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INTERNATIONAL LAW QUARTERLY

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Five Years After the USA Patriot Act–

An Update on FinCEN's Regulatory and Civil Enforcement Activities With Respect to Money Laundering and Terrorist Financing[1]

By Jeffrey M. Telep©

Introduction

Five years ago, Congress enacted the Uniting And Strengthening America By Providing Tools Required To Intercept And Obstruct Terrorism Act of 2001 ("Patriot Act"). Title III of the Patriot Act amended the Bank Secrecy Act ("BSA") in a variety of ways. This article describes the regulatory and civil enforcement activities undertaken in the last five years pursuant to these statutory amendments by the Financial Crimes Enforcement Network ("FinCEN"), the agency within the Treasury Department authorized to administer the BSA as amended by the Patriot Act.

FinCEN's Regulatory Activity Under The Patriot Act

Section 311 of the Patriot Act authorizes the Treasury Department to require domestic financial institutions to take certain "special measures" if Treasury has reasonable grounds to believe that a jurisdiction, financial institution, or transaction outside the United States is a primary money launder-

See "FinCEN," page 18

Why Certification Matters

By Pamella Seay

Have you considered the possibility of becoming board certified in International Law? As a member of the International Law Section, you already acknowledge your interest in international law, and that your practice probably consists, at least in part, of providing advice on international legal issues. So, what's keeping you from becoming board certified? The CLE requirement? The rule requiring three years of international law practice? Or do you wonder if being board certified is worth the time of preparation and the extra fee each year?

As a Florida Bar board certified international lawyer, I can unequivocally state that the process has been worthwhile for me and has been both personally and professionally rewarding. But, what does that mean for you? Should you become board certified? How will it help your practice and your status as an attorney? To answer those questions, you need to examine your practice to determine if you are, in fact, an international lawyer. Next, you should examine the benefits of certification to see if

See "Certification," page 4

New Chair's Remarks

June 2006, Boca Raton Resort & Club

by Francesca Russo-Di Staulo

Dear Executive Council Members, and fellow executive committee members: thank you. I want to thank each and every one of you for granting me the honor and privilege of serving as Chair of the International Law Section for this upcoming year.

When I think of the long line of accomplished, dedicated and dynamic men and women who have preceded me and have already served as Section chairs, I am truly humbled for having the opportunity to follow in their footsteps. I will work hard to follow their example by making a lasting contribution to the Section that will serve the next chair and all Section members well in the future.

Naturally, the job of chair cannot be accomplished alone. As John Rooney, my predecessor will tell you, each and every one of you, all executive committee members, executive council members and committee chairs, especially, are integral components that must work together, side by side, if we wish to achieve the ultimate goal of raising the stature and prestige of this Section to that of a world class organization. To do so, we need to work closely together to make it a reality.

We, as a Section have already taken some significant steps toward this goal. To name just a few examples:

1. Under Lucius Smejda's leadership, we saw tremendous strides in bringing real structure and organization to the Section and we unveiled the new and improved ILS website.

2. Under John Rooney's leadership, we were able to finalize the revisions to this Section's bylaws so that they would be more in accord with the new face of the Section and better reflect the Section's mandate and goals. John also led the effort in streamlining the Committees of the Section for improved accountability.

3. During my year as chair of this Section, my goal is to continue the tireless, talented efforts of my predecessors and help the Section take additional concrete steps toward the

achievement of our combined goal which is continue to raise the profile and stature of this Section:

a. One of the first significant and concrete steps begins with the Section's Annual Retreat which will take place in early December, at the Ritz Carlton in Key Biscayne. The Annual Retreat is traditionally the Section's major "brainstorming session." I call upon each of you to commit to not only attending the Retreat but to actually come prepared to discuss concrete ideas, including ideas for new seminars that may be held this upcoming year; as well as ideas for further strengthening and increasing the profile and role of the Section in the overall landscape of International Law;

b. This year, I plan to not only hold regular, monthly meetings of the Executive Committee but I plan to personally contact each Committee Chair in advance of the monthly meetings to be held, to touch base with them and discuss the goals of their Committees, the specific steps/activities they plan to take this year to accomplish their Committee's goals and to check-in with them on a regular, monthly basis on the progress of those activities. These periodic exchanges will be followed by brief e-mails that will constitute mini interim Committee reports that will be discussed at the monthly Executive Committee meetings. The idea is to breathe new real life into the Committees, increase accountability and encourage the Committees to have their own regular meetings whether on the phone or in-person so that by the end of the year, we can point to specific, concrete steps each Committee has taken toward the achieving of our ultimate goal.

