collar crime). She is interviewed on the new Italian class action system, below.

F. Rolla

continued, next page
cases), general commercial litigation (including unfair competition) and contentious insolven. She is the Italian representative of Hogan Lovells Class Action Unit, a focused group of dispute resolution lawyers from Hogan Lovells international network of offices with particular experience advising on class action cases.

Endnotes:

1 Law no. 99 of 23 July 2009 (which amended Article 140-bis of the Consumer Code, originally introduced by Law no. 244/2007, the effectiveness of which was suspended). For a detailed overview of the new law, see Italian Class Actions Eight Months In: The Driving Forces by Renzo Comolli et al., 16 Sept. 2010, www.nera.com. See also La responsabilità du fait des produits et l'émergence de mécanisme de recours collectifs en Europe by Rod Freeman and Francesca Rolla in 72 J. des Sociétés 43 (2010).

2 At the time of this writing (May 2011), less than twenty class actions had been filed, and no decision on the merits had been issued. Four class actions have been dismissed as non-admissible (see, e.g., Codacons v. British American Tobacco, infra); only one (Codacons v. Voden Medical, infra) has been declared admissible and will proceed through the merit stage.

3 Under Art. 140-bis, litigation funding is borne entirely by the initial plaintiff. In addition, Law 99/2009 did not introduce limits to legal costs to be borne by the plaintiff (as envisioned by the EU Commission in the Green Paper on Judicial Collective Redress dated 27 November 2008). In addition, the leading plaintiff can be ordered to pay attorneys' fees and further damage if the class claim is found non-admissible in the preliminary phase and can be ordered to give publicity of the non-admissibility decision at own expense. Allocation of said costs between class members is only theoretical, as class members can opt-in after the claim is declared admissible (and the exposure to costs of a non-admissibility decision is nil).

4 For example, these uncertainties may relate to the time frame of the law's applicability. Indeed, a class action can be filed only for conduct by defendants subsequent to 15 August 2009—a restriction that has been challenged on constitutional grounds. See Guido Alpa, Class Action: note sull’art. 140-bis c. 1 del Codice del consumo, www.altalex.com.

5 Decisions granting or denying admissibility can be challenged before the Court of Appeal within 30 days (Art. 140-bis n 7).

6 Under section 140-bis of the Consumer Code, each individual consumer or user has standing to sue on behalf of other prospective class members. Consumer associations may also be mandated to act but do not have their own standing. A similar ruling on lack of standing to sue by consumer associations is found in another recent decision (Court of Turin, 7 April 2011 in Aduc v. Banca Popolare di Novara).

7 See, for example, Court of Brescia, decision n° 3900 of 25 July 2005, which concluded that placing additives in cigarettes does not amount to tobacco manipulation.

8 The decision by the Court of Appeal in Codacons v. Voden Medical Instruments S.p.A. also contains some guidelines on the “identity of rights” requirement. In commenting on the requirement in general, the Court of Appeal clarifies that, in class actions relevant to contractual rights, the identity requirement is met when, for example, “consumers have entered into contracts which, even if concluded separately by each consumer, have the same content or, in any event, are aimed at governing identical rights.” In class actions for liability in tort (as was the case in the Voden Medical class action), the court considered that identity exists when the rights are infringed by the same unlawful event, which shall “necessarily consist in a uniform conduct.”

9 In this regard, see also the position expressed by the Court of Turin (and confirmed by the Court of Appeal of Turin) in Codacons v. Banca Intesa S.p.A.—a class action related to alleged overdraft fees charged by Banca Intesa S.p.A., and the first class action to be decided since entry into force of the law. The case was declared non-admissible by the Court of Turin on 27 May 2010 on grounds that the lead plaintiff lacked interest (another general precondition for any claim, including class claims). The Court of Appeal of Turin confirmed the decision on non-admissibility in October 2010. The Turin decisions established an important general principle: that the requirements for the admissibility of class actions (including the plaintiff’s capacity to bring an action in court and his individual, current and concrete interest in the remedies requested) must be assessed with regard to the lead plaintiff individually.

10 Under point 11 of Article 140-bis, the court, if the class action is declared admissible, shall ensure “the fair, effective and timely management of the trial” and shall “adopt measures to prevent undue repetitions or complications in the presentation of evidence or arguments [by the parties]; order the parties to give adequate publicity to the proceedings, in the interest of members of the class who have opted in; set the most appropriate rules for the acquisition of evidence phase; decide all procedural issues, omitting those formalities which are not essential for the fair presentation of the case.”

11 In most of the class actions filed since entry into force of the law, both plaintiffs and defendants have filed briefs during the admissibility stage.

12 In the first instance, the court ruled that “although in the writ of summons reference was expressly made only to a claim under article 140-bis, letter b) . . . the writ clearly included allegations of separate claims which were relevant to the inability of the product to satisfy the consumers’ needs . . . the other, relevant to the alleged misleading nature of the information leaflets inserted in the product package.”

13 Consumer associations are considered the “de facto” plaintiffs. See Comolli supra note 1.
Class Actions Under Polish Law

By Grzegorz Barszcz and Agnieszka Majka, Warsaw

1. Introduction

The concept of class actions was unknown to the Polish legal system until the beginning of 2010 when the Act on Asserting Claims in Group Proceedings (“Group Proceedings Act,” or “Act”) came into force. The Act was the result of discussions carried out by legal scholars and of legislative work that began in early 2007 by the Civil Law Codification Commission at the Ministry of Justice, followed by a vast number of discussions among legal practitioners and representatives of Polish civil jurisprudence.

1.1 Collective Actions in Poland

It must be underlined that, despite the lack of a class action concept under Polish law, the Polish Code of Civil Procedure provided collective actions similar to the class action; i.e., joint participation and participation of social associations. These, however, were not equivalent to class actions that are known in other jurisdictions, particularly common law jurisdictions; neither did they serve the purpose intended for class actions.

Joint participation is a type of multi-party proceeding based on the concept of allowing each joint participant to act on his or her own behalf. Independence of a joint participant, however, is limited by the requirement that all participants agree on settlement, renouncement of a claim or its acceptance. With regard to the participation of social associations, a claim can be brought by a social association in favour of citizens in consumer protection, non-discrimination and alimony disputes. Also, social associations with a statutory objective that specifies the protection of a collective interest (such as protection of the environment, consumer protection, or protection of intellectual property) are allowed to join the proceeding at any stage, upon a claimant’s consent. The disadvantage, however, is the necessity of establishing an association beforehand.

1.2 The “Group Proceeding”

The collective actions introduced to the Polish legal system differ from those in other jurisdictions. One difference is that participation in the group is designed as an opt-in system. This means that unless a person makes a positive declaration that he or she wishes to join the group, the court’s judgement is not binding and effective upon such person, and he or she may well pursue the claim later in individual proceedings, irrespective of the outcome of the group proceedings. This is generally considered the biggest difference between the regime adopted in most of the European countries and Poland as compared with the regimes that exist in countries like the United States. The regime enacted in Poland shall therefore be referred to as “group proceeding,” rather than “class action.”

2. The Group Proceedings Act

2.1 Admissible Claims

The primary prerequisites for a group claim to be admissible under the Act are that the individual claims asserted must be of the same kind for all of the injured parties, and the claims must be based on the same or identical facts.

The scope of cases that can be brought under the Act has been limited to three types of claims:

1. claims for consumer protection;
2. product liability claims; and
3. claims in tort (with the exception of protection of personal rights).

Claimants in group proceedings may seek monetary and non-monetary compensation (action or benefit). It is disputable, however, whether they are allowed to seek other claims, such as a group claim for declaration of the will of the defendant, execution of a final agreement, or establishment of the existence of a right or a legal relationship. Due to the fact that no case law is available, it is difficult to predict how the courts will act.

Notably, several important types of claim have been excluded from the scope of the Act, including, for example, employment cases where the accessibility of group proceedings would be appreciated by many claimants. It must also be noted that there was a discussion on admissibility of group proceedings in disputes between business people. The majority of opinions, however, provide that group proceedings should not be limited only to consumers.

2.2 Composition of the Group

Claims in group proceedings may be brought by a minimum group of ten natural or legal persons. The Act does not set forth any requirements in this respect except for the minimum number of claimants. The group must have a representative, be it a person chosen from among the members of the group or a regional consumer ombudsman. The representative is authorized to bring the claim on behalf of the group and acts in the proceedings on the representative’s own behalf and in favour of all members of the group.

The Group Proceedings Act does not refer to any legal basis regarding the relation between the group and its representative. Thus, such legal relationship can be governed by the separate agreement concluded by each member of the group with its representative and which sets forth the scope of the representative’s duties. It is essential, although not explicitly provided by the Act, that each member of the group agree on the representative. The group members may request the court to change the representative only by way of a motion made by more than 50% of the group members. This, in turn, could
mean that once group claims have become more accessible and complex, choosing a representative without requiring any explicit authorisation will pose a threat to the due course of the proceedings.

The group is to be represented in the proceedings by professional legal counsel (an advocate (adwokat) or a legal advisor (radca prawny)). Representation by professional legal counsel in civil law cases is currently required in complex and sophisticated proceedings before the Supreme Court and the Supreme Administrative Court. Under the Act, the professional legal counsel acting before the court may also be a member of the group. It is assumed that he or she acts on the basis of the power of attorney given by the representative. One point is crucial to note: change of the representative does not cause the power of attorney to terminate. The legal counsel’s remuneration can be agreed on as a contingent fee; this, however, may not be more than 20% of the award to the claimant.

Under Polish law, a group may be formed only by a claimant. Thus, a claim in group proceedings cannot be lodged against a group of defendants, and defendants cannot establish a group, although such an option would probably have been appreciated by many claimants, especially in asserting claims for infringement of copyrights by a larger group of persons who acted independently. It is permissible, however, to lodge a claim in a group proceeding against few defendants or to apply to the court, on the basis of general rules set forth in the Polish Code of Civil Procedure, to call them to join the proceedings.

2.3 The Opt-In Regime

The group proceedings under the Act deal only with claims of persons who have declared to participate in the proceedings as members of the group within a period specified by the court.

As noted above, the Act adopted the opt-in regime which means that only persons who lodged a claim as a member of the group will be able to benefit from the court judgement if damages are awarded. Thus, the judgement will not be effective upon a third party who did not participate as a member of the group.

On the other hand, instituting a group claim against a defendant does not prevent a person outside the group or a person who left the group from lodging an individual claim against the same defendant. The parallel proceedings remain without any mutual influence, and judgements given in any of the cases do not serve as precedents for the other pending cases. It must be noted, however, that the possibility for a potential claimant to join the group and then leave it and afterwards lodge a separate individual claim against the same defendant might very bothersome for the defendant.

2.4 Unification of Value of Monetary Claims

Both monetary and non-monetary claims can be asserted in the group proceedings with the reservation,
however, that the value of each member’s claim in a monetary claim must be
unified with regard to the common circumstances of the case. Thus, one
party may eventually be awarded a lesser amount of damages than
initially expected because the other claimants’ claims were smaller. Or,
conversely, a party might take advantage of joining a group where the
amount of damages awarded would be higher than it might have been
on the individual claim. Nonetheless, such is the purpose of the group
proceeding—to facilitate a matter by easing the evidentiary obligations of
each particular case.

In order to avoid too much discrepancy, the Group Proceedings Act
permits the unification of the value of claims in “subgroups” of at least
two persons. This should allow group members’ claims to be joined where
the facts, and the amount of damages sought, are similar, without the
need to understate the damages of the other members of the group. The
number of subgroups is unlimited.

2.5 Statement of Claims and Procedure

The statement of claim, or complaint, must fulfill the statutory condi-
tions prescribed by both the Code of Civil Procedure and the Act. These
include, in particular, a motion to de-
cide the claim in group proceedings,
an explanation of the facts that jus-
tify the group claim and a declaration
made by the group members regarding
their participation in the group. If the
group claim concerns a monetary
claim, the statement of claim must
show the value of the claim, unified
throughout all of the group members,
together with the principles of unifi-
cation. If a group claim is filed by the
group’s representative, an explicit
declaration regarding the representa-
tive acting in this role, together
with consent of the group, must be
attached to the statement of claim.
The statement of claim must be in
writing; must include details of the
parties and the court; must set forth
the claim and its justification as well
as evidence, and a list of attachments;
and must be signed. The power of at-
torney for the professional legal coun-
sel representing the group, together
with a confirmation of payment of the
court fee, must be also enclosed.

After submission of the statement
of claim, the court establishes wheth-
er the case can be decided within the
group procedure. The court issues a
decision to this effect which can be
appealed by either party. Should the
group claim be dismissed, the indi-
vidual claimants are not prevented
from asserting their claims by way
of individual proceedings. It is impor-
tant to note that a group member’s
individual claim submitted to the
court within six months from the
date of the decision dismissing the
group claim will have the same effect
as a group claim. This is very unfa-
vourable for a potential defendant
because it excludes application by the
defendant of limitation periods.

Upon admission of the claim to the
group proceedings, i.e., the decision
on admissibility is final, the court
will issue a statement in the nation-
wide press. The statement will note
the procedure has started, will state
the subject of the dispute and will
note the deadline for joining the case,
which shall be between one and three
months. This provides an opportunity
for other potential group members,
so far unaware of the proceedings, to
join. It is not permissible to join the
group after the set date. It is possible
to avoid publication of a statement
in the nationwide press if it follows
from the facts of the case that all
possible members of the group have
already joined. Avoidance of a public
announcement about the group pro-
ceedings might be favourable for the
defendant and his reputation.

The group may be joined by ad-
tional persons by presentation of
a declaration of intention to partici-
pate. The proposed additional person
must specify the claim and provide
the common factual grounds for the
claim and the right to be a group
member, as well as present evidence
to this effect. Members of the group
have the right to leave the group,
continued, next page
although this must take place before the court issues a decision on the composition of the group or, otherwise, with the approval of at least half of the remaining members of the group. Before the decision is issued, within a period specified by the court (not shorter, however, than one month), the defendant will have the opportunity to comment on the eligibility of individual persons to be members of the group.

After the decision on the composition of the group is final, the case is heard on the merits and the evidentiary proceedings are conducted under the general rules of Polish civil procedure. The case is finished with a judgment. Unless appealed, the final and binding judgment is enforced under the applicable rules of the Code of Civil Procedure. The final judgment covers all members of the group. A judgment awarding monetary compensation should provide amounts awarded for group (sub-group) members. All members of the group must be listed in the judgment.

2.6 Mediation, Settlements, Withdrawal of Claim

The claim can be withdrawn, limited or waived by the claimants, but such decision has to be approved by at least half of the group members. The Act also allows for the claim to be submitted to mediation or settled at any time during the proceedings. The Act does not refer to any other forms of ADR but does not exclude such methods from being accepted by the court (ADR, other than mediation, is not popular in Poland). Standard mediation in the case of a group composed of a large number of participants might be difficult.

2.7 Competent Court and Costs

The applicable court is the Circuit Court (sąd okręgowy) where the defendant is located. The case is decided by a panel of three judges, which may be expected to contribute to a higher level of expertise and professionalism in the proceedings. This parallels the requirement concerning representation of the group by professional legal counsel.

The rules regarding costs of the proceedings have been eased in favour of the claimants. The Act provides that the amount of the court fee in monetary claims shall be 2%, as compared with 5% of the value of the claim in non-monetary proceedings; not more, however, than PLN 100,000 (approximately $30,000). The court fee in non-monetary claims is PLN 600 (approximately $200).

3. Comments

The Act was expected to have an important impact on the Polish legal system, particularly on product liability and tort liability claims. A year after its entry into force, however, its effects remain limited to discussions by legal practitioners and representatives of Polish civil jurisprudence.

According to press releases, among the first group claims submitted to the courts were those by groups of residents of flooded regions who filed claims for damages against the state administration and insurance companies. Other group claims were submitted against major banks by groups of borrowers who suffered losses during the 2008 global financial crisis. Other entities said to be exposed to group claims include real estate developers, airlines, travel agencies, telecom providers and pharmaceutical companies.

The cost of the proceedings and legal counsel is likely to be more acceptable to claimants in group proceedings, especially if the value of an individual claim is relatively low. Also, group standing may increase chances of dealing with the case in a more professional way than in individual claims where the injured persons frequently are not represented by counsel. Thus, claimants may be expected to be more willing to lodge claims in a group than they would individually.

It must be noted, however, that amounts of compensation awarded by Polish courts are far from those awarded by U.S. courts. Press releases indicate that the highest compensations for death or permanent and serious detriment to health did not exceed $1 million. It cannot be ruled out that the approach of Polish courts will change as a result of group proceedings and group claims. Right now, however, it appears better to be a claimant in U.S. and a defendant in Poland.

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The Settlement of Mass Claims: A Hot Topic in The Netherlands

By Karen Jelsma and Manon Cordewener, Amsterdam

Introduction
The settlement of mass claims receives a lot of attention in The Netherlands. Although Dutch law does not provide for a U.S.-style class action procedure, it does provide for a system based on a collective settlement on an opt-out basis. The rules governing the collective settlement procedure can be found in the Dutch Act on Collective Settlement of Mass Damage Claims (Wet Collectieve Afwikkeling Massaschade, hereinafter, the “WCAM”).

The WCAM came into force on 27 July 2005. Before the WCAM came into force on 27 July 2005, mass damage claims could be settled only on the basis of one of the following (legal) proceedings:

(1) A collective action brought by a foundation (stichting) or association (vereniging), whose statutory goal is to represent (groups of) injured parties having similar damage claims and a similar interest in holding a third party liable for damages suffered by the group (article 3:305a paragraph 1 DCC). The collective action could still be used to obtain a declaratory judgment against a responsible party. The disadvantage of this, however, is that for each and every individual injured party, an assignment document or a power of attorney must be prepared and validly signed which, in practice, can be burdensome.

(2) An action brought by a legal entity to which claims of individual injured parties have been assigned and for which a power of attorney has been granted. Such legal entity could be the foundation or association referred to under (1) above, so it is thereby possible to combine the declaratory judgment obtained on the basis of a collective action in (1) with a claim for damages for individual parties. The disadvantage of this, however, is that for each and every individual injured party, an assignee or a power of attorney must be prepared and validly signed which, in practice, can be burdensome.

(3) A so-called test case (proefproces) initiated by one or two injured parties against the party responsible for the damages. Test cases have been initiated in the past (and are still initiated), although there is no specific legal provision governing them. A test case claim is usually based on the general rules of either wrongful act or product liability and is usually brought by a limited number of injured persons, while a consumer organization might coordinate the action and pay related costs.

All these options, however, share the significant common disadvantage that the mass damages claims cannot be settled in a way that will bind all injured parties. Thus, a new collective settlement proceeding, the WCAM, was introduced in The Netherlands.

The System of the WCAM
The WCAM provides a mechanism for collective redress in mass damages on the basis of a settlement agreement concluded between, on the one hand, one or more foundations or associations representing the interests of a group of injured parties who suffered damages and, on the other hand, the party or parties allegedly causing the damages. Once all parties involved have reached a collective settlement agreement, they may submit a joint application to the Amsterdam Court of Appeal for an agreement, decision, or judgment obtained on the basis of a collective action in (1) with a claim for damages for individual parties. The disadvantage of this, however, is that for each and every individual injured party, an assignment document or a power of attorney must be prepared and validly signed which, in practice, can be burdensome.

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(the “Court”), requesting the Court to declare the collective settlement binding on all injured parties falling within the scope of the settlement agreement. Pursuant to article 1013 DCCP, the Court has the sole jurisdiction to declare such a collective settlement binding.

