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INTERNATIONAL LAW QUARTERLY

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Reserve the Date:

February 9, 2006 is the DEADLINE to sign up for

Seminar-at-Sea

April 16-28, 2006 on Celebrity's *Century*.

Contact Larry Gore: 954/493-7400, or gorel@msn.com

See page ___ for more information.

Chair's Message

Our section retreat was finally held on Thursday, January 19, 2006 in conjunction with other section activities at The Florida Bar's Midyear Meeting at the Hyatt in downtown Miami. Discussions were held on the section's bylaw amendments (which will be voted on during the section's annual meeting in June), the faculty council committee, multi-jurisdictional practice, use of the section webpage (www.internationallawsection.org), and section goals / outreach. The Retreat was followed by a retreat luncheon with special guest speaker, Professor Jan Paulsson. Professor Paulsson spoke about his recently published book, "Denial of Justice in International Law." In addition to being a visiting professor at the University of Miami, Professor Paulsson is the Chair of Freshfield's Arbitration Practice Group and President of the London Court of International Arbitration. Professor Paulsson has been involved in hundreds of commercial and investor-state arbitrations and is a world-renowned expert in his field. Following the luncheon, the section's executive council voted to approve its 2006-2007 budget as amended by treasurer, Brock McClane. The council discussed the upcoming events: 27th Annual Immigration Law Update, February 9-10 at the Hyatt in Miami; the Vienna Moot Court Competition, March 17-18 in Orlando; and the 4th Annual International Litigation and Arbitration Update, April 21-22 in Miami. For more information about these events, please contact the section administrator, Angela Froelich, at 850/561-5633 or afroelic@flabar.org.

— John H. Rooney, Jr., Chair

The Alien Tort Claims Act: The Eleventh Circuit Weighs in on *Sosa v. Alvarez-Machain*

by Rima Youakim Mullins

Introduction

Originally enacted as part of the Judiciary Act of 1789, the Alien Tort Statute, 28 U.S.C. §1350 ("the ATS"), reads in its entirety:

> The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.[1]

This simple statute has unclear roots.[2] Indeed, there is no record of any congressional discussion regarding the statute, but current events at the time suggest that it was enacted in response to two incidents of

See "Alien Tort Claims Act," page 15

Compliance With Export Laws and the Bureau of Industrial Security (BIS)

By Michael C. Berry, Sr., Esquire

Many exporters are unaware of the number and nature of export regulations. They are a trap for the unwary, and in the post 9/11 era, an aggressively pursued area of the law.

In 1775, the Continental Congress outlawed the exportation of goods to Great Britain, which was the beginning of export controls in the United States. Export controls have come a long way since then and exist for three main reasons: national security, foreign policy, or as a hedge against short supply. The United States Department of Commerce[1] is primarily responsible for administering and enforcing the export controls, known as the "Export Administration Regulations" (EAR). The EAR provides controls on the use of products, and identifies the types of export licenses that may be required as well as the types of commodities and technical data under export control, when activities by United States persons are regulated, and the interplay with the various anti boycott laws.[2] The definition of "export" under the EAR is far broader than the standard dictionary definition of export, i.e.: "to ship an item away from a country for sale to another country."[3] It is the actual shipment or transmission of items subject to the EAR out of the United States, or release of certain technology or software subject to the EAR to a foreign national that will trigger the export control regime. The Bureau of Industry and Security (BIS), a division of the United States Department of Commerce, oversees and enforces the EAR. The BIS is divided into two branches, Export Administration and Export Enforcement[4].

Export Administration

BIS has done an admirable job to simplify the compliance process by including informative graphs and charts, and automating the license application process.[5] However, it is still a maze to determine "who's on first" and "who is on second," when it comes to complying with the various regulations. To start with, an exporter needs to answer the following questions for each product shipment:

1. What is the item?
2. Where is it going?
3. Who will receive it?
4. What will they do with it?
5. What else does the end user do?
6. Who are the people and businesses involved in the transaction?

Under the EAR, products must be defined and assigned a special number called an "Export Control Classification Number" or (ECCN). It is an alpha numeric code on the "Commerce Control List" (CCL). The list consists of ten categories with five product subgroups. Once found, the particular product must be cross referenced with the Commerce Country Chart, which defines the reason for a control for a particular country. Products will fall into three categories: "No License Requirement," "License Exception," or "License Requirement." However, just matching the EAR number to the country list is not enough. If the product is going to a composite manufacturer and that manufacturer is selling to a third country that is on the control list, you are to apply the most restrictive regulations of the two. For example, if you are shipping to country "A," which is not on a restricted list, but country "A" is assembling a packaged product that includes your product to ship to country "B," which is on a control list, the government expects you to abide by the restrictions for country "B" if they are more restrictive. But, you are still not done. Approval for shipment can depend upon who the end user is and the use of the product.

BIS maintains lists of people and businesses that the United States government has determined, for purposes of national security, to whom you cannot "export." BIS has four lists: "Denied Persons List," "Unverified List," "Entity List." and "Country Code List." You must check the people to whom you are selling or through, to where you are selling, the purpose of the product purchase, and whether or not the transaction is a transfer point for further sale to a person or country that is restricted.

The "Denied Persons List" is a list of people who are terrorists or suspect persons of some sort. You cannot sell to them no matter what.

The "Unverified Persons List" is a list of questionable persons as determined by the United States government that you cannot sell to because they are under suspicion.

BIS also will send agents around the world to check out recipients of "sensitive" products, like "Dual Use Products." For example, an inquiry was attempted by a BIS agent who traveled to Pakistan, the point of final destination for a product that required a license, and it was learned that there was never a business like that, at that location, but the address was used for the order so persons involved made the "Unverified Persons List".

"Dual Use" products are products that are designed for commercial use but may have military uses[6]. For example, a sophisticated commercial pump could be a pressure chamber for a rocket. The bad guys of the world frequently will attempt to construct a weapon out of commercial products; somebody needs to be watching and that is BIS.

There is also an "Entity List." An "Entity List" is a list of businesses around the world that are not allowed to receive certain products as determined by the United States government.

Lastly, there is the "Country Code List." The "Country Code List" will define restrictions for certain products as organized under the ECCN. Had enough of the lists? That is not all. You may not be able to sell those ginseng knives yet, there is more!

There are other government agencies and departments that get involved in export controls due to overlapping responsibilities. The United States Department of Treasury[7] maintains a "Specially Designated

See "BIS," page 9

Baywatch:
A Column of Updates on International Law in the Making

By Attilio M. Costabel

International Arbitration

Action to vacate – Federal or State Standard of Review – "International Award" Rendered in the United States

Jacada (Europe), Ltd. v. International Marketing Strategies, Inc., 2005 U.S. App. LEXIS 4508 (6th Cir. 2005)

Jacada (Europe), Ltd. ("Jacada"), a software development company incorporated in the United Kingdom, signed a distribution agreement with International Marketing Strategies ("IMS"), a marketing firm incorporated in Michigan, for the right to market and distribute a software package, produced by Jacada, throughout Europe, the Middle East, and Africa. The contract had a general choice-of-law provision, calling for Michigan law to apply, and an arbitration clause specifying that all disputes under the agreement would be resolved in Kalamazoo, Michigan, with the American Arbitration Association under its commercial arbitration rules, and a limited liability provision. Jacada failed to compensate IMS, and IMS sought arbitration. The arbitrators issued an award for IMS, and IMS filed an action to enforce the award in the United States District Court for the Western District of Michigan. A few hours before IMS's filing, Jacada filed an action to vacate the arbitration award in Oakland County Circuit Court in Michigan. IMS sought removal of the case on the sole ground that the case fell under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958 ("the New York Convention"), even though the case also could have been removed on the grounds of diversity. The case was removed to and consolidated in the Federal Court.[1]

In finding for IMS, the distributor, the arbitrators had refused to apply the limitation of liability clause contained in the contract. Jacada, the losing party, argued that the panel exceeded its powers and acted in manifest disregard of the law. Jacada also argued that review of the award should have been made under the laws of Michigan, which laws call for a more thorough review than the one allowed by the Federal Arbitration Act ("FAA").

The Sixth Circuit disagreed, with a detailed and comprehensive opinion that is also a mini-treatise on the essentials of international arbitration. The court addressed and resolved the following issues:

1. Whether an award rendered in the United States is "domestic" or "international".

The court supplied a concise, but clear and comprehensive outline of the history and purpose of the New York Convention and of the enabling Act, concluding that "9 U.S.C. §202 provides the definition for determining whether an award is 'not considered as domestic' under Article I(1) of the Convention".[2] Over the objection of Jacada, the court found that the second sentence of §202 does not apply only when all the parties to the arbitration are citizens of the United States, but supplies the test for determining whether an award is "domestic" or "international."[3]

2. Whether a choice of law clause in the contract has the effect of opting out of the FAA's standard for vacatur in favor of the selected law's standard of review.

Citing to precedents from the Third and other Circuits, the court found that a "*generic* choice-of-law provision does not displace the federal standard for vacating an arbitration award." This result would obtain only when the choice-of-law clause is an "unequivocal inclusion" of a specific state's standard of review.

3. *"Without the scope of authority" and "manifest disregard of law".*

The arbitrators' refusal to apply the limitation of liability provision contained in the contract was not outside the scope of their authority because, the court found, the arbitrators recognized that the provision "could potentially exclude damages for large breaches of the agreement," and render the rights of the distributor meaningless.[4]

"The arbitrators", the court found, "did not manifestly disregard the law in concluding that the limited liability provision failed of its essential purpose". The court also dismissed the objection of Jacada that the "failure of its essential purpose" is an exclusive principle from the Uniform Commercial Code, not applicable outside that context.