This past year, we, as a Section, took an important step toward increasing the profile of this Section, when under John Rooney's chairmanship, we sent Brock McClane, as a representative of this Section to attend the very 1st World Bar Leaders' Conference, in London, England, May 24-26th. Significantly, This Section was the only section of the Florida Bar to send a representative and represent Florida at this event. As is outlined in Brock McClane's report, this World Conference attracted Bar Leaders from. such countries as, Argentina, Australia, Belgium, Brazil, Bulgaria, Canada, China, France, Germany, Israel, Japan, New Zealand, to name just a few. Attendance at these types of events are important steps toward increasing the overall profile of this Section and where we can show bars from other countries just what our Section is all about, what we have accomplished and what we plan to accomplish. This upcoming year, I plan to attend the next Bar Leader's Conference, and represent this Section, as a continual effort to further increase the profile of this Section;

4. This coming year, I plan to continue to increase the ties and relationships that this Section already has with foreign Bars such as the Canadian Bar and the Barelona Bar, and to estab-

lish new ones. For example, I would like to see this Section enter into an agreement with the Genovese Bar of Italy, to name but one example;

5. This coming year, I hope you will all work with me and the CLE Committee in bringing to this Section Class-A seminars and presentations that will not only serve to increase the profile of the Section but that will result in positive revenues for the Section.

a. Thanks to Elke Roff, we were able to end this past year and kick-off this year with a great seminar entitled: An Overview on International Transactions, which took place this morning from 8:30 a.m. to approximately 12:30 a.m. This seminar is an important first concrete step in improving participation in the area of Transactional Law. The goal is to further increase participation in this branch of the Section and to raise its profile to the level of recognition that the International Litigation and Arbitration Committee already enjoys.

b. This upcoming year, the International Chamber of Commerce will be holding its Fourth Annual Conference on International Commercial Arbitration in Latin America, which will take place in Miami, from November 5-7, 2006. This year again the Section has been invited to act a promotional supporter of this event. We have already received a proposal for consideration.

c. I encourage all of you to give serious thought to additional seminar ideas for this upcoming year.

6. As a continuing goal of this Section, I want to see a significant increase in the Section membership as well as an increase in attendance at Section events;

7. In addition, in the interest of increasing accountability, visibility and ensuring concrete results for this upcoming year, I encourage each of you to contact me by phone, or e-mail with not only your ideas but also to discuss any complaints or issues you may have and that might otherwise constitute an impediment or obstacle to achieving specific goals.

These are just a few brief thoughts. Once again, thank you for your confidence and trust.

As Chair, I am pleased to introduce the first 2007 issue of the *International Law Quarterly*

SECTION CALENDAR

Mark your calendars for these important Section meeting & CLE dates:

For more information contact: Angela Froelich:
850-561-5633 / afroelic@flabar.org

February 22 - 23, 2007

"28TH ANNUAL IMMIGRATION LAW UPDATE" CLE
[Course Number 0399R]
Hotel Reservations: 305/358-1234 / Group Rate: $220 / Group Rate Expires: February 2, 2007
Hyatt Regency Downtown Miami, Miami, FL
(Course will not be taped.)

February 23 - 24, 2007

THE THIRD ANNUAL INTERNATIONAL COMMERCIAL ARBITRATION MOOT COURT COMPETITION
Orlando Downtown Marriott, Orlando, FL

April 19 - 20, 2007

"FIFTH ANNUAL INTERNATIONAL LITIGATION AND ARBITRATION CONFERENCE" CLE
[Course Number 0400R]
The Biltmore Hotel, Coral Gables

June 29, 2007

"INTERNATIONAL TRANSACTIONS OVERVIEW" CLE
9:00 a.m. – 12:00 p.m.
In conjunction with The Florida Bar Annual Meeting
Orlando World Center Marriott, Orlando, FL

June 29, 2007

INTERNATIONAL LAW LUNCHEON, ANNUAL EXECUTIVE COUNCIL MEETING & RECEPTION
In conjunction with The Florida Bar Annual Meeting
Orlando World Center Marriott, Orlando, FL

they apply to you. Last, you need to take part in the certification process, take the exam, and establish yourself as one of the few who have chosen to distinguish their practices with the designation "Board Certified in International Law."

What Is the Practice of International Law?