If the Court indeed declares the collective settlement binding on all injured parties, the settlement agreement will bind all injured parties falling within the scope of the settlement agreement, whether known or unknown and whether residing in The Netherlands or abroad. Those injured parties who do not want to be bound by the settlement agreement have the option to opt out, but they must do so within a limited period of time. This period of time is set by the Court but should be at least three months following the day of the judgment in which the collective settlement is declared binding.4 Those individuals, who have chosen to opt out of the settlement agreement will no longer be bound by the collective settlement and will therefore maintain their right to initiate individual legal proceedings against the third party.5

In order to decide whether or not the collective settlement can be declared binding, the Court has to determine whether the settlement meets the statutory requirements and whether the interests of the injured parties are sufficiently protected. In this respect, the Court should determine, among other things, whether the statutory goal of the foundation or association requesting the Court to declare the settlement agreement binding on all injured parties, is to represent the interests of the injured persons6 and whether the amount of the compensation to be paid to the injured parties is reasonable (thereby taking into account the extent of the damage, the ease and speed with which the compensation may be obtained and the possible causes of the damage).7

As a part of the process, the Court will set a hearing at which the represented injured parties will be heard. In addition, the injured parties will be given the opportunity to file a statement. An important issue in this respect is that under the WCAM, interested persons (i.e., the persons for whose benefit the settlement agreement is concluded) have to be notified of the fact that a settlement agreement has been reached and that proceedings have been initiated in relation to the binding declaration of the settlement agreement in order to enable them to submit a statement and attend the hearing. The notification will also play an important role at the time the Court has declared the collective settlement agreement binding, as the interested persons need to decide whether or not they wish to opt out.8

If all requirements contained in the WCAM have been met and the Court is of the opinion that the interests of the injured parties are sufficiently protected, it will declare the settlement agreement binding upon all injured parties falling within the scope of the collective settlement agreement.
Cases Settled Under the WCAM

Since its introduction, the WCAM has been used in the following cases:

The DES case.

This case was the immediate reason that the WCAM was initially introduced. This was a pharmaceutical product liability case concerning damages allegedly suffered by women (“DES daughters”) whose mothers had taken the pharmaceutical product DES during pregnancy. On 1 June 2006, the Court declared binding the settlement agreement between DES Centre (the organization protecting the interests of DES daughters) and the pharmaceutical companies that had marketed DES. On the basis of the settlement agreement, compensation has been granted to all DES daughters who suffered personal injury as a result of DES.

The Dexia case.

This concerned financial damages suffered by individuals as a result of allegedly misleading information provided by Dexia Bank regarding certain of its financial products. On 25 January 2007, the Court declared binding the settlement agreement between the Lease Loss Foundation, the Eegalease Foundation, the Dutch Consumers’ Association and the Dutch Equity Holders’ Association, on the one hand, and Dexia Bank, on the other hand.

The Vie d’Or case.

This case concerned financial damages allegedly suffered by shareholders of life insurer Vie d’Or as a result of the sudden decrease of the share price on the morning of 30 November 2007. On 15 July 2009, the Court declared the Vie d’Or settlement agreement binding.

The Converium case.

This related to financial damages suffered by shareholders of the Swiss company Converium as a result of the inflation of the Converium share price caused by false statements made by Converium in relation to its financial condition. On 9 July 2010, Converium (currently known as SCOR Holding AG) and its parent company, Zürich Financial Services LTD (“ZFS”), on the one hand, and the Stichting Converium Securities Compensation Foundation and the Dutch Equity Holders’ Association, on the other hand, submitted a joint request to declare the Converium settlement agreement binding. On 12 November 2010, the Court rendered a (provisional) decision about its international jurisdiction in cases based on the WCAM. This decision is discussed in more detail below. The Court has not yet declared the Converium settlement binding.

The Shell case.

This case concerned financial damages allegedly suffered by Shell shareholders as a result of misleading information by Shell in relation to certain of its oil and gas reserves in 2004. On 29 May 2009, the Court declared binding the non-U.S. Shell Settlement Agreement between Shell Petroleum N.V. and Shell Transport and Trading Company Limited, on the one hand, and the Dutch Equity Holders’ Association, the Shell Reserves Compensation Foundation and two Dutch pension funds, on the other hand. By declaring this Shell settlement agreement binding on all non-U.S. shareholders, the Court for the first time declared a collective settlement agreement binding on injured parties residing outside the Netherlands, thereby having a direct influence in many other jurisdictions.

Jurisdiction of the Court in International Collective Settlements

Based on the cases settled under the WCAM so far, as listed above, and particularly in relation to the Shell and Converium cases, various private international law issues have been raised in both Dutch literature as well as in Dutch practice. One of the most important issues in this respect is the question of whether or not the Court may assume jurisdiction in those cases in which either the injured parties or the third party allegedly causing the damages are residing abroad (the so-called “international collective settlement agreements”).

The first case in which the Court assumed jurisdiction in this regard was Shell. In that case, however, there was a strong connection with the Netherlands, because one of the allegedly liable parties (Shell Petroleum N.V.) and many of the injured parties (shareholders) were located or resided in The Netherlands.

After the Shell decision, the question was whether the Court would also assume jurisdiction in international mass damage claims with minimal connections to the Netherlands. The answer was provisionally provided by the Court in Converium. In that case, none of the allegedly liable parties was located in the Netherlands, while only a limited number of injured parties resided there. The Court nevertheless determined to assume jurisdiction. Similar to the Shell case, the Court reasoned as follows:

(1) The case must be considered as a “civil and commercial matter” pursuant to article 1 paragraph 1 of the Brussels I Regulation and the Lugano Convention. Therefore, the provisions of the Brussels I Regulation and Lugano Convention should be examined in order to determine whether or not the Court would indeed have jurisdiction to declare the Converium settlement agreement binding.

(2) In case the Converium settlement agreement would be declared binding in a final decision of the Court, it would impose an obligation on Converium and ZFS to pay damages into the bank account of Stichting Converium Securities Compensation Foundation (located in the Netherlands) which foundation would then pay the damages.
es to the relevant injured parties. Because the payment obligations of Converium and ZFS would have to take place in the Netherlands, the Court found that it had jurisdiction on the basis of article 5 paragraph 1 of the Brussels I Regulation and Lugano Convention.

(3) With respect to shareholders residing in the Netherlands, the Dutch courts have jurisdiction on the basis of article 2 paragraph 1 of the Brussels I Regulation and the Lugano Convention. The Court considered that if the settlement agreement would be declared binding, it would then bind all injured parties falling within the scope of the settlement. As a consequence, such injured parties will no longer be able to initiate separate legal proceedings against Converium and ZFS in order to claim a higher amount of damages and/or compensation, provided, of course, that such injured parties do not opt-out.

(4) With respect to shareholders residing outside The Netherlands, but within an EU Member State or a Lugano Convention Member State (i.e., Norway, Switzerland and Iceland), the Court has jurisdiction on the basis of article 6 paragraph 1 of the Brussels I Regulation and Lugano Convention. The Court ruled that the claims of these injured parties were “so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.” As the Court had already assumed jurisdiction over the shareholders residing in the Netherlands, article 6 paragraph 1 made it possible to assume jurisdiction in the combined case as well.

(5) The Court could also assume jurisdiction with respect to injured parties (i.e., shareholders) neither residing in the Netherlands, nor in any other EU or Lugano Convention Member State. Pursuant to article 3 of the DCCP, the Court has jurisdiction over cases in which one or more of the petitioners resides in The Netherlands. Since both the Stichting Converium Securities Compensation Foundation and the Dutch Equity Holders’ Association resided in The Netherlands, the provisions of article 3 were therefore satisfied.

As indicated above, the decision of the Court in *Converium* is not yet final. Based on article 6 of the European Convention on Human Rights and the general principle of hearing both sides of the argument (*hoor en wederhoor*), the Court was of the opinion that it was not yet in a position to render a final decision because not all of the injured parties had been notified that the Court had been requested to render the collective settlement agreement binding. The injured parties involved (or their respective representatives) were therefore given the opportunity to submit a statement on 22 August 2011. A hearing will be held on 3 and 4 October 2011 in which all parties involved will be heard.

Based on the decision of the Court in *Shell* and the provisional decision in *Converium*, it is expected that the number of WCAM cases with international elements will increase in The Netherlands. This is even more likely since the decision of the U.S. case *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869 (2010), in which the United States Supreme Court decided not to assume jurisdiction over claims initiated by foreign investors against a foreign company in relation to shares purchased at a foreign securities exchange (the “foreign-cubed” claims). The Supreme Court ruled that the principal anti-fraud provisions of U.S. securities laws do not have extraterritorial effect and therefore apply only to transactions in securities that take place in the U.S. or transactions in securities listed on a U.S. securities exchange.

Another notable judgment is the decision of the District Court of Amsterdam dated 23 June 2010 where the District Court ruled that the U.S. collective settlement agreement in *In re: Royal Ahold N.V Securities & ERISA Litigation*, 461 F. Supp 2d 383 (D. Md. 2006)—declared binding by the U.S. Court on 16 June 2006—should be recognized in The Netherlands. The main reason the Amsterdam District Court recognized the U.S. collective settlement agreement was that U.S. proceedings for a binding declaration of a collective settlement are very similar to the collective settlement proceedings contained in the WCAM. The effect of this decision is that the Ahold shareholders, residing in The Netherlands, who did not opt out of the U.S. collective settlement agreement, were bound by the Ahold collective settlement agreement and thus unable to initiate legal proceedings in The Netherlands.

**Improvements to the WCAM**

Based on the experiences with the WCAM so far, the collective settlement procedure has proven to be a success. One evaluation of the WCAM—performed at the request of the Dutch government—determined that the act is an efficient and effective method of settling collective mass claims and that it has a broad scope.12

Despite this, the evaluation found that supplementary measures are still required in order to increase the willingness of parties to enter into negotiation and actually achieve a collective settlement. A legislative proposal is currently under consideration with the goal of improving the WCAM. Another legislative proposal is being considered to introduce a separate legal proceeding, enabling the district courts or the court of appeal to request preliminary rulings directly from the Dutch Supreme Court (de Hoge Raad) with regard to collective mass claims.13

The proposed modifications to the WCAM include:

(a) **Notification of foreign injured parties**

As indicated above, the notification of possible injured persons plays an important role in the
WCAM. The notification is of relevance in two stages of the collective settlement procedure: at the time a settlement agreement has been reached and has been submitted to the Court in order to declare such settlement agreement binding on all injured persons (covered by the settlement agreement); and at the time the settlement agreement has been declared binding by the Court.

The WCAM provides that the notification in both stages shall be effected by ordinary mail, unless otherwise provided by the Court. In the Dexia case the Court allowed the notification by ordinary mail, even for those injured parties residing abroad. In the Vie d’Or and Vedior cases, however, the Court—with respect to injured parties residing abroad—referred in more general terms to the relevant international treaties and conventions on the service of documents. In Shell, the Court went even further and gave strict instructions on how to notify the injured parties residing abroad by ordering the petitioners to follow the procedures on the service of documents referred to in Service Regulation 2007, the Hague Service Convention and similar instruments.

Given the case law, it is now being suggested that the notification provisions in the WCAM be amended so that the Court must order petitioners to follow a specific notification procedure (based on available international treaties and/or conventions on the service of documents) when notifying the injured persons residing abroad. By amending the WCAM this way, the Dutch Parliament would seek to ensure that all injured parties residing abroad are always notified of the existence of a potential collective settlement agreement and its binding effect in accordance with applicable international provisions. During the first phase of the notification procedure—when a collective settlement agreement has been reached and is being submitted to the Court to obtain a binding order—the Court would most likely be granted the right to stay the collective settlement proceedings if it is of the opinion that the injured persons residing abroad have not been adequately notified.

(b) The representation of the foundation or association
The current WCAM does not specify at what point in time the foundation or association representing the group of injured parties is sufficiently representative. According to the Explanatory Memorandum to the WCAM, this can be derived from several factual circumstances, and it would not be advisable to deem any of these circumstances decisive.

The Explanatory Memorandum to the new legislative proposal indicates that the WCAM does not sufficiently take into account that a collective settlement agreement can be concluded between more than one foundation or association. Because of this, it is now being suggested that in case more than one foundation or association will be a party to the collective settlement agreement, not every such individual foundation or association must meet the requirement of being sufficiently representative. Pursuant to the legislative proposal, it would be sufficient that for every possible group of injured parties, at least one of the contracting foundations or associations sufficiently represents the interests of such group (article 7:709 paragraph 1 and 3 DCC).

(c) Suspension of proceedings already pending
The legislative proposal further provides for amendments in relation to the suspension of individual proceedings. Under the current WCAM, pending individual proceedings may be suspended at the request of the party responsible for the damages. Pursuant to the legislative proposal, this would be changed in such a way that all pending individual proceedings will be suspended by operation of law as soon as the collective settlement proceeding is initiated (article 1015 paragraph 1 DCCP).

The proposal also includes an amendment relating to the recommencement of the individual proceedings in case an injured party has opted-out of the collective settlement agreement. Where the WCAM currently provides that the suspended proceedings will be recommenced as soon as the injured party has opted out, under the legislative proposal the recommencement of the individual proceedings would not take place before the opt-out period has lapsed. This change is designed to prevent final judgments in individual proceedings from being rendered while the opt-out period has not yet lapsed. This has proven to be a serious issue under the WCAM because any positive result in such individual proceedings often triggers other injured parties to opt-out as well, which also may have a negative impact on the outcome of the collective settlement agreement.

(d) Pre-trial appearances
To increase the number of cases in which a collective settlement agreement can be achieved, one proposal enables parties involved in mass damage cases to ask a judge at a very early stage for assistance in the negotiation of the collective settlement agreement. During such pre-trial appearances—as they are called—the judge may assist in identifying the main disputes between the parties and encourage them to reach a collective settlement agreement or to seek the assistance of a mediator.

(e) Preliminary rulings procedure
Another legislative proposal has been submitted to the Dutch Parliament that would introduce a separate legal proceeding, enabling lower courts to request preliminary rulings from the Dutch Supreme Court (de Hoge C. 

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It is expected that the introduction of a preliminary ruling procedure would also have an important effect on the WCAM cases. The underlying premise is that if parties know where they stand in mass damage cases, they might find it easier to commence negotiations—and possibly reach a settlement—at an early stage.

Comparative Analysis of Collective Mass Claims in Other Jurisdictions

Although the Dutch system is unique, other jurisdictions have systems with aspects resembling the WCAM. Below is a comparative discussion of the U.S. class action rule under the Federal Rules of Civil Procedure, the Swedish Group Proceedings Act and the German Capital Markets Model Case Act.

The U.S. Damages Class Action

The U.S. class action procedure came into effect in 1966 with the introduction of Rule 23 of the Federal Rules of Civil Procedure. Like the WCAM, the U.S. class action system has an opt-out procedure. Of course, a substantial difference between these systems is that it is impossible under Dutch law to claim monetary damages in a class action procedure. Such a claim is explicitly excluded in article 3:305a paragraph 3 DCC. The WCAM has not changed this, as the WCAM “only” provides for a collective settlement (instead of a class action).

In addition, the U.S. class action process enables an individual person—as a “lead plaintiff”—to claim monetary damages for the entire group of injured parties (the “class”), providing of course that the interests of the members of the class are similar and the lead plaintiff will be suitable to represent the class. Under the collective settlement procedure contained in the WCAM, however, it is the foundation or association that must act on behalf of the class. Foundations and associations representing the injured parties do not conclude the settlement agreement in order to bind themselves. The collective settlement agreement is obviously concluded to bind the group of injured parties they represent.

The Swedish Group Proceedings Act (Lag om grupprättegång)

The Swedish Lag om grupprättegång entered into force on 1 January 2003. With this act, Sweden became the first European country to have a system truly comparable to the American class action system. The Swedish act provides for three types of group actions:

• individual group actions (i.e. class actions);
• public group actions (an authority designated by the Swedish government may initiate group actions); and
• organization actions restricted to consumer law and environmental law.

Similar to the U.S. class action system, any individual injured party who has a potential claim in the class action lawsuit will be entitled to initiate class action proceedings under the system of the Lag om grupprättegång. Before a Swedish court decides whether or not the putative class action will be permitted to go forward, it must first decide whether the case is indeed appropriate for a class resolution. The court should determine whether the class action is more effective and efficient than the many individual legal proceedings that might be initiated; whether the class action has more benefits than the already available procedural options; and, of course, whether the group’s representative is indeed suitable to represent the group.

A further similarity with the U.S. system is that the group’s representative is entitled to enter into settlements with the alleged liable party or parties, and this settlement will be binding upon the members of the class only after a decision of approval of the court.

Contrary to the system in the U.S. and The Netherlands, however, the Swedish Act does not have an opt-out procedure, but instead...
requires individuals to opt-in. Only the individual persons who have notified the court that they would like to join the action will be included in a judgment or court settlement arising from the class action lawsuit.

The German Capital Markets Model Case Act (the Kapitalanleger-Musterverfahrensgesetz)
The German Kapitalanleger-Musterverfahrensgesetz ("KapMug") entered into force on 1 November 2005. The KapMug differs from the American and Swedish collective actions and the WCAM in various respects.

In the first place, the KapMug applies only to group actions in the securities litigation context. It is especially designed for certain disputes under the German Capital Markets Law. The KapMug allows both the injured investor as well as the alleged liable party to submit a request to the court of first instance in order to set up a "model case procedure" so that cases related to the same matter may be handled together. The purpose of the model case procedure is to determine facts or points of dispute that also play a role, or could play a role, in other cases. When the request for the model case procedure has been filed with the court in first instance, it will be published in a public register of claims (the "Klageregister nach dem Kapitalanleger-Musterverfahrensgesetz") to enable other parties with similar cases to file identical requests concerning the model case procedure. At least nine further identical requests must be filed within a period of four months in order for the court of first instance (i.e., the court where the first request was filed) to refer the model case procedure to the Higher Regional Court (the "Oberlandesgericht"). Subsequently, the Higher Regional Court will decide who will be the "lead plaintiff" in the model case procedure. The lead plaintiff will be designated by the Higher Regional Court on equitable grounds, taking into account the amount the lead plaintiff has claimed and suitability to represent the group. This means that it is irrelevant in Germany who the first person is to file the request for the model case procedure, which is designed to prevent "a race to the courthouse."

Once the model case procedure is pending at the Higher Regional Court, all other cases concerning that model case procedure will be stayed. Next to the lead plaintiff, the other claimants will be designated by the Higher Regional Court as interested parties to the model case procedure. When the Higher Regional Court renders its decision, the individual proceedings will continue. The KapMug stipulates that the decision in the model case procedure will be binding for any court that must give a decision in the individual proceedings. This means that, similar to the Swedish Group Proceedings Act, the procedure under the KapMug must be considered as an opt-in procedure. It is available only to parties willing to initiate proceedings themselves, be it those of pending proceedings, or those joining later.

The KapMug was introduced for a trial period only. It was initially due to expire on 31 October 2010. The German legislature, however, decided to extend the KapMug for two years to gain time for reforms. The KapMug will now expire on 31 October 2012. Recent statements by the German Federal Government indicate that the KapMug will be extended not only in time, but also in scope to include other mass civil damages.

Conclusion
The Netherlands is the only European country where a collective settlement of mass claims can be declared binding on the basis of an opt-out system. Considering the available case law, the collective settlement procedure contained in the WCAM has proven to be very successful, not only in cases where Dutch injured parties are involved but also in cases involving foreign injured parties. With the provisional decision of the Amsterdam Court of Appeal in the Concerium case, it is expected that the number of collective settlement procedures with international elements will increase in The Netherlands. This is even more likely since the decision of the U.S. Supreme Court in Morrison v. National Australia Bank Ltd. and the decision of the District Court of Amsterdam of 23 June 2010 in which the court recognized the U.S. settlement agreement in the Ahold case. Despite (or perhaps because of) this initial success, additional improvements to the WCAM are currently being proposed in order to enlarge the applicability of the WCAM and make it more attractive for parties to come to a settlement. The public consultation with regard to the legislative proposal to improve the WCAM was closed on 15 April 2011, and the Minister of Justice will now incorporate the comments before submitting a definitive proposal to the Dutch Parliament.

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Endnotes:
1 The codification of this act is found in article 7:907 et seq of the Dutch Civil Code (DCC)
and article 1013 et seq of the Dutch Code on Civil Proceedings (DCCP).

2 Letter of the Minister of Justice to the President of the House of Representatives of the States General dated 23 Oct. 2008 [hereinafter Letter of the Minister of Justice], and Kamerstukken II 2003/04, 29414, nr. 4.

3 Art. 7:907 para. 1 DCC.

4 Id. para. 2.


6 Art. 7:907 para. 3 under (f) DCC.

7 Id. under (b) DCC.

8 H. van Lith, supra note 5, at 17-18.

9 The Shell Reserves Compensation Foundation is specifically established for the purpose of representing the interests of non-U.S. shareholders.