In conclusion, *Jacada* is a very useful precedent on enforcement of international awards; for the important issues resolved; the clarity and specificity of the solutions supplied; and, not least, for the scholarly lessons to be drawn from it.

Service of Process

Service under the Hague Convention – Service on subsidiary

Elvira de la Vega Glen and Robert M. Glen vs. Club Mediterranee, S.A. and Club Mediterranee Group, 18 Fla. L. Weekly Fed. D 315 (S.D. Fla. 2005)

Club Mediterranee, S.A. ("Mediterranee") built and operated a 337-room luxury resort hotel on a property in Varadero (Cuba). Elvira de la Vega Glen and Robert M. Glen, alleging that they owned the property, sued Mediterranee for unjust enrichment, trespass; and violations of the Trading with the Enemy Act.[5] Service on Mediterranee was done via Mediterranee's Florida subsidiaries.[6] Mediterranee moved to dismiss under Federal Rule of Civil Procedure 12(b)(5), for allegedly insufficient service of process.

The court found that Florida law requires "transmittal of documents abroad" to Defendant, under Fla. Stat. §48.181(1) and §48.161[7] and *McClenon v. Nissan Motor Corp.*,[8] and therefore found that under

See "Baywatch," page 19

The UN Convention on the Limitation Period in the International Sale of Goods: The Statute of Limitations for International Sales Transactions

By Allison E. Butler

I. Introduction

After years of obscurity, the United Nations Convention on Contracts for the International Sale of Goods (hereinafter referred to as the "CISG") has begun to receive widespread recognition in the United States.[1] Numerous courts and practitioners have increasingly recognized and applied the substantive law of the CISG over the course of the past decade.[2] However, little attention has been given to the UN Convention on the Limitation Period in the International Sale of Goods (hereinafter referred to as the "Limitation Convention").

Originally adopted in 1974, the Limitation Convention provides a concrete set of uniform rules governing the period within which a party to a contract must commence legal proceedings against the other party in order to assert a claim under a contract – an international statute of limitation.[3] The 1974 version has had limited success. Yet, in 1980, the Limitation Convention was amended by a Protocol in anticipation of the adoption of the CISG. Both the original and the amended versions of the Limitation Convention entered into force on August 1, 1988.[4]

Although relatively few countries have adopted the Limitation Convention in comparison to the CISG,[5] scholars had anticipated an increase in recognition and adoption based in part upon the United States' ratification of the Limitation Convention in 1994.[6] The United States' adoption of the Limitation Convention provides that it is the applicable procedural law for international transactions, while the CISG provides the substantive law of international transactions unless the parties have '"opted out," or a party comes from a country that is a non-signatory to both conventions.

Although few of the United States' trading partners have adopted the Limitation Convention,[7] it is essential that practitioners be aware of its existence as part of his or her ethical and professional duty to their clients, and to the Bar in general. In addition, the ratification of the Limitation Convention by the United States establishes federal law and therefore preempts state law under certain circumstances. However, if a party is from a non-signatory state to the Limitation Convention, private international law would govern this issue, as procedural matters fall outside the scope of the CISG.[8] This article provides a brief historical analysis of the adoption of the Limitation Convention, as well as a general overview as to its provisions.

II. Why Adopt the Limitation Period?

The need to adopt a uniform limitation period has its foundation in the different approaches taken under the common law versus the civil law regarding limitation periods. Specifically, the nomenclature for the limitation period is different in civil law than in common law. In civil law, a limitation period is referred to as *prescription*; whereas in common law jurisdictions it is known as a *statute of limitation*. The difference between how the two systems treat the subject matter goes beyond mere terminology. In the majority of civil law jurisdictions, prescription is a matter of substantive law. In contrast, the common law views limitations matters as a procedural matter.[9] The resolution of this issue would "be solved though the *characterization* process of private international law of the *forum*."[10] Based on the necessity to provide a uniform code and to promote and develop world trade, the Limitation Period was created to eliminate the various application of conflicting national law that "creates legal barriers to the free flow of transnational trade."[11] Hence, the Limitation Convention provides that for interpretation and application, regard must be paid to the Limitation Convention based on the "international character and the need to promote uniformity" in international sales transactions.[12]

III. Application

The Limitation Convention should be considered at the transactional phase as well as during litigation. It applies to claims between a buyer and a seller arising from a *contract of international sale of goods or relating to its breach, termination or invalidity.*13 Therefore, it is necessary to determine whether the Limitation Convention is applicable. Practitioners should note that the similarity in terms between the CISG and Limitation Convention is an excellent source to assist in the interpretation and application of the Limitation Convention.

A. International Contract

The Limitation Convention applies if the contract is an international contract. Under Article 3(1), the Limitation Convention applies when both parties in an international sale of goods have their place of business in different contracting *signatory states*,[14] or when the rules of private international law point to the law of a signatory state. Similar to the CISG, signatory states can opt out of the application of these provisions.[15] Where a party to a contract of sale of goods has places of business in more than one State, the place of business for purposes of the Limitation Convention is the State that has the closest relationship to the contract and its performance

taking into account the circumstances known to or contemplated by the parties at the time of conclusion of the contract.[16] Where a party does not have a place of business, reference shall be made to his habitual residence.[17] Neither the nationality of the parties, nor the civil or commercial character of the parties or of the contract, shall be taken into consideration.[18]

B. Sale of Goods

Similar to the CISG, the Limitation Convention defines goods through omission. The term "goods" does not include items bought for personal, family, or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use by auction, on execution, or otherwise by authority of law.[19] Stocks, shares, investment securities, negotiable instruments, and money are also excluded from the definition, along with ships, vessels, hovercrafts, and aircraft, and the sale of electricity.[20]

C. Claims

The Limitation Convention does not apply to claims based upon the death of, or personal injury to, any person.[21] The Limitation Convention does cover claims of invalidity based on incapacity of a party, duress, fraud, unconscionability, and illegality, provided that these claims do not arise independent of the contract under the Limitation Convention.[22] Actions based on nuclear damage caused by the goods sold; a lien, a mortgage or other security interest in property, a bill of exchange, a judgment or award made in legal proceedings, and a document on which there is direct enforcement, execution, or otherwise, by authority of law, are not covered under the Limitation Convention.[23] The Convention does not apply to contracts in which the preponderant part of the obligation of the seller consists of the supply of labor or other services.[24] Contracts for the supply of goods to be manufactured or produced are considered to be sales, unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.[25]

IV. General: Limitation Period

The Limitation Convention defines a limitation period of four years within which a party to a contract for the international sale of goods must commence legal proceedings in order to assert a claim arising from a contract or relating to its breach, termination, or invalidity.[26] Under some circumstances, the limitation period may be extended beyond four years, but in no case will the period run for more than ten years after a claim accrues.[27]

Articles 22(1)(3) prohibit the parties from reducing the limitation period; however, the parties may agree to "opt out" of the Limitation Convention.[28] The debtor may, at any time during the running of the limitation period, extend the period by a declaration in writing to the creditor.[29] Articles 9-12 of the Limitation Convention subscribe commencement periods for the running of the period for claims based on breach of contract, defects, or nonconformity of the goods.[30] A limitation period ceases to run when a creditor performs an action, which serves to institute judicial proceedings,[31] or when arbitral proceedings begin, provided the parties agree to arbitration.[32] Additional cessation rules are set forth in Articles 15-21. [33]

IV. Notice Requirements

The statute of limitation, or prescription period, becomes relevant upon the notice requirements of Article 39 of the CISG. Specifically, this provision provides in part that a buyer must give notice of lack of conformity of goods to a seller within a reasonable period of time.[34] This period is further limited by providing "the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time limit is inconsistent with a contractual period of guarantee." The Limitation Convention excludes notice requirements from its application by stating "time-limit[s] within which one party is required, as a condition for the acquisition or exercise of his claim, to give notice to the other party or perform any act other than the institution of legal proceedings."[35] Notably, "if notice is given within the time periods set by domestic legislation or by the Sales Convention, the aggrieved party must still institute legal proceedings within the limitations period of the [Limitation] Convention."[36] To date, there has been no case law addressing this issue, although case law exists under the CISG with different results.[37]

V. Conclusion

Counsel should not overlook procedural matters, whether at the transactional phase or during actual litigation. Proper consideration of these issues cannot only clarify terms of a contract, but can eventually terminate litigation. The Limitation Convention not only complements application of the CISG, but provides a secure applicable time limitation. Although application of the Limitation Convention has not been addressed by any Court, it should not be dismissed as the increase of CISG cases in the United States may soon also provide such case law.

Allison E. Butler *received her JD from Loyola University School of Law, New Orleans, Louisiana (Common Law Program) and her B.A. in International Relations, with honors, from the University of South Florida, Tampa, Florida. She is a published author and a member of the Florida Bar and California Bar in private practice in Southern California. Ms. Butler is also the author of a book tentatively entitled* A Practitioner's Guide to the CISG, *due out by Kluwer/Aspen Publishers in 2006.*

Endnotes:

1 S. Treaty Doc. No. 9, 98th Cong. 1stSess. 22 (1993), reprinted at 15 U.S.C. App.52 (2002); also available at http://www.uncitral.org.