According to the specifications for The Florida Bar International Law Certification Examination, "[t]he practice of 'international law' is defined as the practice of law dealing with issues, problems, or disputes arising from any and all aspects of the relations between or among states and international organizations as well as the relations between or among nationals of different countries, or between a state and a national of another state, including transnational business transactions, multinational taxation, customs, and trade. 'International law' includes foreign and comparative law." This definition provides some guidance, but fails to express the breadth of the practice.

International law actually includes a wide-range of practice areas, from import-export, customs, immigration, and international trade, to estate planning, taxation, and dispute resolution. It includes business planning, labor and employment, litigation and arbitration. Even the buying and selling of property can be considered 'international law' when one or more of the parties is from another country.

To qualify to sit for the Certification exam, you must "demonstrate substantial involvement in the practice of international law during … the 3 years immediately preceding the date of application." "Substantial" means that you have "devoted 50 percent or more" of your practice to "matters in which issues of international law played a significant role and in which the applicant had substantial and direct participation."

Now, examine your practice. Do you often service clients with international problems, or domestic problems that involve an international aspect? Are you or your staff multi-lingual because your clientele is primarily from a country other than the US? Do you find yourself immersed in research on international service of process and worry about the challenges and hazards of attempting to take a deposition abroad? When you watch the news, do you focus on global events because they are more relevant to your practice? If so, then it is possible that you have a substantial practice in international law.

Keep in mind that, if your practice focuses on immigration, there is a Florida Bar program to become board certified in immigration. But, if the matters you address tend to involve assisting clients in establishing US businesses for foreign clients, or helping your US clients to export their products overseas, or if your clients hold property in other countries and you advise them on tax-related matters, or any other of the myriad international issues that can arise, you may be eligible to seek certification.

Recently, I spoke to an attorney who said that he didn't believe that it was necessary or even desirable to be board certified in international law, because, in his opinion, "international law" covers so many different areas that it was not a clearly delineated area of practice. I respectfully disagree. Any attorney who claims to practice in "international law" must have certain knowledge common to all practitioners in the field. We share an underlying foundation of information and knowledge relating to international and comparative law and justice that other practitioners won't readily recognize.

Our role is to provide an essential service to clients by recognizing and analyzing the issues that relate to multinational or international representation. From international business transactions, international money payments, intellectual property rights, to customs, foreign direct investment, and other matters, our clients rely on our expertise in the field of international law. We must be able to identify the relevant issues and have the respective knowledge to advise our clients directly, or to find an appropriate practitioner to whom they can be referred. Board certified practitioners participate in mandatory continuing legal education requirements in the field, thus further assuring our clients that we are current on the latest issues that will affect them.

Benefits of Certification

Certification in international is no more required than it is in any other field of practice. An attorney can practice quite well in this field or any other without ever achieving certification. So, what are thee benefits of certification?

Many board certified attorneys tout the potential for referrals and the resulting increase in business as a motivation for becoming certified. Attorneys in your community, when realizing they are facing an international issue, often look to The Florida Bar for the list of board certified attorneys to whom they can turn for reliable assistance or a referral. Through certification, your reputation precedes you.

To your clients, it is an immediately recognizable credential. Does it mean that you are better than others who are not board certified? No. But it does mean that you have submitted yourself to the scrutiny of your peers, in terms of ethics, professionalism, and competence in the field. It is a second level of assurance to your clients that you can do what you say you can do.

But certification is far more than referrals or the recognition of your peers. It is an outward symbol that you have achieved a level of accomplishment in the field, distinguishing yourself by your willingness to participate in the certification process. Achieving certification expresses a level of maturation in the field, a natural progression in your legal career.

Certification allows you to become personally identified with international law. Once you become board certified, your letterhead, your business cards, your e-mails, your advertisements, even your lapel, declare that you are board certified in international law. Though attorney ads are allowed to state areas of practice, The Florida Bar does not permit advertisements claiming specialization or expertise unless the attorney has obtained certification, either from The Florida Bar or another organization approved by The Florida Bar. If the central focus of your practice is in the area of international law,

then certification makes sense, since you are then permitted to share this information with your clients, other members of the profession, and the public at large.