10 The Stichting Converium Securities Compensation Foundation is specifically established for the purpose of representing the interests of non-U.S. shareholders.

11 H. van Lith, supra note 5, at 19.

12 Letter of the Minister of Justice at 6.


14 Art. 1013 para. 5 and art. 1017 para. 3 DCCP.

15 H. van Lith, supra note 5, at 70-72.

16 Letter of the Minister of Justice at 8.

17 Id. at 7.


21 H. van Lith, supra note 5, at 18.


23 Kamerstukken II 2003/04, 29414, nr. 7, p. 16-17.


26 §1 Abschnitt 1 KapMug.


28 §3 KapMug.

29 Brock & Rekitt, supra note 26.

30 Id. at 98.

FROM THE EDITOR..., from page 4

be a special edition on international business transactions in one of the world’s hottest economies, Brazil. Issue coordinator Quinn Smith has already lined up an outstanding slate, including many true heavyweights in Brazil’s public and private sector, who will contribute to what will surely be a memorable issue that will serve as the ultimate Brazil IBT guide for years to come. That issue will be followed by a “focus on” intellectual property issue in the winter, then our special NAFTA issue next spring. Please contact me or any of the International Law Section leadership should you wish to have an article considered for any future edition.

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While the International Law Quarterly does print paper versions of each edition, the vast majority of our readers rely upon the electronic edition. Indeed, with the advent of tablet computing and with traditional purveyors of paper media going out of business, this trend will no doubt continue. For us, the up-side of electronic publication is that it means our readers can easily forward issues anywhere. While we prefer that such electronic transfers not be regularly provided to Florida Bar members—who will want to join the section for this benefit—we definitely encourage our readers to forward this publication to their friends and colleagues around the world. Not only does this expand the footprint of our readership, but also the pool of our potential contributors. We have even seen the ILQ posted on legal blogs from Miami to Australia. This type of international exposure only helps to further our goal of being the premier journal on all areas of international law.

Safe travels,

—Alvin F. Lindsay
Editor-In-Chief
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International Taxation: China’s SAT Circular 698—Quite a Stretch in the Workings of the “Permanent Establishment” Clause

By Margarita P. Muina, Miami

China’s State Administration of Taxation (SAT) Circular No. 698 was issued in December of 2009 and is heavily if aptly titled: “Notice on Strengthening the Administration on Collection of Enterprise Income Tax on Income from Equity Transfers by Non-Resident Enterprises” (Guoshuihan [2009] 609) (hereinafter “Circular 698”). Circular 698 seeks to tax foreign holding companies on gains arising from the “direct” and “indirect” transfers of “equity” occurring after January 2008, even if the transaction takes place outside of China. Since the tax is collected by withholding from the Resident Enterprise (RE) or Non-Resident Enterprise (NRE) situated in mainland China and since the withholding rate is normally 20%, the tax severely restricts any benefit to be gained from the transfer of the equity along the chain or tiers of the client’s structure.1

The Circular requires a minimum nexus to mainland China, albeit it applies by its terms to any structure anchored by an RE or NRE as both are defined under China’s organic Enterprise Tax laws. As noted in the Circular and confirmed in the text of the Enterprise Tax Statutes, the foreign enterprise need not be formed in China and need not be managed in China. Circular 698 will not tax shares of stock traded on stock exchanges, but does not define any minimum requirements of eligibility for the stock exchange where the equity may trade. In effect, Circular 698 seeks information on transfers of equity along the chain of any holding structure above the RE or NRE situated in mainland China and holds the RE or NRE responsible for the tax deemed generated by the transfer. The Circular requires that the tax be withheld and paid to the local SAT by the local RE or NRE regardless of whether the RE or NRE received a benefit as a result of the transfer and regardless of whether earnings embedded along the chain and transferred may have been taxed already, perhaps by China itself.

Safe Harbor from the Circular—a Bare, Bonded Warehouse?

The terms of Circular 698 may lead a reasonable practitioner to conclude that the only safe harbor from the equity transfer tax is for the client to limit its operations in mainland China to a bare, bonded warehouse used to store, display, and perhaps ship goods without having any dependent agents or employees of the foreign client engage in installation, adaptation, repair or maintenance activities. Otherwise, the service-related activities, when added to the warehouse, would forfeit immunity and give rise to either the NRE, as defined by China’s Enterprise Tax Act, or to a “permanent establishment” (also, basically an NRE) if there is a bilateral income tax treaty between China and the domicile of the foreign client. Either would support Circular 698’s taxation of any equity transfer along the holding entity chain even if removed from the NRE’s or RE’s China structure.2

Taxation of “Gain” Arising from “Direct” or “Indirect” Equity Transfers

Circular 698 announces China’s intent, under the “direct” or “indirect” transfer standard, to subject gains arising from transfers in the equity of any tier right above or several steps removed along the chain from the RE or NRE situated in China. The Circular does not allow any deduction for gains retained within the structure, which gains already may have been subject to tax—perhaps by China itself—when earned. The wide reach of the Circular is clear from its terms, but no basic operating terms are defined in the Circular or even in the Enterprise Law itself. It is clear that the RE or NRE situated in China is to bear the cost of the tax even if no benefit of any sort—or currency from which to pay the tax—accrues to it as a result of the transfer. The tax is to be paid to the local SAT via withholding by the RE or NRE (even if, as noted, no monies are forthcoming from which to withhold), and the RE or NRE is charged with disclosing the transfer to the local SAT seven (calendar?) days from the date of the transfer.

It is as yet unclear whether the Circular may reach non-cash exchanges, such as stock-for-stock exchanges, under its “non-monetary” terms, even if the stock is privately held and has no market value itself. Also, the Circular tacitly assumes a value to the underlying China RE or NRE without considering that a gain down the chain of entities may not be representative of operations in mainland China. Failure to pay the tax is penalized under the penalty regime of the Enterprise Tax Law applicable to “tax collection.”

Definition of Direct and Indirect Equity Transfers

Direct Equity Transfers

Certainly, the international client may expect that any entity holding the shares of the RE or operating the NRE (even if the “management organ” is outside mainland China— continued, next page
usually holding companies formed in Mauritius or Hong Kong) will be subject to Circular 698 tax in any transfer of its “equity” interests. Even a single “de minimis” share may trigger the Circular tax. Further, the term “equity” may or may not also include convertible instruments, incentive stock options, or other equity-flavored instruments used in compensation packages or joint ventures. Finally, no exemption is made for purely “administrative” transfers; nor, conversely, does the Circular specially penalize “tax-flavored” transfers or “circular” transactions, as do tax authorities of other countries. As stated above, “gain” is defined roughly as the difference between monetary and non-monetary value received, less the cost (capital contribution to the RE or NRE?). But it is likely that any gain retained within one of the entities represented in the equity transfer may be taxed again. The cost of the direct equity transfer may well outweigh any benefit to be gained from repositioning a more favorable market share or repositioning IT interests.

Indirect Equity Transfers

It is plain from its wording that Circular 698 will apply to any “transfer” of “equity” in any entity interposed between the holding company “directly” holding the RE or operating the NRE in mainland China and the collective of entities composing the “foreign client” so that any change whatsoever in the equity structure issued in response to favorable market opportunities or cost containment is subject to the enterprise tax liability. Such liability is to be borne by the China operations underlying the RE or NRE (thereby diminishing its economic value) even if, as stated, there is no change—favorable or not—to the China RE or NRE position. Stated otherwise, Circular 698 will operate to pierce more than one corporate or company veil to tax the transfer of the equity in the intervening company structure. In this regard, the Circular’s reach is outside the norms of the tax systems of most countries, which refrain from such a tax—barring blatant tax evasion or alleged fraud.

Vodafone

The SAT Circular is similar to, albeit goes further than, the by-now notorious Mumbai High Court’s holding in Vodafone. By contrast with Vodafone, the effect of the Circular is not restricted to one or more cases before a court (in fact, the decision may be overturned or modified). The Circular instead is a methodical administrative pronouncement retroactively applied, though like Vodafone, it overrides treaty benefits but is consistent with the tax statutes of the host nation. In sum, Vodafone creates a risk to foreign companies with an Indian subsidiary but does not create a withholding obligation enforceable via a statutory penalty regime.

In Vodafone, a Dutch holding company acquired a controlling interest in Vodafone’s Indian subsidiary as a result of transferring the shares of a Cayman company held two or three tiers down from the Indian subsidiary via a Mauritius/Cayman structure. In fact, the Cayman company held but one share of stock in the Indian subsidiary hosting Vodafone’s operations in India. The Mumbai High Court, in a none too clear articulation of value accruing to the transfer as a result of the growth attributed to the Indian subsidiary, found a nexus to tax the gain on the transfer of shares of the Cayman company. In so doing, the court disregarded several tiers of legal entities existing between the Indian subsidiary and the Cayman company whose shares were traded to the Dutch holding structure. Unlike other cases—which mandate some showing of circularity, blatant disregard of rules and regulations or just plain fraud—no wrongdoing was attributed to Vodafone. Moreover, no transfer pricing standard or other articulable rationale ordinarily used to disregard the existence of well-maintained legal entities was invoked to impute added value to the Indian subsidiary, which would have been reflected in the transfer. Similarly, Circular 698 will tacitly assume added value accruing to the RE or to the NRE’s China operations, even if the transfer was to be a cost-cutting measure, based on non-current gains already taxed at some point along the line by China or one of its treaty partners. The High Court’s Vodafone decision overrode the terms of the income tax treaty between Mauritius and India that allocated capital gains on intangibles to Mauritius, not India. Circular 698 will have the same result, overriding any bilateral income tax treaty that allocates capital gains on intangibles. Also the Circular inappropriately overrides or supplements the Limitation of Benefits clauses that limit tax jurisdiction to entities “controlled” by residents of one or the other of the Treaty countries.

China’s Enterprise Law

Circular 698 is an administrative pronouncement of China’s SAT and, using U.S. legal analysis, it should find a legal basis in China’s Enterprise Tax Law. The Chinese statute defines terms used in the Circular—i.e., “Resident Enterprise” and “Non-Resident Enterprise”—but a “stretched,” if literal, reading of the statute would limit taxability to the first tier, the shares of the holding company housing the NRE or the parent of the RE. In other words, there is no legal basis to continue down the chain of entities to impose, as Circular 698 does, a tax on “transfers” far removed from the NRE or RE. For example, Article 2 of the Enterprise Income Tax Law reads: “a Non-Resident Enterprises (NRE) refers to enterprises which have organs or sites established within the territory of the People’s Republic of China, though they are established in accordance with laws of a foreign country (region) and their effective management organs are located outside the territory of the People’s Republic of China.” As interpreted by the Bureau of National Affairs’ Tax Management Portfolio, an NRE must (1) be organized under foreign law and have “effective management organs” outside of China (assuming it has an “establishment”
within China not rising to the level of a “permanent establishment”), or (2) absent an “establishment” within China, must have income derived from China. Stated more clearly, in the interpretative words of BNA’s Tax Management Portfolio, with emphasis added:

This definition of organs or sites, which is most often simplified to “establishments,” is quite different from the definition of “permanent establishment” appearing in many of China’s bilateral tax agreements. It is therefore quite likely that foreign enterprises with “sites or organs” in China as defined by Enterprise Income Tax Law (EITL), but not a “permanent establishment” as defined by the relevant bilateral tax agreement, will be made to pay tax on income connected to the site or organ, although under the bilateral tax agreement such funds would not be taxable. Moreover, the “effectively connected” definition in the EIT Regs requires nothing more than a shareholding in the entity that has the establishment, as well as some ownership, management or control over the properties giving rise to the income.6

The “shareholding in the entity that has the establishment” language arguably limits taxability to the shares of the holding company or parent of the Chinese subsidiary. There is no discernible basis for taxing shares of trades down a chain of corporations absent any finding of fraud or other wrongdoing.7 As such, Circular 698’s “indirect” standard is an unseemly “grab” of income tax jurisdiction that offers tax planners little that is settled even as investors of all nationalities seek to have a “presence” in the Chinese mainland.

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Endnotes:

1 The tax is subject to withholding by the mainland China RE or NRE, and so the rate of withholding on the gain may be 20%. It is sometimes reduced to 10%, still a substantial “tax” on invested resources. See Bureau of National Affairs, Tax Management Portfolio, Subsection VII, D, “Enterprise Income Tax Law.”

2 The client could also opt for a rigid, static offshore structure unresponsive to market, business or legal needs, but this may carry heavier costs than exposure to the Circular’s equity transfer tax.

3 Multinational clients operate via chains or tiers of structure not just to gain tax advantages or tax arbitrage, but to shield parent operations from employee claims or labor laws of the host country, to position IT, and to provide good administrative alignment. Seldom do any of the companies also engage employees or are, in fact, working or operating centers; they instead are used to address business concerns and minimize risks.

4 The U.S. may pierce the corporate veil upon a finding of fraud, or may instead apply case-developed standards, such as sham, agency, or alter ego. The U.S. may also use Sec. 71(l) or find “substance over form” to reattribute tax incidences without thereby disregarding the entity itself.

5 Curiously, Article 13 of 1989’s India/U.S. Income Tax Treaty may create a double tax over capital gains. The Treaty states that each nation “may” apply its own domestic laws to capital gains from the other nation’s residents. This means that a resident of India may elect the Treaty, but the U.S. will then tax his or her capital gains from intangibles even if India were to tax the same gains. In fact, the Internal Revenue Code requires the individual to be a U.S. person before taxing capital gains from intangibles.


7 The host country’s “source” basis for income tax jurisdiction over business profits is derived from the interpretation of the “permanent establishment” clause. While the clause has expanded over the years, as evidenced by successive OECD Model Commentaries, at no time does it work to allow taxability over capital gains from property of the taxpayer situated (using conflicts of law analysis) in the domicile of the taxpayer. See generally, J. Ross McDonald, “Songs of Innocence and Experience”: Changes to the Scope and Interpretation of the Permanent Establishment Article in U.S. Income Tax Treaties, 1950-2010, 63 TAX LAW. 285 (2010).
How to Catch a Mobster (or a CEO)

Using the Walsh Act To Subpoena U.S. Citizens Abroad

By Jason Kellogg, Miami

In 1970, a federal grand jury was convened in Miami to investigate the Mafia’s skimming of tens of millions of dollars from the iconic Flamingo Hotel in Las Vegas.¹ Among those targeted: Meyer Lansky, the infamous “Mob Accountant.” Tipped off, Lansky fled to Israel in search of asylum.

Undeterred, prosecutors looked to a somewhat obscure federal statute in an effort to bring Lansky back to the United States. The Walsh Act, codified at 28 U.S.C. §§ 1783-84, allows parties to any civil or criminal lawsuit in U.S. federal court to request subpoenas requiring U.S. citizens to return to the States for deposition and/or to produce documents and records.² In Lansky’s case, the Miami court issued the subpoena and when he failed to return, held him in contempt.³ After Israel and several other countries denied his requests for asylum, Lansky flew back to Miami, where he was arrested in his first-class seat upon landing.⁴ He stood for trial—and coolly beat all charges of tax evasion.⁵

Despite Lansky’s acquittal, the Walsh Act served its purpose, and it continues to serve a purpose today. Litigants have used it in varied settings to depose former corporate officers and employees living abroad,⁶ to aid in the enforcement of judgments,⁷ to obtain discovery aimed at establishing federal court jurisdiction over a person or entity,⁸ to depose foreign-based auditors in securities fraud cases⁹ and to reach criminal defendants like Lansky.¹⁰ The Walsh Act enjoys almost limitless application—provided certain factors are established.

1. The Walsh Act Factors

Federal court litigants seeking a subpoena directed at an American citizen living abroad must show that the witness’ testimony is “necessary in the interest of justice.”¹¹ In civil cases, an additional factor must be met. The subpoena may be issued only if the petitioner can show that “it is not possible to obtain [the witness’] testimony in admissible form without his [or her] personal appearance.”¹²

Courts analyzing the Walsh Act’s first prong require that the testimony or documents sought be “relevant under the liberal standards set forth in Federal Rule of Civil Procedure 26(b).”¹³ Indeed, Rule 26(b) is very broad. It permits discovery “regarding any matter . . . that is relevant to the claim or defense of any party, or discovery of any information that appears reasonably calculated to lead to the discovery of admissible evidence.”¹⁴ Courts also consider certain factors listed the Act’s legislative history, such as “the nature of the proceedings, the nature of the testimony or the evidence sought, the convenience of the witness or the producer of the evidence, the convenience of the parties, and other facts bearing upon the reasonableness of requiring a person abroad to appear as a witness or to produce tangible evidence.”¹⁵

The second prong of the Walsh Act analysis, which examines whether it is possible to obtain admissible information without the witness’ personal appearance, presents a closer question and requires a fact-intensive analysis. Courts examining this prong, however, have held that “sheer impossibility is not required.”¹⁶ Rather, the analysis focuses on whether it would be “impractical” for the moving party to obtain the information without a subpoena.¹⁷

In both criminal and civil cases, the courts have broad discretion to order a subpoena’s issuance under the statute.¹⁸

2. Service of a Walsh Act Subpoena

If the court issues the Walsh Act subpoena, Section 1783(b) requires the party serving the subpoena to do so pursuant to “the provisions of the Federal Rules of Civil Procedure relating to service of process on a person in a foreign country.”¹⁹ In practice, that means the subpoena must be served pursuant to Federal Rule of Civil Procedure 4(f), which lists the acceptable methods of serving an individual in a foreign country.²⁰ If the target of the subpoena is located in a country that has agreed on a means of service of documents from the United States, such as the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents, then service may be effected through that means.²¹ If there is no internationally agreed means, or if such an agreement allows but does not specify other means, then service may be effected by one of at least three methods that are listed in Rule 4(f)(2).²² Service may also be effected “by other means not prohibited by international agreement, as the court orders.”²³

3. Location and Travel Expenses
Section 1783(b) requires the party serving the subpoena to pay the witness’ “estimated necessary travel and attendance expenses” in an amount determined by the court. Thus, the serving party should research and estimate the witness’ necessary travel and attendance expenses before filing its motion for the issuance of a subpoena. The court must then make a determination of those expenses and state them in the order directing the issuance of the subpoena. Section 1783(b) also requires the court to “designate the time and place for the appearance or for the production of the document or other thing.” Where the serving party seeks to compel the witness to appear for trial, then the witness must return to the United States. Where the subpoena seeks deposition testimony, however, the location of the deposition can be a source of contention. Some U.S. courts have allowed the depositions to occur abroad out of consideration for the sovereignty of the foreign locale and the convenience of the witness. That position has been criticized by other U.S. courts, which have held that depositions should be taken abroad only where there is some basis for the court to assert jurisdiction over the deposition process and compel the witness to appear.

4. The Walsh Act’s History
The Walsh Act’s colorful history informs its use today. The U.S. Congress enacted it in 1926 to secure the return of individuals involved in the Teapot Dome scandal—the biggest government scandal in U.S. history prior to Watergate. Six years later, the U.S. Supreme Court upheld the Walsh Act’s constitutionality. In Blackmer v. U.S., 284 U.S. 421, 436 (1932), the Court reviewed the issuance of a subpoena served on a U.S. citizen residing in Paris and examined the source of the Act’s extraterritorial reach. Citing sovereign powers rooted in English common law, the Court held that “[i]t cannot be doubted that the United States possesses the power inherent in sovereignty to require the return to this country of a citizen, resident elsewhere, whenever the public interest requires it, and to penalize him in case of refusal.” The Court found that “one of the duties which the citizen owes to his government is to support the administration of justice by attending
its courts and giving his testimony whenever he is properly summoned.31

5. Contempt Powers Under the Walsh Act

When U.S. citizens such as Meyer Lansky fail to carry out their duties and refuse to comply with a subpoena issued pursuant to the Walsh Act, they become subject to the Act’s contempt provisions, which are set forth in 28 U.S.C. § 1784. Section 1784 provides that a person found in contempt of Section 1783 may be fined up to $100,000.32 Before a fine is levied, however, the court must issue an order to show cause.33 A copy of that order must be served on the person34 and may direct the person’s property located in the U.S. to be levied upon or seized as security.35 An evidentiary hearing must then be held prior to a finding of contempt.36 If contempt is found and a fine is levied, the fine and any costs arising out of the contempt proceedings may be satisfied from the liquidation of any seized property.37 Section 1784’s procedures must be followed. In Lansky’s case, the U.S. Court of Appeals for the Eleventh Circuit reversed a contempt order in part because the government did not proceed under Section 1784.38

Conclusion

Although Meyer Lansky died a free man in 1983, it is interesting to note that he died in Miami Beach rather than Tel Aviv. The Walsh Act, which musters the United States’ inherent power to reach its citizens around the world, played a role in bringing him back to the U.S. That power is still available to any practitioner who invokes it.