2 For recent developments *see* Guide to the Pace Database on the CISG and International Commercial law, available at http://www.cisg.law.pace.edu.

3 Kazuaki Sono, The Limitation Convention: The Forerunner to Establish UNCITRAL Creditability, available at http://www.cisg.law.pace.edu/cisg/biblio/sono3.html.

4 The text of the Limitation Convention appears in A/CONF.63/15, reproduced in Official Records of the United Nations Conference on Prescription (Limitation) in the International Sale of Goods, New York, 20 May-14 June, part one (A/CONF.63/16, United Nations publication, Sales No. E.74.V.8), in Yearbook of the United Nations Commission on International Trade Law, vol. V: 1974, part

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U.N. CONVENTION

from preceding page

three, chap. I, sect. B, and in UNCITRAL: The United Nations Commission on International Trade law (United Nations publications, Sales No. E.86.V.8), Annex II.A.

5 To date there are only 18 countries including the United States that has adopted the Limitation Convention. Countries that have adopted the Limitation Convention include the following: Argentina, Belarus, Cuba, Czech Republic, Egypt, Guinea, Hungary, Mexico, Paraguay, Poland, Republic of Moldova, Romania, Slovakia, Slovenia, Uganda, United States of America, Uruguay, and Zambia. http://www.uncitral.org.

6 President Clinton transmitted the Limitation Convention to the Senate on August 6, 1993. S. TREATY DOC.NO. 10, 103rd Cong., 1st Sess. (1993). The Senate Committee on Foreign Relations held hearings on October 26, 1993. The Committee agreed to report favorably on November 18, 1993. S. EXEC. REP. 103-16, 103d Cong., 1st Sess. (1993). The full Senate gave its consent on November 20, 1993. 139 CONG REC. S16, 213 (daily ed. Nov. 20, 1993). *See*, Katherina Boele-Woelki, *The Limitation of Actions in the International Sale of Goods*, Uniform Law Review, issue 3 (1999) for analysis of U.S. adoption of Limitation Convention.

7 See Boele-Woelki, *supra*, note 6 for analysis of civil law countries' rejection of Limitation Convention.

8 Switzerland 11 July 2000 Federal Supreme Court (*Gutta-Werke AG v. Dörken AG*) available at http://cisgw3.law.pace.edu/cases/000711sl.html (procedural matters are not governed by the CISG); *Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co., Inc.*, 313 F. 3d 385 (7th Cir. 2002)(attorney fee issue was procedural issue outside realm of CISG).

9 In the United States, state law rather than federal law generally governs the limitation period for claims arising from contracts of sale. U.C.C. section 2-725.

10 Sono, *supra*, note 3.

11 Peter Winship, *The Convention on the Limitation Period in the International Sale of Goods: The United States Adopts UNCITRAL'S Firstborn*, 8 Int'l Law. 1071 (Winter 1984); *see also*, Boele-Woelki, *supra*, note 6, for an in depth analysis of why most civil law jurisdictions have rejected the Limitation Convention. The rationale of the Limitation Convention is similar to the purpose behind U.C.C. section 2-725.

12 Article 7.

13 Article 1.

14 Article 3 (2).

15 *Id*.

16 Article 2 (c).

17 Article 2 (d).

18 Article 2 (e).

19 Article 4.

20 *Id*.

21 Article 5.

22 Article 1; *See generally*, Allison E. Butler, *The International Contract Knowing When, Why, and How to "Opt Out" of the United Nations Convention on Contracts for the International Sale of Goods*, Fla. Bar Journal, Vol. LXXVI, No. 5 (May 2002) at 28-30.

23 Article 4.

24 Article 6.

25 *Id*.

26 Articles 1 and 8.

27 Article 23.

28 Article 3 (2).

29 Article 22 (2). A debtor is defined to mean a party against whom a creditor asserts a claim. Article 1 (c). A creditor is defined to mean a party who asserts a claim, whether or not such a claim is for a sum of money. Article 1 (b). A writing includes telegrams and telex. Article 1(g).

30 Subject to the provisions of articles 10, 11 and 12, the limitation period commences on the date on which the claim accrues. Commencement of the limitation period is not be postponed by notice requirements or a provision in an arbitration agreement that no right shall arise until an arbitration award has been made. Article 9. A breach of contract claim accrues on the date on which such breach occurs. A defect or other lack of conformity accrues on the date on which the goods are actually handed over to, or their tender is refused by, the buyer. A claim based on fraud committed before or at the time of the conclusion of the contract or during its performance accrues on the date on which the fraud was or reasonably could have been discovered. Article 10. If the seller has given an express undertaking relating to the goods which is stated to have effect for a certain period of time, whether expressed in terms of a specific period of time or otherwise, the limitation period in respect of any claim arising from the undertaking commences on the date on which the buyer notifies the seller of the fact on which the claim is based, but not later than on the date of the expiration of the period of the undertaking. Article 11. If a party is entitled to declare the contract terminated before the time for performance is due, and exercises this right, the limitation period in respect of a claim based on any such circumstances commences on the date on which the declaration is made to the other party. If the contract is not declared to be terminated before performance becomes due, the limitation period shall commence on the date on which performance is due. The limitation period for installment contracts commences on the date on which the particular breach occurs; however, if party is entitled to declare the contract terminated by reason of such breach, and exercises this right, the limitation period in respect of all relevant installments commences on the date on which the declaration is made to the other party. Article 12.

31 Article 13; however, if legal proceedings have ended without a decision binding on the merits of the claim, the limitation period continues to run. Article 17(1). If, at the time such legal proceedings ended, the limitation period has expired or has less than one year to run, the creditor shall be entitled to a period of one year from the date on which the legal proceedings ended. Article 17(2).

32 Article 14 (1). In the absence of any such provision, arbitral proceedings shall be deemed to commence on the date on which a request that the claim in dispute be referred to arbitration is delivered to the habitual residence or place of business of the other party or, if he has no such residence or place of business, then at his last known residence or place of business. Article 14 (2).

33 Article 15 (bankruptcy, death or incapacity, corporate, partnership or company dissolution); Article 16 (counterclaims); Article 17 (no binding decisions) ; Article 18 (joint and several liability, proceedings by subpurchaser); Article 19 (act to recommence limitation period); Article 20 (debtor's acknowledgement); Article 21 (commencement prevented by *force majeure*).

34 Readers should note that under Articles 38 and 39 of the CISG "unless the lack of conformity was evident without examination of the goods, the total amount of time available to give notice after delivery of the goods consists of two separate periods, the period for examination of the goods under article 38 and the period for giving notice under article 39. The Convention requires these two periods to be distinguished and kept separate, even when the facts of the case would permit them to be combined into a single period for giving notice." CISG-AC Opinion no 2, Examination of the Goods and Notice of Non-Conformity: Articles 38 and 39, 7 June 2004. Rapporteur: Professor Eric E. Bergsten, Emeritus, Pace University School of Law, New York, available at http://www.cisg.law.pace.edu/cisg/CISG-AC-op2.html.

35 Article 1(2).

36 American Bar Association Section of International Law and Practice Reports to the House of Delegates Convention on the Limitation Period in the International Sale of Goods, 24 International Lawyer (1990), at 588.

37 ICC Arbitration Case No. 6149 of 1990, http://cisg3.law.pace.edu.cases/906148il.html (holding CISG has no statute of limitation); but see, Cour de Justice Geneve, Case No. 1230, 10.10.1997, available at http://unilex.info/case.cfm (holding that Swiss law on limitation period should be adapted to and harmonized with the CISG and therefore extended limitation period to two years).

Minutes of the Texas Service Center/ Florida Bar Liaison Meeting

June 27, 2005

Attending on behalf of Florida Bar:
Larry S. Rifkin, Esq.
Natalia Poliakova, Esq.

Attending on behalf of the Texas Service Center:
Lisa Kehl, Acting Center Director
Rosie Reyna, Assistant Center Director
Lynn Gros, Assistant Center Director
Wyvette Covington, Assistant Center Director
Ninfa Luna, Assistant Center Director
Jack Pittman, Assistant Center Director
Paul Sturgeon, Assistant Center Director
Morris Whitacre, Assistant Center Director
Nancy Moser, Acting Associate Director
Jume Puripongs, Center Adjudications Officer
Marvin Estes, Assistant Center Director
Kathy Vaughan, Supervisory Center Adjudications Officer
Jeff Brecht, Assistant Center Director

1. Form I-140 - Members have reported receiving RFEs on multinational manager/executive petitions requesting "persuasive documentary evidence to establish a qualifying relationship exists between the US company and the beneficiary's foreign employer. This evidence should be in the form of stock certificates, copies of corporate bylaws or constitutions which clearly indicate stock ownership . . . ." In most cases the alien has already been in L-1A classification for over a year and copies of stock certificates were submitted with the L-1A petitions and the I-140 petition. In addition the RFEs are requesting that we provide evidence of the means by which stock ownership was acquired. Is this a training issue or does the Service want to see more documentation that the stock certificates alone which have been accepted in the past?

ANSWER: Previously being an L-1 is not an automatic approval for E11 status. Each case is adjudicated on its own merit. The evidence submitted must clearly show how the stock was acquired.

2. Form I-140 - Does the Service review or audit approved cases? For example an immigrant visa petition was approved on March 14, 2005 and on May 19, 2005 a 30 day Notice of Intent to Revoke the Approval was issued requesting ability to pay.

ANSWER: The Service reviews a percentage of approved cases and, in some instances, if warranted, a Notice of Intent to Revoke may be issued after an approval.