Some attorneys are afraid that certification might limit their practice, that if they become board certified in international law, they might lose the domestic side of their practice. On the contrary, certification opens doors, not closes them. It gives your domestic clients another facet of the potential representation you can provide. It encourages your current clients to seek you out for advice on expanding their businesses abroad or investing with a foreign partner. You may even discover some hidden international connections that your client previously failed to mention. Being board certified also allows you to take the lead in your field. You will become a part of a small number of attorneys in the state with the credentials necessary to call themselves "board certified." At last count, there were only 30 statewide. If you'd like to become number 31, take a look at the certification process and see when you can fit it into your busy schedule.

The Certification Process

The basic qualifications are spelled out in the Standards and Policies of The Florida Bar Board of Legal Specialization and Education. These include (a) five years, the most recent of which must be in Florida as an attorney in good standing, , (b) three years of substantial involvement in the practice of international law, (c) completion of at least 60 hours of continuing legal education credits in international law, (d) satisfactory completion of a peer review, conducted by the international law certification committee, (e) a passing grade on the certification exam, and (f) payment of the fee.

The requirements are fairly straightforward. The minimum practice requirement and the CLE requirements are clear. The "substantial practice" requirement has been discussed previously. That leaves peer review and the exam.

The peer review process consists of several steps. To encourage candid responses, the process is confidential. The applicant is required to submit the names of five attorneys who can attest to their knowledge and ability in international law, as well as their professional and ethical reputation in the community. These persons are sent a form which also allows them to submit the names of other persons who may know of the applicant's reputation. In addition to these attorneys, the international law certification committee randomly surveys attorneys active in the field. The staff also requests a report from the Bar about any disciplinary actions filed about the applicant.

Assuming satisfactory completion of this portion of the process, as well as the minimum requirements, the next step is the exam. A broad overview of the topics covered by the exam is provided to each applicant. The exam is divided into two parts, taken over the course of five hours, all in one day.

The first part consists of a series of multiple choice questions focusing on objective information related to international law. The second part is an essay question designed to allow the practitioner to focus on his or her area of expertise within international law. The applicant is given a choice of questions from which to select. The range of topics may include dispute resolution, incoming business, taxation, customs and trade, or outgoing business. The applicant is asked to review the situation presented and advise the client. Grading the exam response is far different from what we all became accustomed to in law school, where" "issue-spotting" was the key to passing the class. Here, the focus is on advising a client. The response is graded by the committee using a "holistic" methodology which looks at the entire response, not just specific terms or topics that might be included.

The Florida Bar Board of Legal Specialization and Education reviews the statistics for those who take the various certification exams. Most applicants who sit for the exams spend several hours studying in preparation for the exam. Though most practitioners who practice in the field of international law are familiar with the range of topics on which they'll be tested, it is recommended that some time be spent reviewing the applicable treaties, rules, and statutes as well as current case law.

Conclusion

If your practice involves international law, and you've been an attorney for at least five years, you should consider the possibility of becoming board certified. The exam takes place every spring. To sit for the exam, you must submit your application by the end of August. You can prepare yourself for the process by reviewing your CLE records to assure that you've met the minimum requirements and, if not, to attend additional programs over the next several months to accumulate the necessary amount. The International Law Section of The Florida Bar presents some exceptional programs, particularly in the areas of litigation and arbitration.

If you'd like more information about the certification process, you can contact The Florida Bar staff assistant to the International Law Certification Committee, Adam Brink at abrink@flabar.org. When you pass the exam, we will all want to welcome you to the ranks of those board certified in International Law.

Advancing the Arbitral Costs of the Recalcitrant Respondent

By Lisa Bench Nieuwveld, Esq.

Introduction

As international arbitration increases in popularity, so do the number of strategies each party develops to gain procedural advantage. One strategy is for a party, typically the Respondent, simply to refuse to pay the advance on costs necessary to enable the arbitration to proceed. Most institutions require some initial fee for both sides to initiate an arbitration. Most institutions, such as the International Chamber of Commerce ("ICC") will dismiss any claims should the parties fail to pay the advance on costs. Without paying this fee, the case is dismissed without ever reaching the arbitral tribunal. In other words, it does not matter who pays but that the fees are, in fact, paid in order for any claim to reach the arbitral tribunal. As Bühler describes it in his *ICC Bulletin* article, "arbitration is a 'pay-as-you-go" concept.

> Most arbitral institutions allow the paying party to front the entire advance on costs in order to have its case proceed to the arbitral tribunal. The paying party then must wait and hope that, should it win the dispute, the arbitral tribunal will include the other side's share it fronted in its final award. However, this places a heavier financial burden on the paying party. Indeed, one of the attractions of arbitration is that both parties bear the costs and is typically less expensive than the traditional court route. As such, the recalcitrant respondent hopes the claims will be dismissed before reaching any arbitral tribunal and, therefore, simply refuses to pay.