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Endnotes:
1 See U.S. v. Lansky, 496 F.2d 1063, 1064 (11th Cir. 1974).
2 The Walsh Act formerly was codified at 28 U.S.C. §§ 711-18.
3 See Lansky, 496 F.2d at 1067.
5 See id.
8 See id.
10 See U.S. v. Danenza, 528 F.2d 390, 391 (2d Cir. 1975).
lack of jurisdiction also renders the event jurisdiction over the process, and the Court’s law for permitting the testimony to occur States citizen, there is simply no basis in authority to compel the testimony of a United subpoena is sought under the Court’s au-

WL 3561523, at *6 (“Where, as here, the subpoena was sought under Rule 26); Sandifur, No. C05-1631 C, 2006 WL 3692611, at *3.

Fed. R. Civ. P. 26(b)(1); see Klesch & Co., 217 F.R.D. at 523-24 (ordering issuance of subpoena under Walsh Act where information sought was relevant under Rule 26).


Medimmune LLC, No. C08-05590 JF, 2010 WL 2179154, at *1 (ordering issuance of subpoena to American living in Belgium).

Id.

See Estate of Yaron Ungar, 412 F. Supp. 2d at 333.


See, e.g., Estate of Yaron Ungar, 412 F. Supp. 2d at 335 (appointing a commissioner pursuant to Fed. R. Civ. P. 29(b)(4) and ordering the deposition to be conducted in Egypt); Sandifur, No. C05-1631 C, 2006 WL 3692611, at *6 (citing legislative history that a court “has the discretion to impose ‘whatever conditions’ on the issuance of a Walsh Act subpoena that ‘it considers proper,’” and finding that Luxembourg was the most appropriate location for the deposition). See, e.g., Medimmune LLC, No. C08-05590 JF, 2010 WL 2179154, at *2 (ordering witness to appear for deposition in Washington D.C. because “it is doubtful whether this court has the authority to compel him to sit for a deposition in Belgium. Moreover, the court would have no jurisdiction over the proceedings if the deposition took place there”); Sabhlok, No. C 08-4238 CRB, 2009 WL 3561523, at *6 (“Where, as here, the subpoena is sought under the Court’s authority to compel the testimony of a United States citizen, there is simply no basis in law for permitting the testimony to occur in [another country]. The Court lacks jurisdiction over the process, and the Court’s lack of jurisdiction also renders the event something other than what it purports to be.”).

29 See Lansky, 496 F.2d at 1067.


31 Id. (citing Blair v. U.S., 250 U.S. 273, 281 (1919)).


33 See id. § 1784(a).

34 See id. § 1784(c).

35 See id. § 1784(b)(d).

36 See id. §§ 1784(d).

37 See id.

38 Lansky, 496 F.2d at 1068. Rather, the government convinced the district court to indict Lansky under the general contempt statute, 18 U.S.C. § 401. Analyzing Section 401, the Eleventh Circuit held that the government failed to provide sufficient evidence to establish that Lansky engaged in “willful and contumacious conduct.” Id. at 1072. The government failed to rebut Lansky’s defense that it was reasonable for him to follow his Israeli doctor’s advice not to travel to Miami. See id.
The United States District Court for the Southern District of Florida has recently interpreted the Federal Arbitration Act in a manner that creates a risk that competing parties, advancing crossing claims to recognize and annul international arbitral awards “seated” in the United States, may be compelled to litigate simultaneously in state and federal courts. The court in Ingaseosas International Corp. v. Aconcagua Investing, Ltd., No. 09-23078, Slip Opinion, 2011 WL 500042 (S.D. Fla. February 10, 2011), concluded that the scope of federal court jurisdiction under the Federal Arbitration Act over international arbitration matters encompasses proceedings seeking recognition of an arbitral award, but not actions to vacate such awards.

Thus, the losing party in an international arbitration subject to U.S. procedural law may—under the reasoning applied by the Ingaseosas court—be compelled to seek an annulment in a state court action, while the prevailing party pursues recognition of the same award in federal court. This outcome threatens the coherence of the international arbitral award enforcement system under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the “Convention”) by dividing the critical function of the arbitral “seat” between two potentially conflicting courts in a single jurisdiction.

The enormous vitality of international arbitration is based substantially upon the success of the Convention, which has been adopted by more than 140 countries and requires contracting states to “recognize arbitral awards as binding and enforce them...”. The Convention applies “to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, ... [including] arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.”

The international enforcement of arbitral awards implicates several potential sources of procedural law, including the law of the arbitral “seat,” the law of the jurisdiction in which enforcement of a foreign arbitral award is sought and the Convention itself.

The arbitral seat is the forum that the parties to an arbitration agreement have agreed will provide the procedural law governing the arbitral proceedings, which is also often, but not always, the location of the final arbitration hearing. The law of the seat, accordingly, is the primary source of the legal standards that govern whether an arbitral award is to be recognized or vacated. This ability of the parties to agree in advance on the procedural law to be applied in a later arbitration, and thereby anticipate subsequent award enforceability issues, is critical to ensuring “[o]ne of the major objectives of international commercial arbitration, ... [which is to keep] dispute resolution out of the courts of one or the other of the parties.”

The Convention does not, however, require that an award be recognized by the jurisdiction of the seat before it may be enforced in other countries. This change is a departure from the earlier problematic requirement in the 1927 Convention on the Execution of Foreign Arbitral Awards—which the Convention replaced—that an award be recognized in the arbitral seat before enforcement might be sought in another country. One practical implication of this aspect of the Convention is that parties may, and often do, seek the recognition of an arbitral award simultaneously in multiple countries, even where proceedings seeking to vacate an award in the arbitral seat remain unresolved.

The risk of chaotic or conflicting treatment of an international arbitral award in separate jurisdictions is mitigated by the vesting of control over the validity of the award, subject to narrow limitations in Article V of the Convention, with the law of the arbitral seat. This primacy of the arbitral seat is alluded to in Convention Article V(1)(e), providing that one basis for non-recognition of a foreign arbitral award is if the award “has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.” Article VI of the Convention also permits jurisdictions where enforcement or recognition is sought to adjourn consideration of such requests, or to require the posting of security, while an annulment proceeding is pending in the arbitral seat.

The primacy of the arbitral seat in overseeing arbitration proceedings and resulting awards has been acknowledged by United States federal courts of appeals, including the Second and Fifth Circuits. The Fifth Circuit, in Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 335 F.3d 357 (5th Cir. 2003) (“Karaha Bodas I”), applied the nomenclature of “primary” versus “secondary” jurisdictions in distinguishing between the role of the seat and other jurisdictions in which recognition or enforcement of an award might be sought under the Convention. The Karaha Bodas I court explained:

The New York Convention governs...
the confirmation and enforcement of the Award and “mandates very different regimes for the review of arbitral awards (1) in the [countries] in which, or under the law of which, the award was made, and (2) in other [countries] where recognition and enforcement are sought.” Under the Convention, “the country in which, or under the [arbitration] law of which, [an] award was made” is said to have primary jurisdiction over the arbitral award. All other signatory States are secondary jurisdictions, in which parties can only contest whether that State should enforce the arbitral award.8

“[U]nder the Convention, the power and authority of the local courts of the rendering state ([i.e., the arbitral seat]) remain of paramount importance.”9 The Convention itself is narrow in its terms and focused on the international recognition or enforcement of arbitral awards. For example, whereas Article V states various grounds pursuant to which a contracting state is permitted under the Convention to decline to recognize or enforce an award—including because the award has been annulled by the arbitral seat—the Convention does not directly provide any specific procedures for assessing the propriety of annulling an award. Such determinations are instead deferred to determination under the law of the arbitral seat. The Second Circuit in Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys “R” Us, Inc., 126 F. 3d 15 (2d Cir 1997) explained:

What the Convention did not do . . . was provide any international mechanism to insure the validity of the award where rendered. This was left to the provisions of local law. The Convention provides no restraint whatsoever on the control functions of local courts at the seat of arbitration.10

And the court in Karaha Bodas II wrote:

[The Convention does not restrict the grounds on which primary-jurisdiction courts may annul an award, thereby leaving to a primary jurisdiction’s local law the decision whether to set aside an award. . . . Consequently, even though courts of a primary jurisdiction may apply their own domestic law when evaluating an attempt to annul or set aside an arbitral award, courts in countries of secondary jurisdiction may refuse enforcement only on the limited grounds specified in Article V [of the New York Convention].]11

The domestic law to be applied in assessing the propriety of international arbitral proceedings seated in the United States is either the Federal Arbitration Act (the “fAA”) (and related case law) or the arbitral law of the particular state in which the arbitration was rendered. Access to U.S. federal or individual state courts depends fundamentally upon the existence of subject matter jurisdiction or legal authority to hear such matters. The jurisdiction statutes for the courts of individual state jurisdictions in the United States invariably encompass authority over court actions arising from arbitral awards rendered in the state.

The Convention is incorporated into U.S. domestic law through fAA Chapter 2, which includes a provision—i.e., 9 U.S.C. § 203—extending federal court jurisdiction over any action or proceeding “falling under” the Convention. FAA § 203 states:

An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States . . . shall have original jurisdiction over such an action or proceeding regardless of the amount in controversy. [Emphasis added.]

The broad reference in § 203 to “falling under the Convention” is the focus of the Southern District of Florida’s holding in the Ingasesosas case (discussed below) that no federal jurisdiction exists over annulment proceedings regarding international arbitrations.

Similar language appears in fAA § 202, which defines the types of arbitrations that are covered by fAA Chapter 2. fAA Chapter 2 addresses international arbitrations that implicate the Convention. Section 202 contains two references to the phrase “fall[ing] under the Convention.” The first reference is in the initial sentence of § 202, which is a general clause that encompasses a broad range of commercial matters (including the business subject matter of the underlying arbitration in the Ingasesosas case):

An arbitration, agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention . . . . [Emphasis added.]

The second reference is in the subsequent sentence of § 202, which excludes purely U.S. arbitrations from the broad scope of § 202:

An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. [Emphasis added.]

Significantly, fAA Chapter 2 includes a removal mechanism, in § 205, that has extremely broad jurisdictional implications. Section 205 grants federal courts subject matter jurisdiction to hear any proceeding originating in a state court related to an international arbitration that a party elects, at any time, to remove to federal court. The provision also includes the “falling under the Convention” language. Section 205 states:

Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention, the defendant or the defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States for the district and division embracing the place where the action or proceeding is pending. The procedure for removal continued, page 33
SECTION ACTIVITIES AT THE ANNUAL FLORIDA BAR CONVENTION
June 2011
Gaylord Palms Resort, Orlando, FL

CHAIR’S RECEPTION – JUNE 23

Ed Mullins (2010-2011 ILS chair), Christopher Kokoruda (editor of the ILS Gazette), law student guest, and the Honorable Mayra Peña Lindsay (Key Biscayne, Florida, Councilmember).

Richard DeWitt (ILS member), Kim Radcliffe (ILS Executive Council member) and guest.

Ryan Reetz (ILS secretary) and Eduardo Palmer (ILS Executive Council member).
“NEW FRONTIERS IN ARBITRATION” SEMINAR AND ILS LUNCHEON – JUNE 24

LEFT: Ed Mullins (2010-2011 ILS chair), takes questions for a panel discussion on arbitration. Panel members include (L-R) Nicholas Swedloff, Eduardo Palmer, Jamie Bianchi and Richard DeWitt.

RIGHT: Charles M. Trippe, Jr., General Counsel for Florida Governor Rick Scott, was the keynote speaker at the ILS Luncheon.

Ed Mullins, Eduardo Palmer, and Charles M. Trippe, Jr.
The Executive Council of the ILS discusses end-of-year business.

Nicholas Swerdloff, 2011-2012 ILS chair, presents a gift to outgoing chair, Ed Mullins.

Ed Mullins chairs his final ILS meeting.

The Honorable Gerald Cope of the Third District Court of Appeal listens as Richard Lorenzo, managing partner of Hogan Lovells’ Miami office and 2012-2013 ILS chair-elect, makes a point.

The Executive Council of the ILS discusses end-of-year business.
of causes otherwise provided by law shall apply, except that the ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal. [Emphasis added.]

This removal mechanism is broader than the standard removal right created by 28 U.S.C. § 1441, which limits the typical removal jurisdiction of U.S. federal courts to circumstances where original federal court jurisdiction exists over a claim filed in state court and where the removal by a defendant is made within a mere thirty days of receipt by the defendant of the initial pleading in the state court action. 12

The provision in § 205 permitting a removal to federal court of a claim that “relates to an arbitration agreement or award falling under the Convention . . . at any time before trial” enables a respondent to a state court petition for recognition or enforcement of an international arbitral award to remove the action to federal court and there assert a crossing petition for annulment. The Ingaseosas court nevertheless concluded that federal courts lack subject matter jurisdiction over a petition to vacate an arbitral award filed directly in federal court.

The Ingaseosas proceedings in the Southern District of Florida arose from a controversy between two non-United States business concerns—Ingaseosas International Corp. (“Ingaseosas”) and Aconcagua Investing, Ltd. (“Aconcagua”)—over a contract for the sale of shares in a bottling company based in Ecuador. The disputed contract provided for arbitration in Florida, which resulted in an award favoring Aconcagua (the “Award”). 13 Ingaseosas initiated proceedings in federal court through its motion to vacate the Award, to which Aconcagua responded by requesting a confirmation of the Award. Aconcagua also sought dismissal of Ingaseosas’ vacatur request on the grounds of a lack of subject matter jurisdiction. In granting Aconcagua’s dismissal request, the court determined that the language in FAA § 203 directed to claims “arising under the Convention” was limited solely to actions for recognition or enforcement of arbitral awards. The court reasoned:

As its name suggests, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards explicitly regulates only two types of proceedings—(1) for an order confirming an arbitration award (9 U.S.C. § 207), and (2) for an order compelling arbitration pursuant to an arbitration agreement (9 U.S.C. § 206). The Convention makes no mention of vacatur actions. 14

A similar mechanical interpretation of FAA § 203 had been applied by one other federal district court, in Tesoro Petroleum Corp. v. Asamera (South Sumatra) Ltd., 798 F. Supp. 400, 405 (W.D.Tex. 1992). No federal court of appeals has ruled squarely on the question of whether FAA § 203 creates federal subject matter jurisdiction over proceedings to annul international arbitral awards.

The Ingaseosas outcome is problematic several reasons. First, the language used in § 203—as well as other related provisions in FAA Chapter 2—suggests a broader
interpretation than applied by the court. The critical “falling under the Convention” language in § 203 suggests, on its face, application to any controversy associated with the Convention, including proceedings to annul or vacate awards that are within the scope of the Convention. The broader framework of FAA Chapter 2 also supports this construction since essentially the same language is used in §§ 202 and 205.

Section 202 defines matters that “fall[] under the Convention” to include any “arbitration, agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement . . . .” As noted above, Section 205 permits the removal to federal court at any time before trial of an action that relates to an arbitration agreement or award “falling under the Convention.” These provisions together suggest a strong federal policy of facilitating the disposition of all legal proceedings associated with international awards subject to the Convention in a single court, unless both parties elect to pursue relief in a state court.

The Ingaseosas outcome is, in addition, inconsistent with well-accepted standards for statutory interpretation. “The starting point for all statutory interpretation is the language of the statute itself.” In re Tennyson, 611 F.3d 873, 877 (11th Cir. 2010) (citing United States v. DBB, Inc., 180 F.3d 1277, 1281 (11th Cir. 1999)). In DBB, the Eleventh Circuit stated:

We assume that Congress used the words in a statute as they are commonly and ordinarily understood, and we read the statute to give full effect to each of its provisions. We do not look at one word or term in isolation, but instead we look to the entire statutory context. We will only look beyond the plain language of a statute at extrinsic materials to determine the congressional intent if: (1) the statute’s language is ambiguous; (2) applying it according to its plain meaning would lead to an absurd result; or (3) there is clear evidence of contrary legislative intent.16

Finally, and fundamentally, the Ingaseosas outcome conflicts with the design of the Convention, which defers to the arbitral seat the responsibility for overseeing the propriety of arbitrations. A division of the essential role of the arbitral seat between competing state and federal courts undermines the special function of the arbitral seat in managing international arbitrations under the Convention (and therefore under FAA Chapter 2). Although the Convention by its terms is focused on the recognition or enforcement of foreign awards, and the annulment standards of individual states may vary, the factual circumstances that inform whether a particular award should be recognized or annulled commonly overlap.17

The Ingaseosas outcome, accordingly, creates a risk that a state court might annul an award on the ground, for example, that it was procured by fraud, while a federal court might simultaneously consider and reject the same fraud allegation in ruling that the award must be recognized.18 The risk of such a chaotic outcome is inconsistent with the design and purpose of both the Convention and the FAA. FAA § 203 should instead be interpreted in a manner that is consistent with its plain language, honors its statutory construct and protects the vitality of the United States as arbitral seat. Further adoption of the Ingaseosas approach to federal jurisdiction over annulment matters should accordingly be resisted.
Unintended Consequences: Bergesen v. Joseph Muller and the New “Stateless” Award

By Harout Jack Samra, Miami

In Bergesen v. Joseph Muller Corporation,1 the Second Circuit adopted a particularly expansive view of the scope of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”).2 This view has subsequently been adopted by other circuits, including the Fifth3 and Eleventh. As a consequence of Bergesen, however, several circuit courts now significantly differ as to what bases are available for vacating arbitration awards. To the extent that the New York Convention has been interpreted so broadly as to encompass arbitral awards that may also be subject to the Federal Arbitration Act (the “FAA”), substantial questions have arisen as to when and under what circumstances to apply one or the other.

One significant area of confusion involves the interplay between grounds for vacatur or nonenforcement established in the FAA and the New York Convention, respectively. This uncertainty strikes at the core of the essential balance that must be maintained in order for arbitration to remain a viable tool for dispute resolution: the balance between the finality of the award and the procedural safeguards provided to parties who, quite literally, get less than they bargained for.4 Several courts have wrestled with this question and reached, at least on the surface, different conclusions. Clearly, however, this issue arose as a consequence of the Bergeson decision, which leaves open the possibility that an arbitral award may be subject to both the New York Convention and the FAA.

In light of this, the courts have identified two possible resolutions; one incorporating the grounds enumerated by the FAA, and the other opting instead to limit parties seeking to challenge awards to the grounds established in the Convention. If the latter route is chosen, however, and United States courts opt not to apply domestic grounds to awards rendered in the United States, or under U.S. arbitral law, the consequences will be significant as such awards would be removed from the supervision of a state, a result inconsistent with the framework established in the Convention.

Background

Given that the purpose of Chapter 2 of the FAA is largely to incorporate the strictures of the New York Convention into American domestic law, it is therefore necessary to consider several of the relevant provisions of the Convention. Article I of the Convention specifically provides that it shall be applicable to “the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal.”5 Article I also stipulates, cryptically, that the Convention shall “apply to arbitral awards not considered as domestic” provision, which—according to the court—“denotes awards which are subject to the Convention not because made abroad, but because made within the legal framework of another country.”6

The court preferred “this broader construction because it is more in line with the intended purpose of the treaty, which was entered into to encourage the recognition and enforcement of international arbitration awards.”7 In reaching this conclusion, the court was not persuaded by arguments that the award should not be subject to both the Convention and the FAA, because the fact “that this particular award might also have been enforced under the Federal Arbitration Act is not significant . . . . There is no reason to assume that Congress did not intend to provide overlapping coverage between the Convention and the Federal Arbitration Act.”8

This interpretation of Article I has not been without criticism, including from foremost authorities on the New York Convention, such as Albert

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Jan van den Berg, who noted that, although “[t]he expansive interpretation seemingly favours international arbitration in the United States,” it “poses a number of problems.” Regarding the enforcement of awards, he noted that this expansive interpretation:

may give losing parties an extra possibility to stave off the day of reckoning. Under U.S. federal law and most of the state laws[,] enforcement of an arbitral award is relatively simple. In contrast, under the Convention, enforcement of an award can be resisted on a number of grounds. In addition, the expansive interpretation may cause problems for enforcement abroad of arbitral awards with a foreign element made in the United States. The legal framework of international commercial arbitration is fairly complicated. The expansive interpretation has regretfully not contributed to its simplification.