3. Form I-140 - If additional evidence is submitted in response to an RFE, but that evidence is not satisfactory to the officer, what is the policy for deciding whether to issue a 2nd RFE or to deny? Many RFE's are not clearly or specifically worded. RFE issued on an I-140, which was sent to the attorney of record and referenced both the Petitioner and Beneficiary, asking for "the taxes and corresponding W-2s." RFE did not specify whose taxes and W-2s were requested. The Beneficiary's taxes and W-2s were submitted due to the reference to the W-2s. The officer denied the I-140 because it was the Petitioner's documents that the officer wanted. The officer denied the petition instead of issuing a 2nd RFE specifying the requested documents. Does a supervisor review the language of RFEs? Is it possible for officers to be more specific in RFE's to avoid this confusion?

ANSWER: The Service attempts to make decisions on cases as soon as possible. If an RFE/ITD is issued and it is not clear as to what is being requested, the petitioner should respond with a cover letter stating specifically what was not clear and request clarification before a decision is made. We are constantly reviewing the language to make sure we are asking for what we need.

4. Form I-485 - There are a number of I-485 cases still pending from 2002 and 2003. How are these cases being handled? Inquiries have been made through NCSC but no action taken.

ANSWER: TSC is systematically pulling and reviewing all cases older than 2003 to determine reasons cases are not adjudication ready. If a fingerprint or FBI Name Check is a reason for a case to remain pending, we are scheduling the applicant for a fingerprint appointment at their local ASC and/or sending their names to our FBI Name Check Liaison to have those processed. In addition, we are reviewing cases to request required additional information, if necessary, so that when the fingerprints and/or the FBI Name Checks are complete, the cases will be ready for final adjudication. Lastly, we must ensure that there is visa availability.

5. Form I-485 - Members report receiving many RFE's on an applicant's maintenance of status during stays prior to their last admission, and many asking about stays prior to October 1, 1997 (the date when unlawful presence would trigger a bar). RFE asking for maintenance of status between 1993 and 03/27/1996 even though the applicant's last lawful admission was after these dates. Please advise on the purpose of these RFE's in light of evaluating maintenance of status from the date of last admission.

ANSWER: Specific case will be pulled to review the reason(s) the RFE was sent.

continued, next page

6. Form I-485 - What is TSC policy for requesting updated letters confirming the offer of employment from employment-based adjustment applicants? Members report receiving RFE's, mainly from the same officer, requesting updated job offer letters even though these letters were submitted with the I-140. Few other officers request updated job offer letters. Is this a training issue or standard Service policy? Examples: SRC0324751757, SRC0309354322,

ANSWER: Form I-485s filed based on an approved Form I-140 petition should be submitted with a letter of employment. The Form I-485 instructions address this issue. However, requesting a letter of employment varies from case to case. One determining factor could be the age of the Form I-140 petition. Usually, if the Form I-140 is over one year old, a new letter will be requested in order to determine if the beneficiary is still employed in the United States and to determine if the same employer employs the beneficiary.

7. Form I-129 - Members have reported that TSC is denying L-1A extensions filed where company has no employees, only independent contractors. 9 FAM 41.54 N.8.2-1a states "... In determining whether an alien supervises others, independent contractors as well as company employees can be considered. . . " Does the Service take this into consideration when adjudicating cases where the company only hires independent contractors other than the alien?

ANSWER: Yes, contract employees are considered. The sole employee of a firm may be classified as an executive in certain circumstances provided his primary function is to plan, organize, direct and control an organization's major functions through other employees.

8. Form I-129 - Members have reported receiving denials on I-129 petitions for L-1A classification where the company operates a franchise. The beneficiary is the senior executive of the company which operates the franchise and not an employee of the franchising company i.e. Subway. Is this a training issue or is there a policy memorandum regarding these situations?

ANSWER: There are two (2) key elements that must be established in franchise type cases- Ownership and Control (the petitioner must have both). The petitioner will often establish ownership; however, they cannot establish that they have control (as almost every aspect of their business is dictated by the franchise agreement). Each case is reviewed on its own merits.

9. Form I-129 - With regard to the new PERM regulations and refiling of labor certification applications, will USCIS consider a labor certification pending if the first labor certification is withdrawn but the priority date is maintained because the second labor certification is identical under PERM? This is important to know for the purpose of maintaining the eligibility to file 7th year H extensions. At our January 24 meeting you advised that TSC was discussing this issue with CIS Headquarters. Did you get an answer yet?

ANSWER: All Service Centers are still waiting on the Headquarters guidance memo.

10. Form I-539 – Members are reporting that in some cases TSC is approving extensions of B-2 classification for less time than requested i.e. six months requested only 3 or 4 months approved. Is there a reason for this?

ANSWER: Six months should be given on the first extension.

BIS
from page 2

Nationals and Blocked Persons List," the United States Department of Defense (DOD) maintains a "U.S. Munitions List," and the United States Department of State, pursuant to the authority delegated by the President, has the Office of Defense Trade Controls (ODTC) in the State Department's Bureau of Political-Military Affairs, which administers the International Traffic in Arms Regulations (ITAR).[8] You could be in compliance with BIS on one category but not in compliance with the Treasury or State Departments, or DOD, simply because of the persons, or businesses, with whom you are dealing. There are no combined lists. There are a variety of private businesses that attempt to merge all of these lists together (none comprehensively); daily monitoring is critical. Detailed records are a requirement and the liability rests with the exporter.

Because "export" under the EAR is broadly defined, the restrictive lists apply not only to the sale of products but to the "activities" involved in the transactions in and out of the United States.[9] For example, if an exporter had a prospective customer in country "A" who would like to come over and study the product before the purchase, you need to check if he or she, or the business he or she is representing, is on one of the lists. If they are, and you have given them the grand tour of your factory, you have just violated the law and could be subject to civil fines and criminal prosecution. The rationale extends to foreign trade shows; if a license is required you must get a license to take the product to the trade show. The regulations are to restrict "exports", which includes the conveying of product or product knowledge.

Practitioners also should be mindful of a significant area of the law that overlaps into export matters: the "Foreign Corrupt Practices Act" (FCPA).[10] The FCPA contains limitations on United States investments abroad involving payments to foreign government officials for the purposes of obtaining or retaining business. At first blush, you might believe you are not selling to governments but to private parties so this law would not apply. However, are your sales agents or your foreign distributor paying government persons to facilitate the sale? If so, you can be held criminally and civilly liable for violations of the FCPA. And, the FCPA is not even part of the BIS administration or enforcement activity.

Export Enforcement

Failure to properly handle the broadly defined "export" can cause significant exposure to civil fines and criminal penalties. Compared to other law enforcement agencies, the enforcement side of the BIS is relatively small but their bite can be bigger than their bark. The operation is divided into nine satellite offices, one of which is in Miami, Florida, and five overseas Export Control Attaches. Section 15 C.F.R. 764, *Enforcement and Protective Measures,* informs the practitioner of the types of violations, sanctions, and administrative measures related thereto. Violations as defined include engaging in prohibited conduct; causing, aiding, or abetting a violation; solicitation and attempt; conspiracy; acting with knowledge of a violation; possession

continued, next page

BIS
from preceding page

with intent to export illegally; misrepresentation or concealment of facts; evasion; failure to comply with reporting and recordkeeping requirements; license alterations; and acting contrary to the terms of a denial order. Sanctions include a civil penalty from $10,000.00 to $100,000.00 for each violation, denial of export privileges, exclusion from the practice (i.e. lawyers, accountants, freight forwarders). Criminal sanctions include fines of up to five times the value of the exports or assessment of as much as $1,000,000.00, depending upon the circumstances. BIS has a defined administrative hearing procedure for civil violations, which includes fundamental procedural requirements.[11] Criminal violations are prosecuted by the United.States Attorneys's Offices.

In conclusion, remember that "exports" under the BIS are more than the sale of goods to another country. They include the product, the place of end use, and the people and businesses involved. To best serve your clients, develop a good internal compliance policy. It will help mitigate damages if a violation occurs and, don't forget about the five year record retention requirement.[12]

Good exporting.

Michael C. Berry, Sr. *is an attorney based in Clearwater, Florida. Mr. Berry limits his practice to international litigation matters, contract law (with emphasis on construction law), export law, international child abduction and black market adoption. His cases have involved countries such as Australia, the Bahamas, Cuba, Canada, Columbia, Costa Rica, England, Italy, Ireland, Mexico, Nigeria, the Philippines, and Spain. Mr. Berry graduated with a B.A. from the University of Michigan and received a Juris Doctorate degree from St. Thomas University School of Law. Prior to attending law school, Mr. Berry was president of a construction and manufacturing company which built low, medium and high-rise glass buildings throughout the United States and a few projects offshore. Mr. Berry has been retained by foreign governmental agencies, such as England, Australia and Israel in complex international child abduction matters and has held many quasi judicial positions as a hearing officer, magistrate and special master in Florida. In his profession, Mr. Berry has served and in some instances chaired various committees for the local and state bar associations, including but not limited to the Civil Practice Committee, Civil Rules Committee and Inns of Court.*

Endnotes:

[1,2] Currently governed by the Export Administration Act (EAA) of 1969, 50 U.S.C. App. § 2401, *et seq.* which has been extended by Presidential Executive Order (there are other overlapping laws).
[3] 15 CFR §§730-774 (2005) covers the regulations, and see 15 CFR §730.1 (2005), and 15CFR §730.5 (2005).
[4] Dictionary of International Trade, 5th Edition, World Trade Press 2002.
[5] See their website *www.bxa.doc.gov*.
[6] See 15 CFR §732 (2005). The automated system is called the "Simplified Network Application Processing" (SNAP).
[7] See 15 CFR §730.3 (2005).
[8] The United States Department of Treasury operates the Office of Foreign Assets Control (OFAC), controlling exports, imports, and financial matters with other countries.
[9] See 22 CFR §§120-130 (2005).
[10] 15 CFR §730.5 (2005).
[11] 15 U.S.C. §78dd-2 (2005).
[12] 15 CFR §766 (2005).
[13] 15 CFR §762.6 (2005).