In this article, I discuss a possible method the paying party can use against the non-paying party to minimize its costs and still get the issue before the arbitral tribunal without having its claims dismissed under the ICC rules. Before going into this recommended procedural path, I discuss other arguments parties have asserted, sometimes with success and sometimes without. As such, the other arguments appear to succeed as often as they fail, making arbitration costs law (for lack of better description) ambiguous at best.

Traditional arguments

The two asserted arguments, found not only in Bülher's ICC Bulletin article, but also in other European authors' texts, revolve mainly around two possible routes to have the non-paying party bear its share of the advanced costs: (1) the breach of contract theory, and (2) the interim measure approach. I won't go into these other theories in depth, rather I will give a general, broad outline as background for what other parties have attempted.

Breach of Contract Theory

The breach of contract theory is exactly as it sounds. The paying party argues that a binding agreement exists between both parties when they chose, in the relevant dispute resolution provision, to submit their dispute to the ICC. This binding agreement means that the parties are contractually bound to comply with the ICC Arbitration Rules, including ICC Rules Article 30(3), which requires both parties to pay their equal portion of the advance on costs. According to Wenger, a breach of contract argument can be made by a party when the other party fails to pay their portion of the advance on costs because this ICC Article creates reciprocal implicit obligations.

At first glance, the argument appears very viable and there are arbitral tribunals who have supported it. However, the problem that often arises is that the paying party still must front the costs of the arbitration in order to have the arbitral tribunal empaneled in the first place. Once before the tribunal, the paying party can raise this claim hoping the arbitral tribunal will order the non-paying party to reimburse the paying party the fronted advance on costs.

Some parties successfully have argued this claim. In Secomb's 2003 article, he discusses a few non-published ICC partial awards in which the arbitral tribunals supported the breach of contract theory. One such partial award looked to Article 9(2) of the 1988 ICC Rules which was almost equivalent to ICC Rules Article 30(3). That case clearly stated that, even if one party pays both portions because the other party refuses to pay, "it does not deprive the contractual creditor of its right to force the other party to fulfil its obligations." This suggests that the arbitral tribunal was following the breach of contract theory.

However, some parties successfully have defeated this theory, arguing that a reciprocal obligation between the parties did not arise. Instead, the parties have made an agreement with the ICC Court of Arbitration, making such a payment a procedural matter. One interim award reached the same conclusion, but was premised on a different line of reasoning. The sole arbitrator looked to ICC Rules Article 30(2), which grants the ICC Court of Arbitration the right to fix separate advances on costs should counterclaims exist. He found that this supported the conclusion that the reciprocal obligations are between the ICC Court of Arbitration and not the parties because if the ICC Court of Arbitration has the authority to separate costs for counterclaims, any commitment to pay costs is between the party and the ICC Court of Arbitration and, as such, is procedural.

This leads to the second approach, an interim measure, to force the recalcitrant party to pay its portion of the advance on costs or refund the paying party for covering costs.

Interim Measure Approach

This approach is actually quite similar to the method I will later describe. Under this approach, parties request the arbitral tribunal to render a provisional measure requiring the non-paying party to come up

with its portion of the costs advance. The standard, even in arbitrations, for an interim measure is typically a showing of irreparable injury and urgency, which means this theory has a higher burden of proof than the breach of contract theory described above. However, what is critical is that a claim timely reach the arbitral tribunal before being dismissed and with the paying party paying as little in way of extra costs as possible.

Therefore, without delving into theoretical arguments other authors have exhausted concerning whether an arbitral tribunal has the competence to make such an award on a costs advance, I focus on my recommended approach. This approach offers the best resolution to getting the case before an arbitrator without paying the entire advance on costs before the claims are dismissed. Taking the standard interim measures approach lacks a solution to the issue at hand. Simply requesting such a measure without paying the advance on costs will get the claims dismissed before the arbitral tribunal can even make a decision.

This recommended approach allows the party to combine the two approaches discussed above or simply to follow another procedural step that the ICC Rules allow to get to the arbitral tribunal to order an interim measure without the case being dismissed for lack of paying the entire costs advance.

Recommended approach

Although no approach will find universal acceptance and even this recommendation will require a little more cash outlay than simply paying half the advance on costs, it has successfully been tried and proven by the international arbitration team with which I work. This approach, referred to as the alternative interim measure approach, is specifically designed for ICC arbitration disputes.