This critique of the Second Circuit’s holding reveals, in part, the extent to which questions of enforcement are inseparably tied to the initial question of applicability. Determining which law applies is the threshold question that must be addressed, as the various enforcement schemes (whether under state law, the FAA or the New York or Panama Conventions, among others) differ—rather sharply in some instances—in the procedures available for vacatur or nonenforcement, never mind the actual substantive bases available for such relief.

Despite this criticism by authorities like Professor van den Berg, the Bergesen approach has been adopted in other cases. The Second Circuit itself in Yusuf Ahmed Alghanim & Sons v. Toys “R” Us, reaffirmed the Bergesen approach, which was also adopted by the Eleventh Circuit in Industrial Risk Insurers v. M.A.N. Gutehoffnungshütte. Although these courts agreed that the Convention applied to the arbitral awards in question, both of which involved foreign parties, they differed as to whether the grounds for challenging enforcement of awards expressed in Article V of the Convention or the grounds for seeking vacatur established in Section 10 of the FAA applied. In Yusuf, the Second Circuit Court of Appeals undertook this analysis and concluded that the two schemes are not in any way inconsistent but, rather, complementary. On the other hand, one might conclude that the Eleventh Circuit addressed this issue in Industrial Risk and reached the opposite conclusion.

In Yusuf, the Second Circuit explicitly addressed the overlapping coverage of the New York Convention and the FAA and, affirming the district court, held that courts have the authority under the Convention to apply the FAA’s grounds for setting aside awards. As to the question of whether the grounds identified in the Convention are exclusive, the court concluded that, consistent with the Convention’s pro-enforcement bias, the defenses established in Article V are exclusive and declined to find implied defenses available. A more complex challenge, however, arose in determining whether Article V(1)(e) of the Convention, which provides that an award may be denied enforcement if “has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made,” required the court to incorporate the grounds outlined in Section 10 of the FAA. Noting that this was a matter of first impression, the court concluded that these grounds indeed did apply to nondomestic arbitration awards rendered in the United States.

Thus, the court created two categories of cases under the New York Convention: (1) nondomestic-nondomestic cases, and (2) domestic-nondomestic cases. It is only the rather limited latter category of cases for which domestic grounds for vacatur are available. To conclude otherwise would have rendered certain awards nearly inviolable, clearly an unacceptable outcome and one to which signatory States to the Convention would not have agreed.

Not long after the Second Circuit’s exposition of Article V(1)(e) and the applicability of domestic standards for vacatur under the Convention, the Eleventh Circuit was confronted with Industrial Risk, a nearly identical case. At the outset of its analysis of the asserted grounds for vacatur, the court summarized concluded that the “arbitral award must be confirmed unless appellants can successfully assert one of the seven defenses against enforcement of the award enumerated in Article V of the New York Convention.” As noted earlier, this conclusion that the grounds enumerated in the Convention are exclusive is completely consistent with Yusuf. The Eleventh Circuit, however, never addressed Article V(1)(e) of the Convention and therefore neither adopted nor rejected the finding in Yusuf that the domestic grounds addressed in the FAA could be incorporated through Article V(1)(e). The court limited its analysis to the grounds enumerated in the Convention, refusing to address those in the FAA.

The New “Stateless” Award

The consequences of the approach outlined in Industrial Risk on the enforcement of awards must be considered carefully. Its shortcomings can be succinctly stated: the court took a one-dimensional approach to a complex, layered puzzle. The court simply stopped at the conclusion that the grounds enumerated in the Convention are exclusive without analyzing those grounds and considering whether one or another of them provides an avenue for the consideration of domestic bases for nonrecognition, as Article V(1)(e) of the Convention clearly does.

Consequently, it is not clear whether Yusuf and Industrial Risk are inherently inconsistent though, on the surface, one could reasonably conclude that they are. The Eleventh Circuit could have foreseen and preempted such obvious confusion through even a passing
footnoted reference to Yusuf, noting that although it otherwise accepted its broader rational, it rejected the Second Circuit’s specific analysis of Article V(1)(e). It did not do so, however. If Industrial Risk is broadly considered, the court may have created a new category of “stateless” awards not subject to the domestic laws of any jurisdiction at the enforcement stage.20

Such an interpretation would render Article V(1)(e), at least in this narrow factual circumstance, a dead letter. In order to analyze the Eleventh Circuit’s ruling fully, however, we must also consider the hypothetical circumstance its analysis would seem to raise. If correct, and domestic grounds for vacatur are not available under Article V of the Convention, the circuit court has created a factual situation in which there is, for all intents and purposes, no competent authority that may independently judge the award on the basis of domestic law.

Plainly, the Convention intended some level of separate consideration in the primary jurisdiction that could then be employed to argue against enforcement in the secondary jurisdiction. If one were to follow a broad understanding of the Eleventh Circuit’s ruling, an award could not be challenged at all under Article V(1)(e) of the Convention. Such a result would be inconsistent with the very terms of the Convention. Moreover, the creation of this new class of “stateless” awards not subject to the supervision of any state would pose significant challenges to the Convention framework.

Conclusion
While some practitioners and scholars have expressed a distinct preference for more limited grounds for vacatur, and thus greater finality, such desires or policy cannot trump the actual terms of the applicable statutes and treaty—in this instance, the New York Convention. As discussed, disagreements among the circuit courts have emerged as to what bases are available for vacating international arbitration awards under the New York Convention.

The conflict that appears to have arisen between the Second and Eleventh Circuits raises the specter of forum shopping in arbitration within the United States. Such a result would arguably inflict damage to the continued viability of arbitration as a reliable means of alternative dispute resolution, as it would assign greater finality to awards rendered in some parts of the United States than in other parts. Further, such a result would significantly confuse the existing jurisprudence and would eliminate numerous grounds for vacatur in several jurisdictions, though not in others.

The prospect of the creation of a new class of awards not subject to any state’s supervision is troubling. To the extent that this is a consequence of the Second Circuit’s decision to amplify the apparent scope of the New York Convention, it might best be labeled as an unintended consequence.
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Opening Remarks
William H. Newton, III, Esq., Law Offices of William H. Newton, III, Miami – Program Chair
Margarita P. Muina, Esq., Law Offices of Margarita P. Muina, P.A., Miami – Program Vice Chair
8:30 a.m. – 9:20 a.m.
Overview of International Tax and Estate Planning Developments
William H. Newton, III, Esq., Law Offices of William H. Newton, III, Miami
9:20 a.m. – 10:10 a.m.
Putting FATCA into Context: The International Focus on Information Exchange
Professor Patricia Brown, Director, Masters of Taxation Program, University of Miami School of Law, Coral Gables
10:10 a.m. – 10:25 a.m.
Break
10:25 a.m. – 11:15 a.m.
Choice of Entity Issues and International Tax Planning
Seth Entin, Esq., Greenberg Traurig, Miami
11:15 a.m. – 12:05 p.m.
Cutting-Edge Developments With Respect to Tax Fraud and Collection Considerations as Related to International Tax
Andrew H. Weinstein, Esq., Holland and Knight L.L.P., Miami
Kevin Packman, Esq., Holland and Knight L.L.P., Miami
12:05 p.m. – 1:30 p.m.
Lunch (on your own)
1:30 p.m. – 2:20 p.m.
Globalization and Legal Education
Professor Patricia White, Dean, University of Miami School of Law, Coral Gables
2:20 p.m. – 3:10 p.m.
Current Issues in Estate and Gift Tax Planning for U.S. Situs Assets
Margarita P. Muina, Esq., Law Offices of Margarita P. Muina, P.A., Miami
3:10 p.m. – 3:25 p.m.
Break
3:25 p.m. – 4:15 p.m.
Expatriation – Current Issues and Required Disclosures
Shawn P. Wolf, Esq., Packman, Neuwahl and Rosenberg, Coral Gables
William Yates, Esq., Associate Chief Counsel (International), Internal Revenue Service, Washington, D.C.
4:15 p.m. – 5:05 p.m.
Transfer Pricing in the Current Economic Environment
Ian Gray, Esq., Economics Partners, L.L.C., Denver, CO
Robert A. Feinschreiber, Esq., Feinschreiber & Associates, Key Biscayne
5:05 p.m. – 5:10 p.m.
Closing Remarks
William H. Newton, III, Esq., Law Offices of William H. Newton, III, Miami – Program Chair
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What Impact for U.S. Companies and Their Lawyers?

By Thomas Rouhette and Christelle Coslin, Paris

Introduction

Regulation no. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (“Brussels I Regulation”) is the cornerstone of European legislation regarding cross-border litigation and judicial cooperation in the European Union. This Regulation succeeded the Brussels Convention of 27 September 1968 on jurisdiction and enforcement of judgments in civil and commercial matters, which had progressively been ratified by all Member States joining the European Union.

Since its entry into force nine years ago, on 1 March 2002, the Brussels I Regulation generally has been considered successful in establishing common jurisdictional rules, as well as facilitating the recognition and enforcement of court decisions in other Member States in commercial and civil matters. To quote the European Commission, “[T]he Regulation identifies the most appropriate jurisdiction for solving a cross-border dispute and ensures the smooth recognition and enforcement of judgments issued in another Member State.”

This being said, the European Commission is contemplating radical changes to the current version of the Regulation, as demonstrated by the Draft Proposal published on 14 December 2010. This Draft Proposal follows the publication of several preliminary studies, among which is the report prepared by Professors Hess, Pfeiffer and Schlüster regarding the concrete application of the Brussels I Regulation.

Based on such studies, the European Commission had previously released a report in April 2009 regarding the application of the Regulation, as required by Article 73 of the Regulation. This report also had envisioned some of the changes developed further in the Draft Proposal. To complete the research on the practical aspects of the Brussels I Regulation, the European Commission issued a Green Paper in April 2009 seeking the views of interested stakeholders—130 opinions were received. The European Commission published, at the same time as the Draft Proposal, an Impact Assessment of the suggested amendments—the result of a study by the Centre for Strategy and Evaluation Services. Thus, the Draft Proposal is the result of several years of study and empirical data gathering as demonstrated by this relatively abundant legislative history.

Objectives of the Revision

The main purpose of the revision of the Brussels I Regulation is to further the development of European justice, which is one of the objectives established by the European Council in 2009 in the Stockholm Programme. According to the European Commission, the objectives of the changes presented in the Draft Proposal are three-fold: (1) lowering legal costs, diminishing procedural delays and improving legal certainty; (2) providing better access to justice and protecting weaker parties; and (3) ensuring better coordination of legal proceedings.

More generally, this reform seeks to take into account the evolution that the European Union has undergone since the enactment of the Brussels I Regulation at the beginning of the last decade, particularly the development of the unified European market. Further, the Draft Proposal was also prepared to address the challenges that arose from cross-border litigation, within and outside the European Union, which globalisation had rendered more frequent and more complicated. For example, some of the new provisions were designed to prevent forum-shopping strategies that seek to circumvent a choice-of-court or arbitration agreement. Moreover, this Draft Proposal was conceived with an economic perspective: the European Commission mentions several times the current economic crisis and its hopes that the Draft Proposal will “create the necessary legal environment for the European economy to recover,” thanks to reduced litigation costs and improved legal certainty.

Consequently, this revision concerns many provisions of the existing Brussels I Regulation. Among those, a few points amounting to major modifications will be examined below.

The Expansion of the Territorial Scope of the Jurisdictional Rules

At present, the territorial scope of most of the jurisdictional rules provided for by the Brussels I Regulation, subject to certain noteworthy exceptions, is limited to cases where the defendant is domiciled in a Member State. For defendants not domiciled in a Member State, the international jurisdictional rules contained in the domestic law of each Member State are applicable and may differ greatly from one Member State to another.

The territorial limitation, which was inherited from the Brussels Convention of 27 September 1968, reflects still today the fact that the application of the Brussels I Regulation is perceived as a protection for defendants against the so-called exorbitant jurisdictional rules that may be part of the domestic law of Member States. The European Commission defined these rules as “rules of jurisdiction in which the court seized does not possess—by internationally agreed standards—a sufficient connection with the parties to the case, the circumstances of the case or subject of the action.”

A typical example of an exorbitant jurisdictional rule can be found in
the provisions of the French Civil Code pursuant to which French courts generally have jurisdiction over any claims brought by or against a French citizen or company. Other frequently mentioned illustrations of such rules include the provisions allowing service of a summons on someone based on his/her mere presence on the domestic territory of some Member States, or using the location of the person’s assets in the territory as a basis for jurisdiction.

One of the most ground-breaking proposals, which will probably trigger fierce debate in the coming months, consists of eliminating the requirement that a defendant be domiciled in a Member State. Indeed, the European Commission suggests extending most jurisdictional rules from the Brussels I Regulation to defendants domiciled in third countries. The European Commission thus seeks to remove what it considers to be a source of complexity and unequal access to justice due to the differences in jurisdictional rules of the domestic law of Member States. In particular, the amendment is designed to reinforce the protection of weaker parties by ensuring that the protective jurisdictional rules available for consumers, employees, and insured persons be applicable in a larger number of cases (i.e., against non-European defendants) as underlined by the European Commission.

Consequently, should such modification be maintained in the revised Regulation, the jurisdictional rules applicable in the European Union should be much easier to apprehend because lawyers, within or outside the European Union, would have to refer to one text only. In addition, the uniform construction of this text would be in the hands of the Court of Justice of the European Union. At the same time, such change could result in an increase in the number of instances where non-European defendants are sued in one of the Member States.

Another consequence would be that Member States, within the material scope of the revised Regulation, would no longer be allowed to apply their own international jurisdictional rules. This point is clearly controversial because, critics argue, it would give away a Member State’s advantage (i.e., the grounds for jurisdiction currently available for the Member States’ citizens against non-European defendants) with respect to Third States without gaining any advantage in return. The Member States could, moreover, no longer negotiate bilateral conventions with Third States regarding jurisdictional matters governed by the Brussels I Regulation. They would, however, retain the power to conclude conventions on recognition and enforcement of judgments which are not affected by the modification.

The Draft Regulation also proposes two additional rules that would be applicable where no other rule of the Brussels I Regulation would confer jurisdiction on the courts of one of the Member States. By definition, such rules would apply only in disputes involving defendants domiciled outside the European Union since the courts of the Member State where the domicile of the defendant is located have jurisdiction as a matter of principle. This is why both these rules require that the dispute have a sufficient connection with the Member State of the court seized. Pursuant to the first rule, non-European defendants could be sued at the place where their moveable assets are located, provided that the value of such goods would not be disproportionate to the value of the claim. In the second instance, non-European defendants could also be sued before a forum necessitating in cases where no other forum (outside the European Union) would guarantee the right to a fair trial. The application of such rule should nevertheless remain exceptional.

As a result, such proposals could significantly reshape cross-border litigation between the European Union and the U.S. in civil and commercial matters. On the one hand, the applicable rules could become a lot more accessible and predictable for U.S. lawyers; on the other hand, one would expect an increase in the number of instances where European companies or citizens could sue U.S. companies in one Member State based on the existing or proposed new grounds for jurisdiction.

**The End of Recognition and Enforcement Proceedings?**

Pursuant to the principle of mutual trust among Member States and the progress achieved towards the single market, the European Commission believes that it is now possible and reasonable to abolish exequatur procedures completely. These are the procedures by which a national court declares a foreign judgment to be enforceable on the territory of one Member State. Such proceedings usually take from a few days to a few months depending on the Member State and the complexity of the case.

The view of the European Commission is that such procedures make cross-border litigation among Member States “cumbersome, time-consuming and costly,” while in 95% of the cases the request for the exequatur of the decision of a judge from another Member State is granted in the end. The Draft Proposal thus provides for an automatic system of circulation of judgments in civil and commercial matters among Member States by removing the requirement to apply for exequatur before enforcing a judgment handed down by a judge of any Member State.

To protect defendants’ rights, two procedural safeguards are proposed. First, the defendant would be allowed to challenge the judgment if he/she was not adequately informed of the proceedings that led to the judgment of which recognition and enforcement are sought. Second, as an extraordinary precaution, the defendant could also argue that the rules for a fair trial were not complied with in these proceedings. Moreover, he/she could challenge the enforcement of a judgment that would not be compatible with another judgment previously handed down in the Member State of enforcement or, in certain conditions, in another State.

In addition, there are a few areas where the requirement of exequatur proceedings will persist because of...
the major differences existing among the Member States’ legislations, notably in matters relating to defamation and collective redress mechanisms. The advantages of removing the requirement for exequatur would be to ease considerably the enforcement of judgments and spare the parties the time and costs required for exequatur procedures, which are cumbersome because of the documents to be collected and translated.

This being said, such proposed modification will not affect many Third States or their citizens or companies since this clearly relates to the circulation of European judgments among Member States. The main impact U.S. companies can expect concerns the case where they have or have been sued by a European party before a court of one Member State. The change obviously would facilitate their enforcing the judgment in another Member State where the European party would have assets. The latter could as easily enforce the judgment against the U.S. company—if the losing party—in another Member State where it has assets. The likelihood of these situations could nonetheless be higher should the territorial scope of the jurisdictional rules be broadened as described previously.

The Search for Better Coordination

Quite a number of proposed amendments aim at achieving better coordination among various sets of proceedings. The first objective is to ensure the proper enforcement of choice-of-court agreements. At present, when the parties have designated a particular court to solve their dispute, lis pendens rules (applicable when the same dispute is brought before two different courts) prevail over jurisdictional clauses. In other words, if a party brings an action before a court different from the one originally elected, the court agreed upon—if seized Afterwards—is compelled to stay the proceedings until the decision of the first court accepting or declining its own jurisdiction.

According to the Draft Proposal, the court initially designated by the parties would now be given priority to decide on its own jurisdiction. Such proposal would increase the effectiveness of a choice-of-court agreement and reduce abusive litigation or forum shopping, thereby increasing legal certainty.

Another purpose of this suggested change is to make the provisions of the Brussels I Regulation consistent with those of The Hague Convention of Choice of Court Agreements of 2005. This international convention, adopted in 2005 and signed by both the European Union and the U.S. in 2009, has not yet been ratified by either one of these parties. After its entry into force, The Hague Convention will be applicable to choice-of-court agreements entered into between a European party and a non-European party.

The Draft Regulation also seeks to improve the lis pendens rules by creating a six-month time limit for the court first seized to rule on its jurisdiction. Whether in practice, courts will be able to comply with this time frame remains uncertain. For this reason, the European Commission contemplates establishing mechanisms allowing a smooth exchange of information between the courts seized.

Similarly, the Draft Regulation includes provisions on the interface between arbitration and court proceed-
ings. If the jurisdiction of a court is challenged on the basis of an arbitration agreement, the said court will have to order a stay in the proceedings if proceedings have been initiated in the Member State of the seat of arbitration relating to the validity and effects of the arbitration agreement. This modification could raise a number of concerns since it may have the undesired effect of increasing the number of instances where the arbitration agreement is challenged before the courts of the seat of the arbitration.

**Preliminary Views of the Other Institutions of the European Union**

In May 2011, the European Economic and Social Committee submitted its opinion on this Draft Proposal. While it generally approves the Draft Regulation and its major orientations, the Committee adopts a more balanced position regarding certain specific points of these modifications. This is especially true concerning the non-general scope of the abolishment of exequatur proceedings and the relations between arbitration and court proceedings.