2006 Section Calendar

February 9-10	**27th Annual Immigration Law Update (0259R)** Hyatt Regency Downtown Miami
March 17-18	**Vienna Moot Court Competition** Orlando
April 16-28	**Seminar-at-Sea on Celebrity's *Century*** Contact Larry Gore at 954/493-7400, or gorel@msn.com
May 11-12	**4th Annual International Litigation and Arbitration Update (0304R)** Miami
June 23	**International Law Section Executive Council Meeting** The Florida Bar Annual Meeting Boca Raton Resort & Club

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February 9-10, 2006

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Miami, FL 33131-2197
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Course No. 0259R

Schedule of Events

THURSDAY, FEBRUARY 9, 2006

Morning Program Moderator:
Jonathan Rose, Miami, Florida

7:45 a.m. – 8:15 a.m.
Late Registration

8:15 a.m. – 8:30 a.m.
Opening Remarks
Anis Saleh, Chapter Chair, S. Fla. Chapter of American Immigration Lawyers Association ("AILA"), Miami, FL

8:30 a.m. – 9:30 a.m.
Advanced Issues for L's and E's
Larry S. Rifkin, Miami, FL
Tim Murphy, Miami, FL
Bernard Wolfsdorf, Treasurer, AILA National, Los Angeles, California
Stephen K. Fischel, Director, Office of Legislation, Regulations, and Advisory Assistance, Visa Office, U.S. Department of State, ("DOS"), Washington, D.C.

9:30 a.m. – 10:30 a.m.
A Question of Status: Maintaining Status—Creative Solutions
H. Ronald Klasko, Past President, AILA National, Philadelphia, Pennsylvania
Tammy Fox-Isicoff, Miami, FL
Efren Hernandez, Director, Business and Trade Services, U.S. Citizenship & Immigration Services ("USCIS"), Washington, D.C.

10:30 a.m. – 10:45 a.m.
Break

10:45 a.m. – 11:45 a.m.
The Visas Many of Us Avoid—O's, P's, H-2B's, and J's
Michael Maggio, Washington, D.C.
Maite Hoyos, Miami, FL
Jeffrey A. Devore, W. Palm Beach, FL
Enrique Gonzalez, Miami, FL
Texas Service Center Adjudications Officer, USCIS, Mesquite, Texas

11:45 a.m. – 12:45 p.m.
Employment Based Residence Without Labor Certification
Susan Hahn, Miami, FL
Jeff Bernstein, Miami, FL
Michael A. Bander, Miami, FL
Texas Service Center Adjudications Officer, USCIS, Mesquite, Texas

12:45 p.m. – 2:15 p.m.
Luncheon – (included in registration fee)

The REAL ID ACT
Ira Kuzban, Past President, AILA National, Miami, FL

The Ethical Considerations of PERM
Deborah Notkin, President, AILA National, New York, New York

2:15 p.m. – 2:30 p.m.
Break

Afternoon Program Moderator:
Sandra Murado, Miami. FL

2:30 p.m. – 3:15 p.m.
Navigating the Murky Waters of PERM
Tammy Fox-Isicoff, Miami, FL
Josie Gonzalez, Pasadena, California
H. Ron Klasko, Philadelphia, Pennsylvania
John R. Beverly, Foreign Labor Certification Division Chief, Department of Labor, ("DOL"), Washington, D.C. (invited)

3:15 p.m. – 4:00 p.m.
Dealing with PERM'S Special Issues (Wages, Special Handling, BALCA Precedent)
Josie Gonzalez, Pasadena, California
Elaine Weiss, Miami, FL
Joel Stewart, Miami, FL
Sandra Stafford, Agency for Workforce Innovation, Tallahassee, FL

4:00 p.m. – 4:15 p.m.
Break

4:15 p.m. – 5:15 p.m.
Advanced Issues in Adjustment and Consular Processing
Anis Saleh, Miami, FL
Michael Maggio, Washington, D.C.
John Myers, Miami, FL
Bernie Wolfsdorf, Los Angeles, California
Stephen K. Fischel, DOS, Washington, D.C.
Efren Hernandez, USCIS, Washington, D.C.

5:15 p.m. – 7:00 p.m.
Talk to the Experts

FRIDAY, FEBRUARY 10, 2006

Morning Program Moderator:
Lisa Enfield, Plantation, FL

8:30 a.m. – 9:30 a.m.
Developments in Family-Based Immigration
Michael Shane, Miami, FL
Mazen Sukkar, Ft. Lauderdale, FL
Raquel Chaviano-Mora, Miami, FL
Anis Saleh, Miami, FL
Bruce Marmar, Senior Adjudications Officer, USCIS, Miami, FL
Janice B. Neetenbeek, Southeast Chief Area Counsel, USCIS, Miami, FL

9:30 a.m. – 10:30 a.m.
Everything you Always Wanted to Know about Waivers and Didn't Know Enough to Ask
Mary Kramer, Miami, FL
John Pratt, Miami, FL
Stuart Karden, W. Palm Beach, FL
Jeff Joseph, Denver, Colorado
The Honorable Stephen Mander, Executive Office of Immigration Review ("EOIR"), Miami, FL

10:30 a.m. – 10:45 a.m.
Break

10:45 a.m. – 11:15 a.m.
Expert Roundtable on Cutting Edge Issues
Panel to be announced

11:15 a.m. – 12:00 p.m.
Asylum, Restriction on Removal and the Convention Against Torture
Antonio Revilla, Miami, FL
Joan Mathieu, President of AILA Central Florida Chapter, Clearwater, FL
Assistant Chief Counsel, Immigration and Customs Enforcement ("ICE"), Miami, FL
The Honorable Denise Slavin, EOIR, Miami, FL

12:00 p.m. – 1:30 p.m.
President's Luncheon (included in registration fee)
The Honorable Deborah Wasserman Schultz, U.S. House of Representatives, Washington, D.C. (invited)
District Director, USCIS, Miami, FL (invited)

1:30 p.m. – 1:45 p.m.
Break

Afternoon Program Moderator:
Maya Chatterjea, Miami, FL

1:45 p.m. – 2:30 p.m.
Winning Your Case in Immigration Court
Lourdes Martinez-Esquivel, Miami, FL
The Honorable John Opaciuch, EOIR, Miami, FL
The Honorable Scott Alexander, EOIR, Miami, FL
The Honorable Rex Ford, EOIR, Miami, FL

2:30 p.m. – 3:30 p.m.
Developments in Removal Grounds & Aggravated Felony Provisions
Jeff Joseph, Denver, Colorado
Mary Kramer, Miami, FL
Alex Solomiany, Miami, FL
Assistant Chief Counsel, ICE, Miami, FL
The Honorable Elisa Sukkar, EOIR, Miami, FL

3:30 p.m. – 3:45 p.m.
Break

3:45 p.m. – 4:30 p.m.
Representing the Detained Alien: Bond and other Options
Alex Solomiany, Miami, FL
Linda Osberg Braun, Miami, FL
The Honorable Kenneth Hurewitz, EOIR, Miami, FL
Assistant Chief Counsel, ICE, Miami, FL

4:30 p.m. – 5:15 p.m.
Advanced Issues in Citizenship & Naturalization
Scott Devore, W. Palm Beach, FL
Kari Ann Fonte, Miami, FL
Elaine Watson, Assistant District Director for Naturalizaiton, USCIS, Miami, FL
Janice B. Neetenbeek, USCIS, Miami, FL

******* All panels will also address ethical issues and considerations affecting their respective topics *******

HOTEL RESERVATIONS:

A block of rooms has been reserved at the Hyatt Regency Downtown Miami, at the rate of $179 single/double occupancy. To make reservations, call the Hyatt Regency Downtown Miami direct at (305) 358-1234. Reservations must be made by 01/20/2006 to assure the group rate and availability. After that date, the group rate will be granted on a "space available" basis.

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assault against foreign ambassadors on United States soil.

After its enactment, the ATS remained essentially dormant for almost 200 years, until the Second Circuit resurrected it in 1980 in *Filartiga v. Pena-Irala*.[3]. There, the court held that officially sanctioned torture violated the law of nations and gave rise to a private cause of action under the ATS[4]

Since *Filartiga*, the number of cases brought under the ATS has risen exponentially, raising significant questions regarding the nature and appropriate reach of the statute. While the United States Supreme Court addressed some of these issues in *Sosa v. Alvarez-Machain*,[5] lower court decisions since *Sosa*, including one from the Eleventh Circuit, shows that the Supreme Court has left more questions than it answered.