ICC Rules Article 30 (1) states,

> After receipt of the Request, the Secretary General may request the Claimant to pay a provisional advance in an amount intended to cover the costs of arbitration until the Terms of Reference have been drawn up.

Utilizing this rule allows the Claimant to request the ICC Court of Arbitration to determine a smaller, provisional amount, which will at least get the claim to the tribunal and will cover the costs of the arbitration through the Terms of Reference. Once the case is finally in the arbitrator's hands, it is then possible to raise claims, such as requesting an interim measure (even premised on the breach of contract theory or any theory the Claimant finds applicable), before the arbitral tribunal for it to make an immediate ruling. The arbitral tribunal may issue partial awards on interim measures before the terms of reference are drawn up premised on ICC Rules Article 23(1).

At this point, the Claimant has managed to (1) pay less fees than the total advance on costs, (2) circumvent any procedural issues, (3) get the claims before the arbitral tribunal, and (4) reserve the argument again for the final award, should the interim petition prove unsuccessful.

The only true downside to this mechanism is that the necessary elements, as mentioned under the Interim Measure section above, are not always easy to prove. However, this approach is meant to assist your client to pay less than the full advance on costs and get its claim before the arbitral tribunal. Once before the tribunal, the tribunal has the authority to hear claims. The paying party then can assert the breach of contract theory or any other suitable argument to get the non-paying party to cover its costs. Some authors argue that all the elements clearly exist since irreparable harm to the paying party is evident and the damages are clear. A partial award in 2000 not only followed the breach of contract theory in its interim measure award, but it also didn't require the party to show irreparable injury or urgency.

Although the traditional claims for an interim measure or breach of contract theory can come into play once you reach the tribunal, as shown above, most parties fail to recognize this method is available to them under the ICC Rules. Doing so would allow them to avoid paying the entire advance on fees without having their claims dismissed before an arbitral tribunal hears the claim.

Conclusion

Parties often will attempt to delay the arbitration proceedings by refusing to pay the advance on costs. The non-paying party may attempt this strategy to deter the paying party hoping it will decide against proceeding further with an arbitration.

Although a paying party simply can pay the entire advance on costs and proceed with the claim in hopes it can recover this advance in the final award, the recommended approach can serve two purposes. First, it makes it possible for the paying party to avoid covering the entire advance on costs. Second, it may invoke a little sympathy with the arbitral tribunal if the tribunal recognizes the strategy-game the non-paying party is attempting to play.

The *International Law Quarterly* is prepared and published by the International Law Section of The Florida Bar.

Articles between 3 and 10 pages involving the various disciplines affecting international trade and commerce may be submitted on computer disk with accompanying hard copy, or via electronic format in Word or WordPerfect (with the use of endnotes, rather than footnotes.) Please contact Manjit Gill at msgill@becker-poliakoff.com for submissions to the *Quarterly* and for any questions you may have concerning the *Quarterly*.

CEDAW - The Convention on the Elimination of All Forms of Discrimination Against Women

By Marcia S. Cohen

By ratifying CEDAW, states commit themselves to end discrimination against women in all forms, to incorporate the principle of equality of men and women in their legal systems, and to establish courts and other public institutions to ensure the effective protection of women against discrimination. CEDAW has been used to incorporate women's rights into national constitutions, update or eliminate discriminatory national laws, and influence court decisions in discrimination cases. Because of CEDAW, millions of girls who were previously denied access are now receiving basic education; measures have been taken against sex slavery, domestic violence and trafficking of women; life-saving improvements have been made in women's health care services; and millions of women have secured loans and obtained the right to own or inherit property.

As of March 2004, 175 countries have ratified CEDAW. The United States is among a small minority of countries that have not ratified the treaty. The few countries that, like the US, have not ratified the treaty are Iran, Oman, Qatar, United Arab Emirates, Brunei, the Cook Islands, Kiribati, Marshall Islands, Micronesia, Nauru, Palau, Tonga, Somalia, Sudan and Swaziland.

It is not an easy process in the US to ratify a treaty. A President must first sign the treaty, then must submit it for review by the Senate Foreign Relations Committee. After full consideration, the Senate deliberates and votes on it. Two-thirds of the entire Senate must approve the treaty. Then the sitting President must re-sign it.