The European Parliament has also published a Draft Report on the European Commission’s Proposal that exposes the views of the Rapporteur and his suggested amendments to the Draft Proposal. While he does not object to the abolishment of exequatur procedures as a matter of principle, he is in favour of applying this reform without the exceptions provided for in the Draft Proposal. The Rapporteur also suggests maintaining a substantive public policy exception (and not only the fair-trial requirement) as a ground available for the defendant to challenge the enforcement of the judgment. Regarding the broadening of the scope of the jurisdictional rules, the Rapporteur reiterates the opinion expressed by the Parliament about the Green Paper of 2009 that led to the Draft Proposal: such major amendment “requires wide-ranging consultation and political debate” and is therefore “premature.” Finally, he approves the solution retained regarding choice-of-court agreements.

**Conclusion**

It is interesting to note that the above-mentioned study by the Centre for Strategy and Evaluation Services concludes that, regarding three key topics—the abolishment of exequatur proceedings, the interface between the Brussels I Regulation and arbitration, and the international scope of the Regulation—the major amendments proposed by the Commission “would have mostly beneficial effects.”

Despite this study, it remains to be seen whether the European Parliament and the Council will in the end agree with this approach and approve the political choices endorsed by the European Commission of which the Draft Proposal is the result. The decision procedure that would lead to the enactment of the revised Regulation is expected to last for at least another year. During this process, one can expect the Draft Proposal to undergo some changes that are difficult to predict, all the more so as the Council has not yet expressed any opinion.

Should the revised Regulation that is adopted follow the contours described above, it could significantly reshape cross-border litigation between the European Union and the U.S. in civil and commercial matters. In any case, this should lead U.S. lawyers dealing with such litigation to follow closely the revision of the Brussels I Regulation.

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**Endnotes:**

7. The Stockholm Programme was adopted at the meeting of the European Council of 10 and 11 Dec. 2009.
8. Impact Assessment, supra note 1, at 8.
9. Id. at Annex I—Glossary of legal terms.
13. Id. at 47.
The International Law Quarterly

Immigration and Ethics in a Troubled Market

By Mark R. Weiner, Tampa

The economic crisis comes as no surprise to immigration lawyers. Of all those who practice law in Florida, it is safe to say that the immigration bar foresaw the economic meltdown first—years before it happened. Deportations rose rapidly as more and more legitimate visas were denied, whether in error or in flagrant disregard of the law, and the citizens of the world slowly began to turn their once envious eyes away from this pillar of democracy. The world's brightest minds began to seek employment elsewhere, reluctant to deal with the harsh and unforgiving process of applying for an employment visa. Investors, dreading the harassment and scrutiny of United States consulates, took their hard-earned money to China or India. Is it any wonder that those economies are growing while ours struggles?

That brings me to the issue of ethics. In such an economic climate, it can be difficult to maintain a successful law practice, particularly in the field of immigration where most attorneys are solo practitioners. When the rent and payroll taxes are late, your internet and phone are about to be shut down and there are no advertising dollars left, ethics is perhaps the last thing on your mind when a potential client is sitting across from your desk. Instead, you are probably thinking, “We take credit cards, checks, cash, gold, silver, drachma, whatever.” Nonetheless, ethics should be the first thing on your mind.

Be compassionate, be concerned about your clients, but most importantly, be honest. In these troubled economic times (and even in good economic times), an immigration lawyer may be tempted to lead clients to believe that their case is likely to succeed when the lawyer knows from the outset that the application or petition will eventually be denied. Fighting a lost cause can be admirable, if the client is made aware of the likelihood of failure at the first consultation.

More and more frequently I find myself telling a potential client that there is nothing substantive that can be done for him or her. The client goes away thanking me, only to return six months later with a Notice to Appear (deportation notice) before an immigration court in hand, because some unethical or unstudied immigration lawyer said that I did not know what I was talking about and that there actually was a way to become “legal.” The lawyer possibly did not understand the law or, worse, knew there was no way to prevail. The attorney took the client’s money, the case was denied, and the client was placed into removal proceedings.

In The Florida Bar v. Nunes, an immigration attorney told his clients that their son was eligible for a green card and undertook representation after collecting a fee. The attorney knew, however, that the son previously had been deported for possession of cocaine, which precluded the son from ever being able to acquire a green card. The lawyer was charged with violating the duty of competent representation, failing to explain a matter to a client, and charging an excessive fee. The court noted the testimony of an expert who stated that “a proper consultation would have ended with, ‘I’m sorry, I just really can’t help your son.’”

Unfortunately, some immigration lawyers believe that being totally honest with their clients is the road to bankruptcy. In fact, the opposite is true. Word of mouth is, and has always been, the best way to grow an immigration practice. A happy client will literally bring a friend so that you can help him or her, too. An upset client will tell as many people as possible what a liar you really are. In the end, we should want our clients to characterize us as honest attorneys. Being honest means putting the needs of your clients before your own. Saying, “I told you nothing was guaranteed,” after you have taken the client’s money—knowing full well there was no chance of success—simply will not hold traction over the long run. It will catch up with you. And, besides, it is unethical.

So how does an ethical, honest immigration lawyer stay clear of bar complaints, law suits and government investigations and still be profitable in these troubled economic times? By being organized, efficient, well-studied and honest. Following is a discussion of a few tools I have used over the last twenty years to stay out of harm’s way, be profitable and successful. Although this discussion is directed mainly toward immigration lawyers, many of these tips and strategies may be applied in other fields of law.

Technology

Two of the leading complaints against immigration lawyers have been: (1) the failure to file an application/petition timely; and (2) the failure to provide true and timely case status information. Although there is no substitute for a skillful attorney, technology can address both of these issues.

There is a plethora of immigration software available. Most is web-based and can therefore run on both Mac and Windows platforms. The costs are reasonable and the features rich. You can use it as a tickler system, making sure that I-94 cards do not expire or that you are notified when a Request For Evidence (RFE) deadline is fast approaching. Some software contains complex contact managers, cross-referencing everything from type of visa to country of origin. This can be a great marketing tool when

continued, next page
lacks change and certain groups or nationalities are affected. You can run a mailing list to notify them of the new law and possibly generate new business.

The Florida Rules of Professional Conduct state that a lawyer shall “keep the client reasonably informed about the status of the matter.” Most software programs allow for enhanced communication with clients, including online chatting. Others allow clients to log onto a proprietary website and view the progress of their case, usually eliminating a telephone call to your office. A client can also see that he or she still owes you that birth certificate you need to file the case. This puts clients in charge of their own future, making them feel empowered and in control. Many immigration software programs also include an accounting component, or a “plug-in,” that allows you to transfer time, costs and fees to such programs as QuickBooks.

Blackberries, iPhones, Droids and other PDAs and cell phones are available to keep you in contact with the office and with your clients. Accessing your calendar, your contacts, and even your client’s information via the web is now possible without ever going into the office or turning on a computer.

Finally, The Florida Bar offers a Law Office Management Advisory Service (LOMAS) to help Florida lawyers with all aspects of running a law office—from trust accounting to avoiding conflicts to integrating technology into day-to-day practice. See The Florida Bar’s website for more information.

Competence and CLE

Another common complaint is that lawyers are not competent at their jobs. The biggest issue I see with immigration attorneys who get into trouble with the local bar is usually a lack of proficiency in the law. They are neither negligent nor dishonest; they are just in over their heads. Organizations such as the American Immigration Lawyers Association (AILA) offer a literal toolbox of information. Anyone who attempts to practice immigration law should become a member of AILA. AILA offers several CLE webinars a month and sponsors at least five major seminars around the U.S. and abroad annually.

In addition, local AILA chapters have “mentor” programs, where new members who need guidance on a particular case can call upon more experienced attorneys to help guide them through the “mine field” of that particular case.

Engagement Agreements

My engagement contract was created from trial and experience in the practice of immigration law for twenty years. Some state bars require written retainer agreements, while others—such as Florida—do not. It is good practice to spell out in writing the terms of the attorney-client relationship at inception, making sure both parties sign the contract.

Clearly delineate what you are and are not going to do. This will set the client’s expectations correctly and, in the practice of immigration law, it is the client’s expectations that can and will cause you problems in the future. If there is no proof of what representations you made to your client at the time of hiring, and if the case is denied (not by any fault of your own, hopefully), you will not be in a good position to deal with an upset client.

If the clients were led to expect a different result, they will talk about you to others or, worse, file a bar grievance or lawsuit. An engagement agreement confirming that “no representations as to success of the E-2 investor visa were made to the client by the attorney” will go a long way in your defense—assuming the foreign national actually did qualify for the visa.

Dual Representation

Immigration attorneys live with dual representations daily. In other areas of law, representing both parties to a case is a recipe for disaster, if not strictly prohibited by law and ethics. Immigration attorneys represent both the husband and wife in a marriage adjustment, and both the employer and employee in employment-based cases. What do you do when the employer tells you that he does not know if his company has the income to support a labor certification (PERM) application but asks you not to tell the alien employee because the employer needs that particular skill and does not want the employee to quit?

In all likelihood, the PERM application will not be certified, and the alien might well be placed in removal proceedings. It does not necessarily mean you must withdraw as the attorney, but you need to address the concern and resolve it. A potential conflict is not a conflict. If a true conflict arises, you must obtain written consent where both parties knowingly waive the lawyer’s duty of full confidentiality and loyalty. There are instances under the Florida Rules of Professional Conduct, however, where the lawyer must withdraw.

The best method is to explain in the written and executed retainer agreement how potential and actual conflicts will be handled. The method I use is to have the clients waive the right to full confidentiality and loyalty up front, so that both parties know at the outset of the representation that there will be no secrets. It has served me well over the past twenty years.

Document and Presentation Fraud

Immigration attorneys are presented with documents, both legal and financial, from all over the world. While we cannot profess to understand all laws and accounting standards, we find ourselves making judgments on documents every day. It is our duty to present the truth and refuse to participate in fraud to a tribunal. Under the Florida Rules of Professional Conduct, immigration judges, USCIS examiners, and immigration service centers appear to fit the definition of tribunal. Under this rule, lawyers are responsible not only for their own representations,
but those of their clients as well.14

If the attorney becomes aware of fraud, it may not be sufficient to withdraw. Under the Florida Rules of Professional Conduct 4-3.3(a)(4), the lawyer may be required to disclose the fraud.15 Florida case law also states that transactions constituting fraud or involving false claims are not protected by the attorney-client privilege.16

Further, the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRAIRA”) created civil penalties for false application or fraud.17 Penalties for violations range from $250-$2,000 per document for a first offense and from $2,000 to $5,000 for subsequent offenses. IIRAIRA also added a provision defining “falsely make,” which now includes failure to state a fact, in an application or document, “which is material to the purpose for which it was submitted.”18

“Documents” include submission letters prepared by the attorney and forms completed by the attorney. Under this provision of IIRAIRA, penalties include a fine and imprisonment. One should reread Immigration and Nationality Act § 274C19 if there is any doubt as to the far-reaching effects of this statute.

Return Telephone Calls and E-Mails

Open and honest communication can go a long way toward alleviating potential bar complaints and lawsuits. Honesty is always appreciated, even if it is bad news. I make it a habit of initiating telephone calls to clients (either personally or via a secretary) even if there is no news on the case.

You would not believe the response when you call a client for no other reason than to say “hello” and to see if he or she has any questions regarding the case. I always take the opportunity to ask for a referral, which generally leads to new business. I also make the call personally when a case goes bad. If an RFE comes in or a case is denied, I do not hide behind an employee. I took the case; I own the responsibility for it. Attorneys who openly and effectively communicate with their clients are the ones who prosper and keep their license.

Conclusion

While the study of ethics can become a never-ending source of discussion, in the end you are the one who must make the daily decisions to do the right thing. Read your local bar ethics rules. Go to the AILA website, where you can find a plethora of articles on ethics that can assist you with your decision making. And go with your gut. If it just does not seem right, do not do it.

Mark Weiner is a Florida Bar Board Certified Attorney in Immigration & Nationality Law and is the Past President of the American Immigration Lawyers Association CFC. He is currently serving his second term on The Florida Bar Ethics Committee.

Endnotes:

1 679 So. 2d 744 (Fla. 1996).
2 Id. at 744-45.
3 See R. Reg. Fla. Bar 4-1-1.
4 See R. Reg. Fla. Bar 4-1.4(b).
5 See R. Reg. Fla. Bar 4-1.5(a).
6 679 So. 2d at 745. The lawyer was given a ninety-day suspension, one year of probation and was required to make restitution to the clients. Id. at 746-47.
7 See R. Reg. Fla. Bar 4-3.1 and Comment for requirements concerning meritorious claims and contentions (“What is required of lawyers . . . is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification, or reversal of existing law.”).
8 For more proof of how damaging this problem can be to a lawyer's relationship with a client, see Model Rules of Prof'l Conduct R. 1.3 cmt. [3] (“Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in a lawyer's trustworthiness.”).
10 See R. Reg. Fla. Bar 4-1.4 cmt. (“A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation.”).
11 See R. Reg. Fla. Bar 4-1.7.
12 If the lawyer has already undertaken representation, Rule 4-1.7(b) of the Rules Regulating the Florida Bar states that the lawyer must withdraw from a case where there is a conflict of interest unless the following criteria are met: the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; the representation is not prohibited by law; the representation does not involve the assertion of a position adverse to another client when the lawyer represents both clients in the same proceeding before a tribunal; and each affected client gives informed consent, confirmed in writing or clearly stated on the record at a hearing.
14 “If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures including, if necessary, disclosure to the tribunal.” R. Reg. Fla. Bar 4-3.3(a)(4).
15 See R. Reg. Fla. Bar 4-3.3 cmt. (“The rule generally recognized is that, if necessary to rectify the situation, an advocate must disclose the existence of the client's deception to the court.”).
16 See, e.g., Kneale v. Williams, 30 So. 2d 284 (Fla. 1947).
18 Id. § 212(b) (codified at 8 U.S.C. § 1324c(f)).
Border Crossing Made Easier and Faster!

By Giselle Carson, Jacksonville

Are you interested in faster, simpler and more secure international travel for yourself and your clients? Then I invite you to keep reading. I had the opportunity to experience firsthand the time savings and convenience of some of the programs I describe below. I am hopeful that you will find them useful and interesting.

Low-Risk Travelers
Save Time With Trusted Traveler Programs

U.S. Customs and Border Protection (CBP) operates several international Trusted Traveler Programs such as Global Entry, FAST, NEXUS and SENTRI. These programs provide expedited screening and admission into the U.S. at designated points of entry for pre-approved, low-risk travelers and can save travelers a significant amount of time and stress.

While attending the 2011 American Immigration Lawyers Association (AILA) annual conference in San Diego, I observed the efficiency and advantages of SENTRI and Ready Lane (not a Trusted Traveler Program but with similar advantages) at Otay Mesa, a U.S.-Mexican port of entry.

Although the Trusted Traveler Programs are intended for frequent international business travelers, there is no minimum number of trips necessary to qualify. To apply, travelers must complete an online application at the Global Online Enrollment System (GOES) website (www.globalenroll.gov), pay a non-refundable application fee, pass a background check and undergo an interview with a CBP officer at an enrollment center. Most enrollment centers are located at a border or major airport. A separate application must be completed on behalf of or by each applicant.

The Trusted Traveler Programs are not for all travelers. They are designed for “low-risk” travelers. Applicants voluntarily undergo an extensive background check against criminal, law enforcement, customs, immigration, agriculture and terrorist indices. Several factors can lead to a denial of an application: having a criminal conviction (including misdemeanors) in any country; having been found to be in violation of U.S. customs, immigration or agricultural laws; or providing false or incomplete information on the application.

Applicants with any derogatory background should not apply as they can also jeopardize their current status and/or any other application for benefits that they might have. In the event that an applicant is denied or revoked from the program, the person is provided a document with a reason for the denial and can challenge the decision.

Global Entry and a Ninety-Second Admission After International Travel

Speedy passport verification and customs declaration are key benefits of this program. Upon arrival in the U.S. or other participating foreign partner countries, approved travelers can go directly to a Global Entry kiosk to process their admission. Program users have said, “Once you experience how the program works, you will never want to get in the entry line again.”

The traveler activates the kiosk by inserting a passport or U.S. permanent resident card into the document reader. Once the passport or card is read, fingerprints are verified and a photograph is taken. After completing the customs declaration form on the touch-screen, a transaction receipt is issued. The receipt is presented to the CBP officer as the traveler exits the inspection area. All in ninety seconds! This process allows a Global Entry traveler to bypass long lines and wait times (which can be a half hour or more, particularly if several international flights arrive at the same time) for CBP inspection.

Kiosks are currently available at twenty U.S. international airports, including Washington (IAD), Houston, New York (JFK), Los Angeles, San Francisco, Atlanta, Miami, Ft. Lauderdale, and Orlando. The program is open primarily to U.S. citizens, U.S. lawful permanent residents, and citizens of certain partner program countries such as the Netherlands and Mexico.

Global Entry is not specifically designed to facilitate travel to and from Mexico or Canada. SENTRI and NEXUS, discussed below, are designed to facilitate travel to and from those countries. As of 12 July 2011, however, Global Entry members are able to use SENTRI and NEXUS lanes to enter the U.S.

The Global Entry program has received so much praise, American Express has even offered to pay the application fee as a benefit to its Platinum cardholders. Global Entry cards are valid for five years. For more information on the program, visit www.globalenroll.gov.

Crossing the Canadian or Mexican Border Often?
Make it Easier by Using the NEXUS and SENTRI Programs

The NEXUS and SENTRI travel programs are designed to minimize the inconvenience of traveling between U.S., Mexican and Canadian borders for pre-screened, pre-qualified travelers.

NEXUS is a joint U.S.-Canadian program that provides expedited processing for pre-approved travelers by U.S. and Canadian officials at dedicated processing lanes at northern ports of entry and at NEXUS kiosks at certain airports and marine reporting locations.

The program is open to citizens or permanent residents of the U.S. or Canada residing in either or both countries such as the Netherlands and Mexico.

Although the Trusted Traveler Programs are intended for frequent international business travelers, there is no minimum number of trips necessary to qualify. To apply, travelers must complete an online application at the Global Online Enrollment System (GOES) website (www.globalenroll.gov), pay a non-refundable application fee, pass a background check and undergo an interview with a CBP officer at an enrollment center. Most enrollment centers are located at a border or major airport. A separate application must be completed on behalf of or by each applicant.

The Trusted Traveler Programs are not for all travelers. They are designed for “low-risk” travelers. Applicants voluntarily undergo an extensive background check against criminal, law enforcement, customs, immigration, agriculture and terrorist indices. Several factors can lead to a denial of an application: having a criminal conviction (including misdemeanors) in any country; having been found to be in violation of U.S. customs, immigration or agricultural laws; or providing false or incomplete information on the application.

Applicants with any derogatory background should not apply as they can also jeopardize their current status and/or any other application for benefits that they might have. In the event that an applicant is denied or revoked from the program, the person is provided a document with a reason for the denial and can challenge the decision.

Global Entry and a Ninety-Second Admission After International Travel

Speedy passport verification and customs declaration are key benefits of this program. Upon arrival in the U.S. or other participating foreign partner countries, approved travelers can go directly to a Global Entry kiosk to process their admission. Program users have said, “Once you experience how the program works, you will never want to get in the entry line again.”

The traveler activates the kiosk by inserting a passport or U.S. permanent resident card into the document reader. Once the passport or card is read, fingerprints are verified and a photograph is taken. After completing the customs declaration form on the touch-screen, a transaction receipt is issued. The receipt is presented to the CBP officer as the traveler exits the inspection area. All in ninety seconds! This process allows a Global Entry traveler to bypass long lines and wait times (which can be a half hour or more, particularly if several international flights arrive at the same time) for CBP inspection.

Kiosks are currently available at twenty U.S. international airports, including Washington (IAD), Houston, New York (JFK), Los Angeles, San Francisco, Atlanta, Miami, Ft. Lauderdale, and Orlando. The program is open primarily to U.S. citizens, U.S. lawful permanent residents, and citizens of certain partner program countries such as the Netherlands and Mexico.

Global Entry is not specifically designed to facilitate travel to and from Mexico or Canada. SENTRI and NEXUS, discussed below, are designed to facilitate travel to and from those countries. As of 12 July 2011, however, Global Entry members are able to use SENTRI and NEXUS lanes to enter the U.S.

The Global Entry program has received so much praise, American Express has even offered to pay the application fee as a benefit to its Platinum cardholders. Global Entry cards are valid for five years. For more information on the program, visit www.globalenroll.gov.
countries for the past three years and who pass a background check. U.S. and Canadian authorities both must approve each application.