The *Sosa* Decision

Unlike many ATS plaintiffs, the plaintiff in *Sosa* was not a particularly sympathetic figure. Humberto Alvarez-Machain is a Mexican physician who DEA officials believed participated in the torture of a captured DEA agent in Mexico. Specifically, DEA officials believed that Alvarez was present in the house where the torture occurred and provided medical treatment to the DEA agent to allow his prolonged interrogation and torture.[6]

In 1990, Alvarez was indicted by a federal grand jury for his part in the torture and death of the captured agent and a warrant was issued for his arrest. After unsuccessfully seeking assistance from the Mexican government to bring Alvarez to the United States, the DEA hired a group of Mexicans, including defendant Sosa, to abduct Alvarez from Mexico to Texas, where he was arrested by federal officers.[7]

After he was acquitted of the criminal charges against him in connection with the torture and murder of the captured DEA agent, Alvarez returned to Mexico and brought an action against Sosa under the ATS, alleging arbitrary detention in violation of the law of nations.[8] The district court granted Alvarez summary judgment on his ATS claim and an *en banc* panel of the Ninth Circuit upheld that decision, rejecting Sosa's argument that the ATS did no more than vest federal courts with jurisdiction but did not create a private cause of action without explicit congressional action.[9] The Supreme Court granted certiorari and reversed.[10]

In determining whether the ATS was simply a jurisdictional statute that does not independently give rise to a private right of action, the Supreme Court examined the limited legislative history of the statute and the historical context surrounding its enactment. The Court, agreeing with the Ninth Circuit, concluded that the ATS supports a private cause of action, holding that "[I]t would have been passing strange for . . . Congress to vest federal courts expressly with jurisdiction to entertain civil causes brought by aliens alleging violations of the law of nations, but to no effect whatever until the Congress should take further action,"[11] the court noted.

The Supreme Court then considered precisely what actions constitute a "violation of the law of nations" giving rise to a claim under the ATS. The Court found that, in enacting the ATS, the first Congress intended to create jurisdiction for federal courts to hear a "relatively modest set of actions alleging violations of the law of nations," specifically the widely recognized violations of offenses against ambassadors, violations of safe conduct, and piracy.[12] The Court articulated five reasons for judicial caution in expanding the scope of the ATS beyond its modest roots. First, the Court noted that the "common law has changed since 1789 in a way that counsels restraint in judicially applying internationally generated norms." Specifically, in 1789, the common law was viewed as a "transcendental body of law" discovered by the court, whereas the modern understanding is that common law is not "found," but is created, by judges.

continued, next page

Second and related, the Court recognized that there had been a significant rethinking of the federal courts' role in making common law.[13]

Third, the Court found that its previous holdings that the "decision to create a private right of action is one better left to legislative judgment in the great majority of the cases" imposed a prudential limitation on its ability to expand the scope of the ATS.[14] Fourth, the Court noted that "the potential implications for the foreign relations of the United States of recognizing such causes should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs."[15] Finally, the Court pointed out as "particularly important" that "we have no congressional mandate to seek out and define new and debatable violations of the law of nations, and modern indications of congressional understanding of the judicial role in the field have not affirmatively encouraged greater judicial creativity."[16]

Taking all of these factors into consideration, the Supreme Court announced that federal courts, in determining whether a claim under the ATS constitutes a violation of the law of nations, should not recognize:

> private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than historical paradigms familiar when §§1350 was enacted.[17]

After setting forth this standard, the Court undertook to apply it to Alvarez' claim under the ATS for arbitrary detention. Examining the applicable international agreements in light of the allegations in Alvarez' complaint, the Court found that "a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy."[18]

The Eleventh Circuit's Decision Examines *Sosa* in *Aldana v. Del Monte Fresh Produce, N.A., Inc.*

In *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, the Eleventh Circuit applied the standard articulated by the Supreme Court in *Sosa* to determine whether the plaintiffs had properly alleged claims under the ATS in connection with their labor union activities.[19][20] The plaintiffs in *Aldana* were a group of seven Guatemalan citizens who were leaders of a national trade union of plantation workers in Guatemala. In that capacity, the plaintiffs were negotiating a new collective bargaining agreement with Bandegua, a wholly owned subsidiary of Del Monte Fresh Produce, N.A., Inc. ("Del Monte").[21] During the course of the negotiations, Bandegua fired 918 workers, and the union filed a formal complaint regarding the firings.

The plaintiffs alleged that Bandegua hired a private armed security

force, which is permitted and regulated under Guatemalan law, and authorized the security force to plan "violent action" against the plaintiffs in retribution for their union activities during these negotiations. Specifically, the plaintiffs alleged that the security force eventually held seven union leaders – including the plaintiffs – hostage, threatened to kill them and shoved them with guns. The plaintiffs were then taken to a radio station where they were forced at gunpoint to announce that the labor dispute was over and that they were resigning from the union. When the plaintiffs had signed resignation letters, after over eight hours in captivity, the security forces released them.[22] The plaintiffs brought claims under the ATS for: (1) cruel, inhuman and degrading treatment or punishment; (2) arbitrary detention; and (3) crimes against humanity against Del Monte and Bandegua. Plaintiffs also brought a claim for torture under the ATS. The district court granted Del Monte's motion to dismiss all the claims, finding that the plaintiffs had failed to allege any cause of action under the ATS.[23]

The Eleventh Circuit summarily affirmed the district court's dismissal of the plaintiffs' three non-torture claims under the ATS. After acknowledging the Supreme Court's admonition to "exercise 'great caution' when considering new causes of action, and maintain 'vigilant doorkeeping thus [opening the door] to a narrow class of international norms [recognized] today,'" the Eleventh Circuit examined each claim.[24]

First, the *Aldana* Court held that "there is no basis in law" to recognize plaintiffs' claim for cruel, inhuman, degrading treatment, or punishment. Second, the Court found that because the detention alleged the plaintiffs was for a *shorter* time period than the detention period found to be inadequate to support a claim in *Sosa*, plaintiffs' detention could not support their claim under the ATS. Finally, the Court held that plaintiffs had failed to allege the type of widespread or systematic attack against civilian populations necessary to support a claim for crimes against humanity.[25]

The Eleventh Circuit then considered the district court's dismissal of the plaintiffs' claims for torture under the ATS.[26] As an initial matter, the Court found that, in order to constitute a violation of international law actionable under the ATS, the alleged torture would have to be "state-sponsored."[27] After determining that the plaintiffs had alleged state action sufficient to overcome a motion to dismiss, the Court considered precisely what actions constituted torture under the ATS, applying the analytical framework set forth in *Sosa*.[28]

To determine the definition of torture under international law, the Court looked to the Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, which is relied on by courts in the immigration context when deciding whether aliens claiming a fear of torture should receive asylum. The Convention defines torture, in part, as an act that causes severe mental or physical pain or suffering under circumstances under which the victim is being punished, intimidated, or coerced.[29]

Applying this definition to the plaintiffs' factual allegations, the Court agreed with the district court that the plaintiffs had not adequately alleged a claim for physical torture. The Court noted that many of the plaintiffs' allegations of physical torture were conclusory and could not overcome a motion to dismiss. The Court explained "the only specified acts of physical violence we can discern from the complaint involves pushing, shoving and having one's hair pulled. These acts do not constitute severe pain or suffering."[30]

While rejecting the plaintiffs' claim of physical torture, the Eleventh Circuit reversed the district court's dismissal of the plaintiffs' claim for mental torture. The Court found that the plaintiffs' allegations of specific threats of acts of physical violence, including killing, by the armed security forces were sufficient to set forth a claim for mental "torture – based on intentionally inflicted emotionally (sic) pain and suffering – under the Alien Tort Act."[31]

The Eleventh Circuit's reasoning in *Aldana* – which upholds a claim for mental torture that arguably is no more than a dressed-up claim for intentional infliction of emotional distress while simultaneously rejecting claims of physical torture – highlights the tremendous amount of un-

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certainty remaining regarding precisely what types of actions constitute a violation of the law of nations under the ATS after *Sosa*. Although the Supreme Court took a first step in clarifying the scope of the statute in *Sosa*, the Supreme Court's reluctance to articulate a bright-line rule in the absence of direction from Congress continues to leave the lower courts with insufficient guidance in their efforts to discern the contours of federal jurisdiction under this statute less than clear.

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Endnotes:

[1] The original text provided that Congress "shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States." Act of Sept. 24, 1789, ch. 20, §90(b), 1 Stat. 79.
[2] The ATC was described by Judge Friendly in *IIT v. Vencap, Ltd.* 519 F.2d 1001, 1015 (2d Cir. 1975) as a "legal Lohengrin" because "no one seems to know from whence it came."
[3] 630 F.2d 876, 884 (2d Cir. 1980)
[4] Id. at 884.
[5] 124 S. Ct. 2739 (2004).
[6] *Id.* at 2746.
[7] *Id.*
[8] Alvarez also brought claims against a Mexican DEA agent, five unnamed Mexican civilians, the United States, and four DEA agents. *Id.* at 2747. These claims are not relevant to the ATS analysis.
[9] *Id.* at 2754.
[10] *Id.* at 2746.
[11] *Id.* at 2758-9.
[12] *Id.* at 2759.
[13] *Id.* at 2762.
[14] *Id.* at 2762-63.
[15] *Id.* at 2763.
[16] *Id.*
[17] *Id.* at 2765. The Court explained: "[w]e think courts should require any claim based on the present day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th century paradigm we have recognized." *Id.* 2761-62.
[18] *Id.* at 2768.
[19] Id.
[20] *Aldana v. Del Monte Fresh Produce, N.A., Inc.,* 416 F.3d 1242 (11th Cir. 2005).
[21] *Id.* at 1245.
[22] *Id.*
[23] *Id.* at 1246. The plaintiffs also brought claims for torture under the Torture Victims Protection Act ("TVPA").
[24] *Id.* at 1246-47.
[25] *Id.* at 1247.
[26] *Id.* The Court also considered plaintiffs' torture claim under the TVPA.
[27] *Id.*
[28] *Id.* at 1249-50.
[29] *Id.* at 1251.
[30] *Id.* at 1253.
[31] *Id.* at 1252-53. The Eleventh Circuit also found that the plaintiffs had stated a claim for mental torture under the TVPA.