President Jimmy Carter signed CEDAW on July 17, 1980 and sent it to the Senate for a ratification vote. The Senate Foreign Relations Committee did not hold hearings on it until 1990, ten years later. In 1993, 68 senators, one more than the two-thirds necessary, signed a letter to President Bill Clinton asking him to ratify it. But though the Senate Foreign Relations Committee voted favorably on the treaty, several senators put a hold on it, blocking ratification on the Senate floor.

Another push for ratification came in 2002 when the treaty was again voted favorably out of the Senate Foreign Relations Committee, but once more it did not come to a vote of the full Senate. Though the State Department has found CEDAW "generally desirable", the Bush administration has not taken a formal position on it.

An excerpt from the majority report of the Senate Foreign Relations Committee, submitted September 6, 2002, shows why the Committee believed that US ratification of CEDAW would serve the country's interests:

> First, it will reaffirm the commitment of the United States before the eyes of the world to the principle of equality between men and women and to the promotion and protection of women's rights at home and abroad.... Most fundamentally, the Convention's promise of providing equal rights to women addresses a question of basic fairness which women have been asking for centuries: why should rights be denied to half the population simply because of their gender? The convention provides a response: women's rights are human rights, which should be accorded on a universal basis.

US non-ratification of CEDAW is embarrassing, leading our allies and adversaries alike to challenge our claim of moral leadership in international human rights. As persuasively argued by Yale Law School Professor Harold Koh, a former U.S. Assistant Secretary of State of Democracy, Human Rights and Labor: "Particularly after September 11, America simply cannot be a world leader in guaranteeing progress for women's human rights, whether in Afghanistan, in the United States, or around the world, unless it is also a party to the global women's treaty."

Marcia S. Cohen *holds a Bachelor of Arts degree in Education from Roosevelt University of Chicago, a Masters degree in Music Composition from Northwestern University, and a Juris Doctor degree from Stetson University College of Law in 1984. Since becoming a member of The Florida Bar, she has practiced almost exclusively in the area of labor and employment law with a concentration in employment discrimination and sexual harassment, and is a certified mediator and a certified arbitrator. A former appointee to The Florida Bar Special Committee on Gender Equality, Ms. Cohen was Chair of the Equal Opportunities Law Section of The Florida Bar for 2001-2002. She is also a member of the St. Petersburg Bar Association and Chair of its International Law Section for 2006-07. She has been a guest lecturer on U.S. civil rights and employment discrimination law at the University of Paris at Nanterre, and is a member of the French-American Foundation of Paris, where she speaks frequently on equal opportunity and the promotion of diversity. She lives part-time in Paris.*

The Source and Nature of Islamic Law

By Frederick V. Perry

What is law, and what function does it have in our lives? Different peoples and cultures answer those questions differently.[1] Islam and its teachings, particularly Islamic Law, or Shari'ah, as it is called, regulates all of the activities, both mundane and spiritual, of the devout Muslim. The use of the term "law" as in "Islamic Law" does not necessarily imply national or state sanctioned, legislated statutes. A handful of countries – for example Saudi Arabia, Iran, Pakistan, Indonesia and Malaysia – rule themselves nearly completely by Islamic law.[2] Some countries use Islamic law for certain matters– for example domestic relations– and not others. Many other Muslim countries do not rule themselves by Islamic law, and some have difficulty in attempting to implement the Islamization of the law.[3] However in countries where Western legal traditions are implemented, such as many Gulf Countries which have adopted Civil Law traditions, these laws are often interpreted in harmony with Shari'ah,[4] much like the original courts of equity in England were expected to interpret legal issues in accordance with Christian principles. When considering the term "law" as a point of study, the average Westerner may have an idea of what law means, but Islamic law has a more basic and fundamental meaning than would be necessarily appreciated by the average Westerner.

The purpose of this study is to explore the way that a very large group of people, the majority of the Muslims of the world, view the way in which they should conduct themselves *vis-à-vis* their fellow human beings, especially in the legal context of commerce or business. However, one might ask: Why concern oneself with Islamic law? What does such a discipline have to do with the legal practice of the typical US lawyer? Should anyone in the West care?

Current geo-political and geo-commercial circumstances suggest that they should care. In view of the role of Islam and Muslims in world affairs in the early twenty-first century, this understanding will continue to grow in importance to US lawyers, business people and politicians. Accordingly, an American lawyer would be well-served by a basic understanding of the nature and source of Islamic law. That source is a religious one.

What is Islam?