SENTRI (tip to remember: Southern) is a U.S.-Mexican program that allows for expedited admission of pre-approved travelers on the southern border. They can use dedicated commuter lanes and port-of-entry lines. The program was first implemented at the Otay Mesa, California, port of entry where I had the opportunity to observe how SENTRI cardholders were rapidly admitted to the U.S., while travelers without SENTRI waited in the heat in long lines to process their admission to the U.S. There are currently about ten SENTRI-dedicated commuter lanes located in various ports of entry in Arizona, Texas and California.

Upon approval of the application, the traveler receives a Radio Frequency Identification Document (RFID) that will identify his or her record and status in the CBP database upon arrival at the U.S. port of entry. A decal is also issued for the traveler’s registered vehicle or motorcycle. NEXUS members can use a SENTRI lane to enter the U.S. from Mexico provided they are in a SENTRI-approved vehicle, and vice-versa.

NEXUS and SENTRI participants in good standing can use the Global Entry kiosks mentioned above at no additional cost. Before using these kiosks, however, NEXUS and SENTRI holders need to request access through GOES and wait for CBP approval. For additional information on these programs, visit: www.cbp.gov.

OneStop and Express Connections Innovations

CBP is also partnering with the private sector in two initiatives to facilitate the processing of international travelers. These two programs are “OneStop” and “Express Connections.”

The “OneStop” program at Houston’s Intercontinental Airport offers a designated primary inspection lane for international travelers arriving without checked baggage. Under this program, approximately 800 passengers per day are allowed to bypass the baggage carousel and exit the federal inspection service area more quickly.

Through “Express Connections,” international travelers who have closely scheduled flight connections during the hours of 10 a.m. to 7 p.m. can receive assistance in making their connections. A contract employee directs the identified travelers to a special lane for expedited CBP processing. Express Connection is currently in place at limited ports of entry but is expected to be expanded in the future. Imagine not having to worry about making your tight connection or spending the night in an airport!

Ready Lanes Accept a Mix of Radio Frequency Identification Documents

Ready Lanes, dedicated lanes for motor vehicle traffic, accept only RFID (Radio Frequency Identification-enabled) cards. The Otay Mesa Ready Lane opened in May 2011. While most drivers and passengers wait in long lines to cross the border, those with RFID-enabled decals typically have a lane that is readily available for border crossing with no wait.

Ready Lanes operate seven days a week, but different sites have different hours depending on the local travel pattern. To use this dedicated lane, all adult travelers (sixteen years and older) in a vehicle must present a WHTI-compliant, RFID-enabled card approved by the Department of Homeland Security, which includes: the U.S. Passport Card; the Enhanced Driver’s License (EDL); the Enhanced Tribal Card (ETC); Trusted Traveler Cards (NEXUS, SENTRI and FAST cards); the new Enhanced Permanent Resident Card (PRC); or new Border Crossing Card (BCC).

An advantage of the Ready Lane over the SENTRI lane is that it can be used by a group of travelers in one vehicle with any mix of RFID-enabled travel documents. A Ready Lane is not a Trusted Traveler lane, however. The accepted RFID-enabled documents verify only citizenship and identity, not necessarily a low-risk traveler. For more information about Ready Lanes, visit: www.cbp.gov.

ESTA—Travel Without a Visa for Some

The Visa Waiver Program (VWP) allows eligible citizens or nationals from thirty-six designated program countries to travel to the United States for tourism or business for stays up to ninety days or less without first obtaining a visa. In March 2010, Greece was the latest country to join the VWP. The DHS is engaged in ongoing membership discussions with select countries for membership.

Citizens or nationals of Visa Waiver countries must complete a mandatory online application under the Electronic System for Travel Authorization (ESTA) to obtain electronic approval or clearance prior to boarding an air carrier or a sea carrier to the U.S. The clearance is valid for multiple trips for two years or until the expiration of the applicant’s passport.

The CBP receives approximately 40,000 ESTA applications per day. Most applications are approved within seconds. Others go to a “pending” status for review by an ESTA representative. Those on the pending queue typically receive an answer in less than seventy-two hours. If travel is denied, the applicant must apply for a non-immigrant visa at a U.S. embassy or consulate.

The CBP has discretionary authority to waive travelers’ ESTA registration in cases of emergent circumstances such as civil unrest and natural disasters. A waiver of the ESTA registration is handled on a case-by-case basis at the port of entry. Contacting the port prior to the arrival is highly recommended.

The implementation of ESTA has eliminated the requirement that ETA-approved VWP travelers complete a Form I-94W prior to their admission to the U.S. These travelers also no longer receive a green I-94W departure card. Instead, travelers will receive a passport stamp, in lieu of the I-94W, that confirms duration of stay. The CBP is looking into ways to automate the entry process, including...
eliminating the widely used Form I-94 in the near future. The use of this electronic database is streamlining
the CBP’s collection of information and increasing efficiency; however, it also contributes to a decrease in application clarity and little response for aggrieved applicants.

VWP Expansion—Which Country is Next?

We are likely to see an increase in the number of Visa Waiver Program countries, which will help U.S. commerce, revenue, travel and security. The expansion and modification of the VWP is one of the proposals under the Secure Traveler and Counterterrorism Partnership Act of 2011. The proposed Act amends country qualifications for program participation. It replaces visa refusal rates with visa overstay rates to determine eligibility for participation and sets a maximum 3% visa overstay rate during the previous fiscal year for program countries. This change could make a number of interested countries VWP-eligible. It is likely that Poland, Brazil or Argentina might be the next VW country. Stay tuned for which country will be next to qualify.

ESTA Applicants, Be Aware

The AILA and other stakeholders have been working with the CBP to improve and provide clarification on some of the ESTA application questions. For example, many business visitor applicants are confused by questions such as “Are you seeking to work in the U.S.?” If the traveler is coming for a business meeting or conference that might lead to a job interview, or coming for after-sale service, the answer should be “No,” but many answer “Yes.” Foreign nationals and their attorneys should be very careful in responding to these ambiguous questions, as an incorrect answer could lead to an application denial. In some cases, an applicant should consider obtaining a B-1/B-2 visa instead of entering the U.S. under the Visa Waiver Program.

Another warning for an ESTA applicant concerns the CBP’s treatment of 221(g) notices. Applicants are required to disclose visa denials in question “F” of the application, which asks, “Have you ever been denied a U.S. visa or entry into the U.S. or had a U.S. visa cancelled?” The applicant can answer “Yes,” or “No” and, if “Yes,” “when and where.” Visa applicants, at times, receive a document from the post with a “221(g)” notation indicating that their case is suspended pending administrative processing or receipt of supplemental information or documents. The CBP considers all 221(g) actions on visa applications as visa denials, even if the visa was subsequently issued.

Applicants have been refused entry and issued expedited removal orders on the basis of misrepresentation for their failure to report a visa denial in their ESTA application when they received a 221(g) notice. Neither the ESTA application nor the posts make clear to applicants that a 221(g) notice is a denial. The CBP has advised that if a traveler has ever applied for a U.S. visa and did not receive it for any reason, then he or she should answer “yes” to question F. I recommend that applicants elaborate, as much possible in the “where” box, on the facts relating to the 221(g) issuance. For example: “Peru – 221(g) Embassy requested additional documents.”

The CBP has advised that it manually reviews, within seventy-two hours, all ESTA applications in which the applicant marked “yes” to question F. The CBP has also indicated that a “yes” answer will not result in an automatic denial of the ESTA application. In practice, however, 221(g) notices based on administrative processing are resulting in
Travelers may experience frustrating and unpleasant repeated entry or exit denials or referrals to secondary inspections because of incorrect information on the government’s databases as a result of mistaken identity or other issues. To try to resolve these issues the DHS, in conjunction with the Department of State and the Transportation Security Administration (TSA), has implemented a Traveler Redress Inquiry Program (DHS TRIP) for travelers who have inquiries or seek resolution of entry difficulties at airports, train stations or other ports of entry or border crossings.

According to the Department of Homeland Security, DHS TRIP can help resolve some of the following traveler issues:

- Inability to print a boarding pass from an airline ticketing kiosk or from the internet;
- Denial or delayed boarding;
- Incomplete or inaccurate personal information;
- ESTA denials; and
- Amendment of a traveler’s record as a result of not submitting the I-94 upon departure.

Travelers can file an electronic or paper inquiry requesting an investigation of their case. Upon filing, the person receives a redress control number that can be used for case status updates and/or to book airline tickets or cross the border after the complaint is resolved. The applicant should also receive a letter describing why he or she is experiencing travel problems.

If no response is received, the traveler or the traveler’s attorney can file an inquiry. An inquiry typically results in the issuance of one of three responses: “in process”; “pending paperwork” (when the traveler needs to submit additional information); or “closed” (when the case has been resolved). The average response time for a TRIP redress is sixty-two days. In practice, the program has not been very reliable. At times, the traveler receives no response, but the person’s admission problems disappear.

DHS TRIP is something to consider as travelers have very few options by which to resolve very frustrating travel problems. As of June 2010, the DHS had adjudicated and closed approximately 74,000 cases since the program’s inception in 2007. In 2010, the DHS Office of the Inspector General (OIG) recognized the problems and limitations of DHS TRIP and issued recommendations for improvements. We are hopeful that the recommendations will be implemented. For additional information on this program, please visit www.dhs.gov/trip.

**B-1 in Lieu of H-1B Could Be Ending**

There was a significant amount of discussion among several AILA panels about the possible ending or significant restriction to the use of the B-1n lieu of H-1B visa. The B-1 in lieu of H-1B has been a convenient visa choice for foreign nationals coming to perform H-1B-caliber work for a short period of time while being paid by and benefiting a foreign employer. There have been reports and allegations of misuse and fraud by some employers, however, who appear to use this visa category to circumvent the H-1B cap and control wage requirements. If your clients are users of this visa category, follow this development as more is likely to occur.

**Enhancing Competitiveness and the Travel Experience**

America has been losing out on millions of international travelers. The uncertainties, expenses and delays that characterize America’s visa and entry process have been actively discouraging international travelers from visiting our country.

The DHS and the CBP are working to identify ways to streamline the process and programs to make U.S. entry and exit more efficient, secure and pleasant. They envision the development of reciprocal Global Entry and Trusted Traveler programs with other countries, which should increase travel and tourism to the U.S.

Additionally, discussions are underway with TSA to pilot a Trusted Traveler program this fall at select airports (likely Atlanta, Miami, Detroit and Dallas) and airlines (likely Delta and American Airlines). The program will be open to select frequent business flyers enrolled in CBP’s Trusted Traveler programs. These travelers will have a quicker trip through security checkpoints, including, maybe, keeping their shoes on! For now, most of us should continue to be ready to take out our laptops, remove our shoes and jackets, and remember to throw out our bottle of water. But, the future should bring much improved travel experiences—particularly for low-risk travelers who can pack light!

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PERSONAL JURISDICTION
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in a particular state where its product causes an injury.

As the first Supreme Court decision to address personal jurisdiction in more than two decades, Goodyear and J. McIntyre bring needed clarity to an area of jurisprudence that impacts literally every lawsuit filed in the United States. Goodyear and J. McIntyre will thus serve as the benchmarks for determining when and where a defendant may be sued. While leaving unanswered several important questions about personal jurisdiction—indeed, the Court declined to address the internet’s impact on personal jurisdiction and it also left open questions about agency and alter ego theories for imputing contacts to establish personal jurisdiction—Goodyear and J. McIntyre add muscle to personal jurisdiction tests and make it more difficult for plaintiffs to hale foreign defendants into court in the United States. At the same time, the Court’s dual rulings highlight some of the strategies that plaintiffs will likely employ in order to expand the scope of foreign defendants who can be sued.

Specific and General Jurisdiction

Goodyear and J. McIntyre both addressed the bedrock question of when a state can exercise jurisdiction over a nonresident defendant. Under established Supreme Court precedent, a state may adjudicate claims involving a nonresident defendant only if the defendant has “minimum contacts” with the forum so that the exercise of jurisdiction does not offend traditional notions of fair play and substantial justice. This threshold Due Process requirement eventually gave rise to the two familiar tests for specific and general personal jurisdiction—the doctrines at issue in Goodyear and J. McIntyre.

Specific jurisdiction applies when a defendant’s activities in the forum state are related to the claims asserted in the complaint—for example, a nonresident defendant may be sued in California for design defects in a product that it sold in California and that injures the plaintiff in California. In order to establish the minimum contacts needed to sustain specific jurisdiction, the defendant must purposefully avail itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws. Such activities can include sending products to a state for purchase while tailoring the product for sale in, and directing advertising to, that forum.

General jurisdiction, in contrast, applies when the defendant’s contacts with the forum are unrelated to the plaintiff’s claims but are nevertheless sufficiently continuous and systematic to justify the exercise of jurisdiction. Because it permits suit against the defendant on any matter, the standard for general jurisdiction is more rigorous than the test for special jurisdiction. Thus, general jurisdiction exists only when the defendant has “continuous and systematic general business contacts” with the forum. These general business contacts must be so extensive that they approximate physical presence and can include some combination of the following: maintaining a place of business in the state; holding a license to do business in the state; making business trips to the state; and making business purchases in the state.

Goodyear: Specific Jurisdiction Standards Do Not Apply to a General Jurisdiction Analysis

In Goodyear, the Supreme Court reaffirmed the stringent standard for general personal jurisdiction and rejected the lower court’s decision that watered down those standards. The defendants in Goodyear were three foreign subsidiaries of Goodyear that were sued in North Carolina by the administrators of the estates of two North Carolina citizens who had died in a bus accident in France. The plaintiffs alleged that the accident resulted from various defects in Goodyear tires; the tires, however, were designed and manufactured by foreign defendants lacking a North Carolina presence. Nevertheless, the North Carolina courts found general personal jurisdiction because the defendants had engaged in certain acts by which they purposefully availed themselves of the privilege of conducting business in the forum state: the subject tires included information written in English, including markings showing that the tires could be sold in the United States; some tires manufactured by the defendants were shipped to the United States for sale, and the defendants made no attempt to keep the tires from reaching North Carolina; and the defendants were subsidiaries of Goodyear U.S.A., and thus had abundant ties to the United States.

The Supreme Court reversed. Rejecting the approach of the North Carolina courts, the Supreme Court made clear that the high barrier of continuous and systematic contacts with the forum state remains the touchstone for general personal jurisdiction: “A court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so ‘continuous and systematic’ as to render them essentially at home in the forum State.” The Court stressed that the lower court’s “stream-of-commerce analysis elided the essential difference between case-specific and all-purpose (general) jurisdiction.” While the “flow” of a manufacturer’s products into a forum “may bolster an affiliation germane to specific jurisdiction,” such ties “do not warrant a determination that . . . the forum has general jurisdiction over a defendant.” Because the foreign defendants were not in any sense “at home in North Carolina,” the court concluded that their “attenuated connections to the State fall short of the ‘continuous and systematic general business contacts’ necessary to empower North Carolina to entertain suit against them on claims unrelated to anything that connects them to the State.”

See “Personal Jurisdiction,” next page
J. McIntyre: Specific Jurisdiction Requires State-Specific Conduct

As in Goodyear, the Court in J. McIntyre also rejected a lower court standard that would have significantly expanded personal jurisdiction. Writing in two separate opinions, six justices invalidated the New Jersey Supreme Court’s finding that New Jersey had specific personal jurisdiction over the English manufacturer of a shearing machine for an injury that occurred in New Jersey, where the manufacturer targeted the U.S. market only generally and otherwise lacked minimum contacts with New Jersey. The defendant, J. McIntyre Machinery, sold the machine to McIntyre Machinery of America, Inc. (“MMA”), an unaffiliated distributor based in Ohio, which subsequently sold the machine to a New Jersey company where it was in use at the time of the accident.16 According to the New Jersey Supreme Court, McIntyre was subject to specific personal jurisdiction because it knew or reasonably should have known that the machine could be sold by MMA anywhere in the United States, including in New Jersey.17 The New Jersey Supreme Court adopted this view even though there was no evidence that the defendant, as opposed to MMA, had any contacts at all with New Jersey and even though there was no showing that MMA acted as McIntyre’s agent. Notably, the New Jersey Supreme Court emphasized that this broader approach to specific personal jurisdiction was more in keeping with recent changes in transnational commerce and was necessary to maintain a forum for in-state plaintiffs who are injured by out-of-state defendants.18

Again, the U.S. Supreme Court disagreed. Stressing that specific personal jurisdiction requires purposeful availment directed at the forum state, Justice Kennedy reverted to established principles. Personal jurisdiction “requires a forum-by-forum, or sovereign-by-sovereign, analysis,” he explained.19 Thus, a defendant might be “subject to the jurisdiction of the courts of the United States but not of any particular State.”20 That was true of J. McIntyre: The facts “may reveal an intent to serve the U.S. market, but they do not show that J. McIntyre purposefully availed itself of the New Jersey market.”21 In other words, “it is the defendant’s actions, not his expectations, that empowers a State’s court to subject him to judgment.”22

By emphasizing that “the defendant’s actions” rather than “his expectations” determine specific jurisdiction, Justice Kennedy took a firm stand against the so-called stream of commerce theory of personal jurisdiction. In Asahi Metal Industry Co. v. Superior Court, a four-justice plurality, led by Justice O’Connor, wrote that “[t]he placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State” and, thus, cannot support personal jurisdiction.23

But in a concurring opinion in Asahi, Justice Brennan wrote for four justices in endorsing jurisdiction based on nothing more than the stream of commerce theory combined with the defendant’s awareness: “As long as a participant in this process [the stream of commerce] is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise.”24 The Asahi Court’s dueling opinions sowed confusion in the lower courts—some followed Justice Brennan and held that personal jurisdiction could rest on the stream of commerce and nothing more, while others insisted that Justice O’Connor’s opinion controlled and that the stream of commerce theory supported personal jurisdiction only if the defendant engaged in some additional conduct to satisfy the “purposeful availment” requirement.25 Justice Kennedy weighed in firmly on Justice O’Connor’s side: “Justice Brennan’s concurrence, advocating a rule based on general notions of fairness and foreseeability, is inconsistent with the premises of lawful judicial power.”26 Thus, as far as the Kennedy plurality was concerned, a defendant who simply places a product into the stream of commerce is not subject to personal jurisdiction wherever the product happens to cause injury, even if “the defendant might have predicted that its goods will reach the forum State.”27

In a concurrence joined by Justice Alito, Justice Breyer agreed with the plurality’s holding that the New Jersey courts could not exercise specific personal jurisdiction over J. McIntyre. But Justice Breyer wrote narrowly that the case’s outcome was “determined by [the Court’s] precedents.”28 Noting no “‘regular . . . flow’ or ‘regular course’ of sales in New Jersey; and . . . no ‘something more,’ such as special state-related design, advertising, advice, marketing, or anything else,” Justice Breyer found no facts to support specific jurisdiction.29 Further, he questioned the plu-
rality’s seemingly “strict rules that limit jurisdiction where a defendant does not ‘inten[d] to submit to the power of a sovereign’ and cannot ‘be said to have targeted the forum,’ and how those rules apply to modern, especially internet-driven, commerce.”

But Justice Breyer also questioned, in the context of this case, the lower court’s broad conclusion that the defendant knew or should have known that its products were distributed through a nationwide system that might lead to sales in New Jersey. Ultimately, he suggested that the Court may need to take up in another case how the specific jurisdiction test should apply to “contemporary commercial circumstances.”

Conclusion: Minimum Contacts with Muscle

For foreign companies, Goodyear and J. McIntyre are good news. They not only mark the Supreme Court’s return to the personal jurisdiction arena, but they do so with an added punch that clarifies important Due Process limits on jurisdiction. Indeed, Goodyear and J. McIntyre can be described as adopting a “minimum contacts with muscle” standard. By harkening back to Perkins and Helicopteros as the baseline for general jurisdiction, the Goodyear Court clarified that “continuous and systematic” contacts must approximate the types of contacts a company has where it is “at home.” That is undoubtedly a rigorous standard. Moreover, for a foreign manufacturer selling through a distributor or subsidiary, Goodyear makes general jurisdiction extremely difficult to establish, even if the manufacturer knows that the stream of commerce will carry its goods to a particular state. In fact, relying on Goodyear, the Eighth Circuit recently turned back a plaintiff’s attempt to establish general jurisdiction over a German company in Missouri because it heads a distribution network that sends products into Missouri, where the plaintiff’s claims did not arise out of the defendant’s activities in the state.