Florida law, service of process to a foreign corporation must be effected pursuant to the Hague Service Convention. The court aligned with the precedents that consider the mere presence of a wholly owned subsidiary insufficient, by itself, to support substituted service under Florida law and that want substituted service to be strictly construed.

Service under Rule 4 (f) – Non-signatory countries - Saudi Arabia – Service by E-mail

Rachel Ehrenfeld v. Khalid Salim A Bin Mahfouz, 2005 U.S. Dist. LEXIS 4741 (S.D.N.Y. 2005)

Plaintiff Ehrenfeld could not obtain service under the Hague Convention because Saudi Arabia is not a party to that treaty.[9] Consequently, she needed to seek recourse in Fed. R. Civ. P. 4 (f), which allows service by means directed by the court and not prohibited by international agreements. The court found no international agreements addressing service of process in Saudi Arabia, and thus allowed plaintiff to present proposed alternative solutions. Plaintiff submitted five tentative proposals for service of process: (1) by certified mail on Defendant's United States attorneys; (2) by Federal Express on Defendant's United Kingdom attorneys; (3) by e-mail to the e-mail address on Defendant's website; (4) by Federal Express to the business address in Saudi Arabia; and (5) by international mail to Defendant's post-office box in Saudi Arabia.

The court found that proposals (1) and (2) were reasonably calculated to provide Defendant with notice of this suit, but that proposal (3) (service by e-mail) was not. The court supplies a useful compendium of precedents that allowed service by e-mail, and distinguished those that did so because the e-mail address was used for business purposes and was even posted as a normal way of communication. In the case before the court, however, there was neither proof nor even any indication that business was conducted through the e-mail address in question.

Service under the Hague Convention – Japan

Fireman's Fund Ins. Co. v. Fuji Electric Systems Co., Ltd., and Fuji Electric Corporation Of America, 2005 U.S. Dist. LEXIS 4580 (N.D. Cal. 2005)

Firemen's Fund attempted service of process on Fuji in Japan by transmission of the Summons and Complaint by Federal Express, and without translation. Fuji moved to dismiss under Fed. R. Civ. P. *12 (b) (5)* for insufficiency of service of process. The court found:

1. under Article *10(a)* of the Hague Convention,[10] precedents in the Ninth Circuit,[11] and Japan's explicit objection to Articles 10(b) and 10(c), but not Article 10(a) of the Hague Convention, service of process by international mail to Japan is allowed under the Hague Convention.[12]
2. However, Article *10(a)* does not provide for an explicit, affirmative authorization to use international mail for effecting service of process. Article *10(a)* merely does not forbid service by mail. The court found that the only affirmative authorization of international mail service is Federal Rule of Civil Procedure 4(f)(2)(c).[13] Under this rule, international mail service may be effected unless "prohibited by the law" of the receiving country.
3. The phrase "prohibited by the law" has received different interpretations. A line of cases reads the phrase as prohibiting any means of service not expressly permitted by the law of the receiving country.[14] Another line of cases excludes only those means of service that are explicitly disallowed in the receiving country.[15] Without siding with either, the court found that the law of Japan expressly forbids service by Federal Express; thus, that service was improper under either line of authority.
4. Finally, the court found that mail service, if authorized, would not have been rendered ineffective by the lack of translation. The court sided with a line of cases that read Art. 10 as requiring translation only where service is transmitted through a Central Authority, and not when, like in this case, the legal papers were served by mail.[16]

Jurisdiction

Personal Jurisdiction – General Jurisdiction – Web sites and advertising – Advertising not directed to a particular forum

Diane Zameska, et al. v. Seguros Ing Commercial America, S.A. De C.V., et al., 2005 U.S. Dist. LEXIS 3295 (E.D. Pa. 2005)

Plaintiffs, Pennsylvania citizens, were injured while vacationing at the Hotel Camino Real Cancun in Cancun, Mexico. Specific jurisdiction could not be established in Pennsylvania, because the cause of action was not related to contact with the forum. Plaintiffs then argued general jurisdiction based upon the existence of a "www.caminoreal.com" internet website, several hotel advertisements in national or international publications, and an affidavit from a friend of plaintiffs.

The court found that the mere ex-

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istence of a website is not sufficient to establish general personal jurisdiction, distinguishing cases that found otherwise on the grounds that the websites, in such cases, were "highly interactive." As far as advertisements in national or international magazines or newspapers, the court held that advertisements not directed to a particular forum are not sufficient to establish personal jurisdiction. In the case before the court, the ads appeared in *Conde Nast Traveler* and *Travel Weekly.* Neither publication was directed specifically toward persons in Pennsylvania. For these reasons, and other findings of fact, the court held that there was no general jurisdiction over the defendants in this case.

Forum Non Conveniens – Dismissal on Forum Non Conveniens Grounds before Determination of Subject Matter Jurisdiction.

Beatriz Dominguez-Cota et al. v. Cooper Tire & Rubber Co., et al., 396 F.3d 650 (5th Cir. 2005)

Plaintiffs, all Mexican nationals, were victims of a vehicle accident that occurred on a Mexican national highway in Camino Tijuana/Cabo San Lucas, Mexico. The United States District Court for the Northern District of Mississippi, where the case was brought, dismissed the action based on *forum non conveniens*. The Mississippi court reached the issue of *forum non conveniens* before deciding whether it had subject matter jurisdiction over the controversy.

The Fifth Circuit, on appeal, acknowledged the existence of a line of precedents in other Circuits, holding that the court is not required to pass first on the question of jurisdiction before ruling on *forum non conveniens*, which is a creature of statute.[17] The Fifth Circuit, however, disagreed. The court noted that both the Second and the D.C. Circuits "label *forum non conveniens* as a non-merits issue and so hold valid the process of using forum non conveniens as a grounds for dismissal where subject matter jurisdiction has not first been decided." However, at least one prong of the *forum non conveniens* analysis (evaluations of the "private factors") calls for the court's inquiry into factual and merits-based issues of the underlying dispute; thus, *forum non conveniens* analysis cannot be labeled as merely "non-merits." For these reasons, the court remanded the case for determination of subject matter jurisdiction first.

International Trade

Dumping – Constructive Export Price – "Actual" and "Imputed" Expenses – Credit and Inventory Carrying Costs

SNR Roulements v. SKF USA Inc., 402 F.3d 1358 (Fed. Cir. 2005)

The United States Court of Appeals for the Federal Circuit struck down a decision of the United States Court of International Trade that did not permit use of actual expenses instead of imputed expenses to account for credit and inventory carrying costs when determining "total expenses" for the purpose of assessing "dumping margins."

In order to determine antidumping duties,[18] the Department of Commerce is required to assess "(i) the normal value and export price (or constructed export price) of each entry of the subject merchandise, and (ii) the dumping margin for each such entry."[19] Constructed export price ("CEP") is the price at which merchandise is sold in the United States to a buyer unaffiliated with the producer or exporter, after making adjustments.[20] The "dumping margin" refers to the amount by which the normal value exceeds the export price or the CEP. [21] One of the adjustments authorized by Section 1677a is to reduce the price by the "CEP profit" allocated to the "total United States expenses."[22] The court remanded the case "with the instruction that Plaintiffs be provided an opportunity to make a showing that their dumping margins were wrongly determined because Commerce's use of actual expenses did not account for U.S. credit and inventory carrying costs in the calculation of total expenses."[23]

Foreign Judgments – Enforcement

English Judgments – Due Process and Fraud

The Society of Lloyd's v. Minna Jane Edelman, 2005 U.S. Dist. Lexis 4231 (S.D.N.Y. 2005)

The Society of Lloyd's ("Lloyd's"), brought action in the United States District Court for the Southern District of New York to recognize and enforce judgments entered in England against certain defendants, who were "Names" at Lloyd's. Lloyd's asked defendants to pay premiums allocated upon them following a Reconstruction and Renewal ("R&R") Plan. Under the Plan, a newly formed company, Equitas Reinsurance Ltd. ("Equitas"), would reinsure each Name's underwriting obligations for 1992 and prior underwriting years, against a premium to be calculated and charged to every Name.[24] Lloyd's obtained an Order 14 final judgment[25] against the defendants, after lengthy hearings and over many defenses raised by the Names. In particular, defendants challenged a "pay now, sue later" clause that precluded them from raising fraud and rescission defenses in an action to collect the Premiums due to Equitas.

Recognizing that New York had adopted the Uniform Foreign Money-Judgments Recognition Act (the "Recognition Act"), and that "the English judicial system provides impartial tribunals" and "procedures compatible with the requirements of due process of law,"" [26] the court cited to many precedents, in New York and other jurisdictions, that upheld English judgments, also in cases nearly identical.[27] Defendants argued that due process was not respected in the particular case, but the court held that, under the Recognition Act, the court was required to examine the fairness of the English system, not to evaluate the individual action.[28]

The court overcame the fraud defense by holding that the "pay now, sue later" did "not exclude or limit [Lloyd's] liability for fraud or on any other basis. Its effect is and only is to insulate, as a matter of procedure, claims for the premium from counterclaims or set-offs asserted by the reinsured.".[29]

This case is a useful mini-treatise on enforcement of foreign judgments in various United States jurisdictions.

European Law

Trade Marks

The Gillette Company and Gillette Group Finland Oy v. LA-Laboratories

Ltd Oy, Court of Justice of the European Communities, Judgment of the Court of Justice in Case C-228/03, 17 March 2005

Gillette obtained the registration and the exclusive right to use in Finland the trade marks "Gillette" and "Sensor." LA-Laboratories Ltd Oy also markets, in Finland, razors composed of a handle and replaceable blade, as well as blades sold separately. The blades (under the trademark "Parason Flexor") are sold with a sticker that says "All Parason Flexor and Gillette Sensor handles are compatible with this blade."

Gillette argued that this sticker constituted an infringement of their registered trademarks "Gillette" and "Sensor", because, in its opinion, the sticker created a connection in the mind of consumers between the products marketed by LA-Laboratories and those of Gillette, or gave the impression that LA-Laboratories was authorized to use the Gillette and Sensor marks.

The Finnish Supreme Court referred these questions to the Court of Justice of the European Communities concerning the interpretation of the 1989 Community directive on trademarks, particularly the provisions referring to limitations on the protection conferred by the trademark.[30]

Under the case law of the European Court, the essential function of a trademark is to guarantee the identity of origin of the marked goods or services to the consumer or end user by enabling the consumer to distinguish the goods or services from others which have another origin, without any possibility of confusion. In that context, limitations of the rights of a trademark owner aim at reconciling the fundamental interests of trademark protection with free movement of goods and services in the common market.

The Court noted that, according to the directive,[31] a trademark owner may not prohibit a third party from using the mark in trade where it is necessary to indicate the intended purpose of a product or service, specially in connection with accessories or spare parts.

The Court also held that the "criterion of necessity" requires the national court to verify whether use of the trademark is in practice the only means of providing the public with comprehensible and complete information as to the intended purpose of the product, taking into account the nature of the public for which the product marketed by the third party is intended.

The fact that a third party uses a trademark of which it is not the owner in order to indicate the intended purpose of its product does not necessarily mean that it is presenting that product as being of the same quality as, or having equivalent properties to, those of the product bearing the trademark.

It is still up to the national court to verify whether the presentation is in accordance with honest practices in industrial and commercial matters.

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Endnotes:

[1] Jacada argued that the FAA did not apply, but that Michigan law governed the award. The jurisdictional posture (diversity rather than FAA) could have had, therefore, *Erie* consequences that may have supported that argument.

[2] 9 U.S.C. §202 reads: "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. 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."

[3] Accordingly, the court found that the award in the case was international.

[4] The court cited to *Marbury v. Madison, 5 U.S. (1 Cranch) 137, 147, 2 L. Ed. 60 (1803)* ("It is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress.")

[5] 50 U.S.C. App. §1 *et seq.*

[6] Club Med Sales, Inc. ("CMSI") and Club Med Management Services, Inc. ("CMMS")

[7] Florida Statutes §48.161 requires the sending of notice of process directly to the defendant, in addition to service upon the Secretary of State.

[8] 726 F. Supp. 822, 824 (N.D. Fla. 1989).

[9] See United States Dep't of State Circular on Service of Legal Documents Abroad, available at http://www.travel.state.gov/law/info/judicial/judicial_680.html (listing countries that are parties to the Hague Convention).

[10] Article 10(a) of the Hague Convention states: "Provided the State of destination does not object, the present Convention shall not interfere with — (a) the freedom to send judicial documents, by postal channels, directly to persons abroad."

[11] *Brockmeyer v. May*, 383 F.3d 798, 804 (9th Cir. 2004).

[12] The court thus is aligned with the line of precedents that interpret the word "*send*" in art. 10(a), to include service of process. *See e.g. Brockmeyer v. May*, 383 F.3d 798, 804 (9th Cir. 2004).

[13] (f) [S]ervice . . . may be effected in a place not within any judicial district of the United States:

continued, next page

. . . (2) if there is no internationally agreed means of service or the applicable international agreement allows other means of service, provided that service is reasonably calculated to give notice:
. . . (C) unless prohibited by the law of the foreign country, (by . . . (ii) any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served[.]emphasis supplied)

[14] *See, e.g., Graval v. P.T. Bakrie & Bros.*, 986 F. Supp. 1326, 1329 (C.D. Cal 1996); *Proctor & Gamble Cellulose Co. v. Viskoza-Loznica*, 33 F. Supp. 2d 644, 664-65 (W.D. Tenn. 1998).

[15] *See e.g., Dee-K Enters., Inc. v. Heveafil Sdn. Bhd.*, 174 F.R.D. 376, 379-80 (E.D.Va. 1997); *Resource Ventures, Inc. v. Resources Mgt. Int'l, Inc.*, 42 F.Supp.2d 423, 429-30 (D.Del. 1999).

[16] *See, e.g. Weight v. Kawasaki Heavy Indus.*, 597 F. Supp. 1082, 1086 (E.D. Va. 1984); *Lemme v. Wine of Japan Import, Inc.*, 631 F.Supp. 456, 464 (E.D. NY 1986).

[17] Citing to precedents in the Second Circuit and in the D.C. Circuit, *see e.g. Monegasque De Reassurances S.A.M. v. Nak Naftogaz of Ukraine*, 311 F.3d 488, 497- 498 (2d Cir. 2002); *In re Minister Papandreou*, 329 U.S. App. D.C. 210, 139 F.3d 247 (D.C. Cir. 1998).

[18] "Dumping" refers to the sale of goods at less than fair value. 19 U.S.C. §1677 (2000).

[19] 19 U.S.C. §1675 (2000).

[20] Id. §1677a.

[21] Id. §1677.

[22] 19 U.S.C. §1677a(d)(3) (2000).

[23] *SKF*, 402 F.3d at 1363.

[24] *Edelman*, 2005 U.S. Dist. LEXIS 4231 at *1.

[25] (the equivalent of summary judgment).

[26] The court cited to *Roby v. Corp. of Lloyd's*, 996 F.2d 1353, 1363 (2d Cir. 1993) (noting that "United States courts consistently have found [English courts] to be neutral and just forums"); *Colonial Bank v. Worms*, 550 F. Supp. 55, 58 (S.D.N.Y. 1982); and *Soc'y of Lloyd's v. Ashenden*, 233 F.3d 473, 476 (7th Cir. 2000).

[27] See, e.g., for New York, *CIBC Mellon Trust Co. v. Mora Hotel Corp. N.V.*, 100 N.Y.2d 215, 222 (2003) (stating that it "is beyond dispute" that the English judicial system affords litigants due process); *Society of Lloyd's v. Grace*, 278 A.D.2d 169, 718 N.Y.S.2d 327, 328 (1st Dep't 2000); *Porisini v. Petricca*, 90 A.D.2d 949, 456 N.Y.S.2d 888, 890 (4th Dep't 1982). *See also Society of Lloyd's v. Turner*, 303 F.3d 325 (5th Cir. 2002); *Ashenden*, 233 F.3d at 476-81; *Society of Lloyd's v. Mullin*, 255 F. Supp. 2d 468 (E.D. Pa. 2003), *aff'd*, 96 Fed. Appx. 100 (3d Cir. 2004); *Society of Lloyd's v. Hudson*, 276 F. Supp. 2d 1110 (D. Nev. 2003); *Society of Lloyd's v. Shields*, No. 03-0032 (M.D. Tenn. Oct. 1, 2003), *aff'd*, 118 Fed. Appx. 12 (6th Cir. 2004); *Society of Lloyd's v. Blackwell*, No. 02CV448-J (AJB) (S.D. Cal. Feb. 24, 2003); *Society of Lloyd's v. Byrens*, No. 02CV449-J (AJB) (S.D. Cal. May 29, 2003); *Society of Lloyd's v. Davies*, No. 02-CV-1602-GET (N.D. Ga. Apr. 23, 2003); *Society of Lloyd's v. Borgers*, No. CV-02-0423-PHX-FJM (D. Az. Mar. 26, 2003), *aff'd*, 107 Fed. Appx. 887 (11th Cir. 2004); *Society of Lloyd's v. Bennett*, No. 02-CV-204TC (D. Utah Nov. 12, 2003); *Society of Lloyd's v. Reinhart*, No. 02-264-LFG/WWD-ACE (D.N.M. Sept. 30, 2002); *Society of Lloyds v. Webb*, 156 F. Supp. 2d 632 (N.D. Tex. 2001); *Society of Lloyd's v. Rosenberg*, No. 02-1195 (E.D. Pa. Aug. 12, 2002); *Society of Lloyd's v. Collins*, No. 00-713-CA-22 (Fla. Cir. Ct. June 4, 2003).

[28] *Id.* at 12, citing to *CIBC*, 100 N.Y.2d at 222 ("The relevant inquiry under C.P.L.R. 5304(a) is the overall fairness of England''s legal 'system.'"); *see Ashenden*, 233 F.3d at 477 (construing Illinois' Recognition Act and holding that assessing due process on a case-by-case basis would "be inconsistent with providing a streamlined, expeditious method for collecting money judgments rendered by courts in other jurisdictions").

[29] *Id.* at 15.

[30] First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trademarks (OJ 1989 I, 40, p.1).

[31] *See id.*

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