But foreign companies are not entirely out of the woods under Goodyear. A plaintiff who seeks to sue a foreign company that lacks “continuous and systematic” contacts with a state might still bring the company into the state’s court by imputing to it the in-state activities of a subsidiary or corporate affiliate. Two theories could come into play. First, under the “alter ego” test, a court may exercise personal jurisdiction over a parent company based on its subsidiary’s activities if there is such unity of interest and ownership that the separate personalities of the two entities no longer exist and that failure to disregard their separate identities would result in fraud or injustice. The second relevant test is the “agency” test, where an in-state subsidiary or affiliate acting as the agent for a foreign company may subject the company to jurisdiction in the state. These theories are strong medicine. They both can extend personal jurisdiction to bring into a state’s court a foreign company not otherwise at home in the state. Indeed, courts easily can apply these tests in ways that arguably run counter to Goodyear’s express holding.

J. McIntyre also marks a positive development for foreign companies. Six justices agree that foreign companies can sell products in the United States through distributors without making themselves subject to personal jurisdiction. More importantly, J. McIntyre likely signals the beginning of the end for the stream of commerce theory, even if the Court could not produce a majority opinion to write the theory off for good. Justice Kennedy’s plurality made clear that the stream of commerce, without “more” as described by Justice Brennan, does not support personal jurisdiction. While Justices Breyer and Alito did not fully endorse Justice Kennedy’s opinion, they unequivocally rejected the view that “a producer is subject to jurisdiction for a products-liability action so long as it ‘knows or reasonably should know that its products are distributed through a nationwide system that might lead to those products being sold in any of the fifty states.” That sounds an awful lot like a rejection of Justice Brennan’s formulation of the stream of commerce test from Asahi. Nevertheless, the fact that Justices Breyer and Alito did not join the plurality may be viewed by some lower courts as cover to continue applying the stream of commerce test, even in cases where the defendant has not taken additional steps to establish contacts with the forum. For the time being, however, it will be the job of lower courts to decide whether the stream of commerce test is viable at all after J. McIntyre.

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Endnotes
3. See International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (“[D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.”) (internal quotation marks omitted)).
4. See Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408, 414 n.8 (1984) (“It has been said that when a State exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant’s...” See “Personal Jurisdiction” next page.
contacts with the forum, the State is exercising ‘general jurisdiction’ over the defendant.” (citing Von Mehren & Trautman, Jurisdiction to Adjudicate: A Suggested Analysis, 79 Harv. L. Rev. 1121, 1144-64 (1966)).

5 See Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985).

6 In Helicopteros Nacionales, 466 U.S. at 415 n.9 (“When a State exercises personal jurisdiction over a defendant in a suit not arising out of or related to the defendant’s contacts with the forum, the State has been said to be exercising ‘general jurisdiction’ over the defendant.”) (citing Brilmayer, How Contacts Count: Due Process Limitations on State Court Jurisdiction, 1980 S. Ct. Rev. 77, 80-81; Von Mehren & Trautman, 79 Harv. L. Rev. at 1136-44; Calder v. Jones, 465 U.S. 783, 786 (1984)).


8 In Helicopteros Nacionales, 466 U.S. at 418, the Supreme Court found general jurisdiction lacking where the defendant’s contacts with the forum, Texas, “consisted of sending its chief executive officer to Houston for a contract-negotiation session; accepting into its New York bank account checks drawn on a Houston bank; purchasing helicopters, equipment, and training services from Bell Helicopter for substantial sums; and sending personnel to Bell’s facilities in Fort Worth for training.” This stood in contrast to the contacts at issue in Perkins, 342 U.S. at 438, which were sufficient to establish jurisdiction, where the president and general manager of a foreign mining company maintained an office in Ohio from which he conducted activities on behalf of the company. This included keeping company files, holding directors’ meetings, carrying on business-related correspondence, and supervising policies.

9 Goodyear, 131 S. Ct. at 2851-52.

10 Id. at 2852.

11 Id. at 2852-53.

12 Id. at 2851.

13 Id. at 2855.

14 Id.

15 Goodyear, 131 S. Ct. at 2857.

16 J. McIntyre, 131 S. Ct. at 2786.

17 Id.

18 Id.

19 Id. at 2789.

20 Id.

21 Id.

22 J. McIntyre, 131 S. Ct. at 2789.


24 Id. at 117 (Brennan, J., concurring in part and concurring in judgment).

25 J. McIntyre, 131 S. Ct. at 2789 (“Since Asahi was decided, the courts have sought to reconcile the competing opinions.”).

26 Id. Recognizing that Justice O’Connor’s Asahi opinion “does not by itself resolve many difficult questions of jurisdiction that will arise in particular cases,” Justice Kennedy allowed that “[t]he defendant’s conduct and the economic realities of the market the defendant seeks to serve will differ across cases, and judicial exposition will, in common-law fashion, clarify the contours of that principle.” Id. at 2790.

27 Id. at 2788.

28 Id. at 2791 (Breyer, J., concurring).

29 Id. at 2792 (Breyer, J., concurring).

30 Id. at 2793 (Breyer, J., concurring).

31 Id. at 2794 (Breyer, J., concurring). Joined by Justices Sotomayor and Kagan, Justice Ginsburg wrote a dissenting opinion. She argued that the “splintered majority” had made it possible for foreign manufacturers effectively to insulate themselves from suit simply by employing independent distributors.

32 See Viasystems, Inc. v. EBM-Papst St. Georgen GMBH & Co., __ f.3d __, 2011 WL 2899147, at *5-6 (8th Cir. 2011).

33 States use different, though largely similar, formulations to define when jurisdictional veil piercing is appropriate on an alter ego theory. See, e.g., Bellairs v. Mohrmann, 716 So. 2d 320 (Fla. 2d DCA 1998).

34 Again, state standards generally apply to determine whether agency exists. See, e.g., Eise, PLC v. F.P. South & Co., Inc., 870 So. 2d 888, 891 (Fla. 5th DCA 2004).

35 In fact, plaintiffs in Goodyear raised a variant of these theories—the “single enterprise” theory—to support personal jurisdiction but waited to raise the argument in their merits brief in the Supreme Court. See Goodyear, 131 S. Ct. at 2857. Finding that plaintiffs waived the argument, the Court declined to address the theory.

36 Applying an agency theory, the Ninth Circuit recently held that a California court has personal jurisdiction over DaimlerChrysler AG, a German company, based entirely on the in-state activities of its California distributor, Mercedes-Benz USA LLC. See Baumann v. DaimlerChrysler Corp., __ f.3d __, 2011 WL 1879210 (9th Cir. 2011). DaimlerChrysler filed a petition for rehearing or rehearing en banc.

37 J. McIntyre, 131 S.Ct. at 2793 (quoting Nieasto v. McIntyre Machinery America, Ltd., 201 N.J. 48, 76-77 (2010)).

UKRAINE

In Kyiv, the second full day into our journey, we were warmly received by a young, impressive law professor in the Institute. Others soon joined. An older law professor approached me—quite face to face—in a moment’s time and introduced himself stating, “I have given you my class. You have one hour, twenty minutes.” My “diplomatic hat” straightened further. “Thank you,” I said. Fortunately, my host professor overheard and certainly knew what was planned. He immediately requested I address three areas, with the principal one being international commercial arbitration. We then proceeded down the hallway to the lecture room, carrying on a conversation while another part of my brain was seeking to organize an eighty-minute presentation.

We were introduced to a near-capacity audience of advanced law students. The elevated lecture hall in the modern building was accommodating, and my wife and I very much appreciated the students’ respectful demeanor. As we entered, they rose. They were very attentive and were generous with applause, an experience we attributed to protocol. Students and faculty in the Institute are fluent in English. My plan was to speak for approximately forty minutes, plant a “seed” or two to prompt questions, and then open the floor for discussion. I began with brief comments about studying law in the United States and then proceeded to the principal subject of international commercial arbitration. It worked! The students asked excellent questions on international arbitration, legal studies in the United States, and its jurisprudence. It seemed the
bell sounded quite soon, but they were not finished. Students lined up in the aisle to ask more questions. I was happy to accommodate.

After the lecture we were hosted by two young lawyers who had graduated from the Institute. They were coaches of a pre-moot student arbitration team, although arbitration was not yet taught there. Curriculum and the team’s strengths were discussed. The visit ended with another meeting with the host professor. There remained no doubt of the Institute’s desire to reach out to western universities, an impression reinforced by comments this year when I returned. Lecturing in universities has frequently been an enjoyable experience for me. We left Kyiv hopeful the faculty and students shared our enjoyment of the visit. Beautiful, historic Lviv was our next stop, with no intention to discuss academic matters. We were received by the city’s “number one citizen,” as I was told this year in the mayor’s office. As was often the case, we were asked how our trip was going. I mentioned our experience at the University of Kyiv and was asked whether I had previously lectured. I shared some of my experiences; in retrospect, an opening to more of them this year.

Our stay was most enjoyable, though far too short. Lviv deserves dedicated, prolonged attention, but we had planned only a few days there and then departed to the better-known, historic city of Krakow, Poland. Old Krakow is beautiful, but the thought of Ukraine remained with us. Already we thought of a possible return, due to the fine reception in Kyiv and initial acquaintance with Lviv’s history, beauty, cuisine, Italian renaissance architecture, European flair, fashion and culture.

My first stop in Krakow was the law school at historic Jagiellonian University, a short walk in the city’s old section where we stayed. The university’s origin is traced to 1364. The main law facility is a grand nineteenth century neo-Gothic building. I was received by the immediate past dean and also spoke with a professor who recently added an emphasis on international commercial arbitration. A second positive response was received with regard to collaboration with the College of Law at Florida International University; the third was in Copenhagen.

Soon after our return home, a request arrived from Lviv for my curriculum vitae. Later I received an invitation to teach and was given the discretion to select dates and conduct a course on international commercial arbitration in the Department of European Law, Faculty of International Relations, Ivan Franko National University of Lviv (named after another prominent Ukrainian cultural icon). The university is now celebrating its 350th anniversary. Two weeks of teaching and two days of free time were planned. In December 2010, I sent greetings to our former host in Kyiv indicating I would be spending time in the spring of 2011 at the University of Lviv and asked if we could possibly meet there. Within continued, next page
a day I received a rather direct request to change my schedule in order to accommodate another visit to the Institute in Kyiv. I happily honored his request, thinking it would be to give one lecture. What follows reflects some of the experiences at both universities this past spring.

While starting my preparation, I recalled a prior lecture experience. Years ago I lectured to three combined business classes at a university in the mid-western United States. The requested topics were preparing for international law and business. The night before, a third request came. Having just returned from Hungary only six months after the “fall of the curtain,” I was asked to give my impressions of the situation there. Somehow I covered all three topics in fifty minutes. My opening statement was, “If you want to go into international business or law, walk across campus and start taking history courses.” The obvious implication being, current laws and norms did not develop in a vacuum. Greater appreciation and understanding of a country are had by knowing its history as a context for current laws, mores and other matters. From that understanding, respect follows, even if one disagrees with some of its historic events. The advice served as a self-reminder. I arduously studied Ukraine’s history. The knowledge proved helpful in building relations with Ukrainian students and faculty as I prepared to leave for Ukraine.

British international law scholar Phillippe Sands has referred to Lviv as “the unexpected place in international law.” In his informative January 2011 presentation at Case Western University School of Law, he mentioned three twentieth century international law scholars with common origins in Lviv: Louis B. Sohn, born in Lviv, was a leader in the field of the law of the sea; Raphael Lemkin, who had some of his law studies in Lviv, developed a legal definition for “genocide” and is referred to as “the father of the Genocide Convention;” and Hersch Lauterpacht, born in the nearby city of Zhovkva, had early schooling and legal studies in Lviv and advocated individual responsibility for international criminal acts. Lauterpacht’s last appointment was a Judge of the International Court of Justice. There are also preeminent middle twentieth century Lviv mathematicians. When I was in Lviv I learned a city resident, Dr. Bohdan Datško, was given the high honor of opening the June 2011 world confer-
ence of mathematicians in Italy. Lviv is clearly a scholarly haven, with many of its famous international legal contributions stemming from its painful history of ethnic politics during World War II.

The Vice Dean of the Faculty of International Relations and Head of the European Law Department was my host professor in Lviv. He was hospitable and arranged student escorts for free times during the first week. All were very helpful. They advanced my understanding of Lviv and the university, and shared their opinions on visiting lecturers, the country and education. They were polite, courteous, knowledgeable and professional. I was most grateful. Of keen interest was a student’s comment, with another concurring, regarding the impression students had that visiting lecturers do not take the time to see if the students comprehend what has been presented. The comment reinforced my confidence in the format I planned for Lviv and Kyiv.

A two-week lecture series was outlined. Thankfully, students of the University of Lviv Faculty of International Relations are also fluent in English. Indeed, a requirement is to have at least three foreign languages—one being English and another Slavic. I soon learned students in the class had not studied arbitration. The terms and concepts were new; consequently, the first session—prepared as an introduction to international commercial arbitration—was challenging. Each session included a fifty-minute lecture, ten-minute break and a one hour discussion. The format worked well. As students gained an understanding, they engaged more. Eventually, I had them role play client and lawyer in hypothetical cases.

Other major areas of discussion were drafting the arbitration agreement, recognition and enforcement (New York Convention), and mandatory rules. Time prohibited going more in depth. Some other areas, such as advocacy, were incorporated to a lesser degree during post-lecture discussions and when illustrating application of materials. The last hour of the final day was open to general discussion.

The class was small. Because some students had outside internship requirements, class attendance sometimes varied. Students were mostly from the European Law Department and others from the Faculty of Law. All but one were at the fifth-year master’s degree level, and most were about twenty-two years of age. They

continued, next page
had started their four-year bachelor of laws studies while still teenagers. As usual there, most students are females. The significant gender imbalance was explained as a result of females maturing faster in adolescence and therefore having more success with their lower school exit and university entrance examinations. My impressions of the students grew increasingly positive during the sessions. They were intelligent, industrious, dedicated and professional; I hasten to add polite and patient. Some mentioned being ad
ditional; I hasten to add polite and industrious, dedicated and professional.

The sessions were intelligent, grew increasingly positive during the sessions. They were intelligent, industrious, dedicated and professional; I hasten to add polite and patient. Some mentioned being admitted to study for another advanced law degree in England. Near the end of my stay, comment was made about developing the short format into a certificate course.

I left Lviv on an early Sunday morning to return to the Institute in Kyiv. The Sunday afternoon was well spent in the comfortable office suite of a German law firm. Upon arrival my host professor asked if I would judge two practice rounds of pre-moot arbitration teams from the Institute that same afternoon. The two teams were preparing for the world competition in Vienna. One of the teams was from his Department of Private International Law. I have judged Jessup competitions at three law schools and more recently did so at a fourth for pre-moot arbitration teams from several states and countries. I was eager to see how the Ukrainian law students would compare. They were equal to most and better than some. The students were very articulate and had a good command of the subject matter. They had to be well prepared, as their faculty judges and coaches were demanding. Professionalism was again evident. With those students I later met informally, I observed self-confidence and relaxed demeanor with this visiting stranger.

On the following Monday and Tuesday, I was in a lecture hall with about thirty students. In 2010, arbitration was not taught at the Institute in Kyiv. The Institute now has a lecturer on the subject. It was apparent that students had already developed in-depth knowledge of the subject, and several were extremely well versed in discussion. Lectures lasted about forty minutes to allow for discussions of equal time. Again, visuals were used to design an international arbitration fact situation. Students shared in leading the discussions while representing different party interests. I left very impressed.

My reflections regarding the recent establishment of arbitration courses in the universities in Kyiv and Lviv should be put in context. In the United States there are law schools with advanced programs in international arbitration. The law school at the University of Miami is a fine example. The two Ukrainian universities’ late start should not be taken as reluctance to engage others outside the country. Far from it, they participate in major academic consortiums. An example is the lecture series given at the Institute of International Relations in Kyiv and at the university in Lviv. Consortium members were Queen Mary and Westfield College, University of London, in the United Kingdom; Institut f{"u}r Volkrecht, Europarecht und Internationale Beziehungen, Leopold-Franzens Universitat of Innsbruck, Austria; Walther-Schucking Institut fur Internationales Recht, Christian-Albrechts-Universitat zu Kiel, in Germany; University of Regensburg, in Germany; Raoul Wallenberg Institute for Human Rights and Humanitarian Law, Lund University, in Sweden; Institute of International Relations Taras Shevchenko National University of Kyiv, and Faculty of International Relations, Ivan Franko National University of Lviv.

The desire of the two universities for collaboration with other universities is clear. Faculty leaders repeatedly stated to me their intent to establish working relations with institutions in the United States. Some evidence of collaboration already exists in other disciplines. Reflecting on my experience caused me to inquire about American foreign policy for eastern and central-eastern Europe, particularly Ukraine. I called the office of the chairperson of the United States House of Representatives Foreign Relations Committee asking about the policy and was told “there is none.” Doubting this response, I called the State Department. My name, telephone number and purpose for my call were requested and given. There has been no return call. Hopefully, whatever the government’s position—if there is one—it does not deter universities in the United States from collaborating with Ukrainian universities and others in the region.

I continue to think of the students I had the privilege to teach. They have my respect. What I saw in them was a fine intellect, eagerness, industry, hope, maturity and a desire for encouragement. They also show courage. Many will need it to lead Ukraine.

Roy B. Gonas is a founding officer of the International Law Section of the Florida Bar. In 1978 he started the in-state international law seminar series for The Bar and created the first two. He is a graduate of Cumberland School of Law, Samford University, and also studied international law in London, England, and at The Hague Academy of International Law. He is an arbitrator and practices law in Miami.
Legal Implications of the BP Deepwater Horizon Disaster
(#1244)

This webinar was presented by the International Energy Law Committee and focuses on legal issues relating to the BP Deepwater Horizon disaster. You will learn issues relating to the negotiation of international offshore drilling agreements, allocation of liabilities and indemnities, the impact that the oil spill will have on future energy-related agreements, potential implications of the Alien Tort Claims Act, as well as limitations placed on BP’s liability under the Jones Act. Moreover, the panelists addressed the U.S. refusal to permit other countries to assist in relief efforts in the Gulf and what can or should be done to enable such assistance in the future. The speakers are each leaders in the area, and this is a “must do” for any Florida lawyer involved in the energy sector.

Edward M. Joffe, Joffe & Joffe, LLC., Coral Gables – Program Chair
Malcolm Riddell, Riddell Tseng, Sarasota
Santiago A. Cueto, Cueto Law Group P.L., Coral Gables
Edward M. Joffe, Joffe & Joffe, LLC., Coral Gables – Program Chair
Malcolm Riddell, Riddell Tseng, Sarasota
Santiago A. Cueto, Cueto Law Group P.L., Coral Gables

Ten Tips on Handling Cross-Border E-Discovery
(#1245)

While many lawyers are now up to speed on litigation holds, back-up tapes, data processing, and other issues related to the collection and production of electronically stored information in federal and state litigation, most have no idea what is required by U.S. courts may be illegal abroad. Privacy laws, blocking statutes and a global hostility toward U.S.-style discovery require that the lawyer representing a foreign client in U.S. litigation proceed with extreme caution. This seminar, presented by Alvin F. Lindsay, a partner at Hogan Lovells and author of the book Technology In Litigation, teaches ten critical best practices for addressing e-discovery when the foreign client is subject to U.S. e-discovery obligations.

Alvin F. Lindsay, Hogan Lovells U.S. L.L.P., Miami

To order audio CDs, go to FLORIDABAR.ORG/CLE and search by course number.
### 2010-2011 ILS Statement of Operations

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Section Reimbursement Policies: General: All travel and office expense payments may be made in accordance with Standing Board Policy 5.61. Travel expenses for other than Bar staff may be made in accordance with SBP 5.61(e)(5)(A)-(I) and 5.61(e)(6) which is available from Bar Headquarters upon request.