In the Islamic tradition, the law comes from the religion. Accordingly, to understand the one, a person must understand the other. Islam means "submission to the will of God"[5] in Arabic, and it refers to the religion that was established by the Qur'an and by the Prophet Mohammed around 1400 years ago. Accordingly, a Muslim is one who is a follower of the religion of Islam, or one who submits to God's will, as defined in the Qur'an.[6]

The Qur'an is for the Muslim the word of God, revealed to the Prophet Mohammed from God through the angel Gabriel. Mohammed was ordered to recite, and the verses of the Qur'an were the result of that recitation.[7] Of course, the three great Western monotheistic religions are all revealed religions. However, it is fairly clear in Christian and Jewish traditions that, except for the Ten Commandments, just about everything else in their holy books was written down by men, some decades or centuries after the events described. Many of the events written about were handed down in the way of stories from generation to generation, but certainly not memorized word for word as a recitation. The Qur'an actually is considered by Muslims to be the Word of God as God intended it to be heard, with no intermediation of a writer or time. The Prophet Mohammed repeated the recitation to his companions and he and they memorized the Recitation, as did their followers, word for word. It was written down not long after the death of the Prophet Mohammed. Generations of Muslims have memorized the same recitation. Because the Qur'an is thus not only a revelation,[8] and for the Muslim also the direct Word of God, it is considered an enduring miracle, the miracle from God.

Mohammed was not considered by his followers to be God or a manifestation of God, like the Christians consider Jesus,[9] but what he said and did was what informed their understanding of how to practice the new religion, in short, how to be pious Muslims.[10]

Western Law

One way to understand Shari'ah is to compare and contrast it to Western law, something with which US lawyers are most familiar. Black's Law Dictionary defines the term "law" as follows: "Law, in its generic sense, is a body of rules of action or conduct prescribed by controlling authority, and having binding legal force. That which must be followed by citizens subject to sanctions or legal consequences is law."[11] The question for us here is who is the "controlling authority"? In other words, who or what is the source of the law? The source of law in the West is entirely different from the source of law in the Islamic tradition. Under the concept of "law" in the West, particularly in those nations, including the United States, guided by the Common Law traditions:

> *"The law consists of rules of conduct established by the government of a society to maintain harmony, stability, and justice. It does this by defining the legal rights and duties of the people. The law also provides a way to protect the people by enforcing these rights and duties through the courts, the executive branch, and the*

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legislature. The law is, therefore, a means of civil management.[12]

Under the United States Constitution– the starting point of all law in the United States– the people are to be the ultimate source of government and the law.[13] The Constitution was written by "we the people", so that a more "perfect union" could be formed, and the power to create laws emanating from the Constitution is vested in the Congress, the members of which are chosen by the "peoples of the several States."[14]

Law in the West in general is considered a "social phenomenon,"[15] that is, emanating from or parts of social conventions, which stem from the legislature or from court decisions. These conventions provide for ways in which these laws can be created, changed or annulled.[16] The government and its institutions are the lawgiver.

In the Civil Law tradition, another Western phenomenon, law is "…a bundle of norms or rules…emanating from legitimate authority and to which its subjects are subjected to, even against their will. This means of course that coercion is inseparable from law, that is, coercion is an essential quality of law, without which law would not practically exist."[17] Again, the law emanates from the government, from man, and it can be created, changed or annulled.

As for the concept of law in general international law, an advisory opinion on the meaning of the term "laws" by the Inter-American Court of Human Rights, interpreting the term "laws" as used in the American Convention on Human Rights, defines "law" as: "…a general legal norm tied to the general welfare, passed by democratically elected legislative bodies established by the constitution, and formulated according to the procedures set forth by the constitutions of the state parties for that purpose".[18] This is similar to the notion of law that permeates the United States Constitution, and the refrain echoed throughout the Western traditions of law coming from the state, and often emanating ultimately from the people.

Islamic Law

Islamic law comes from somewhere else. For Shari'ah, or the Muslim concept of law, God is the lawgiver, and the word Shari'ah in Arabic means the way or path, literally "the way to a watering place".[19] The Qur'an was revealed to the Arabs in the desert, hence the metaphor of the watering hole, a place of ultimate importance to the Bedouin. The Shari'ah therefore is not only the way to God, to Allah, but also the way or path shown by Allah for a Muslim to conduct his or her life.[20] To be sure, the Qur'an says: "We made for you a law, so follow it, and not the fancies of those who have no knowledge.[21] Accordingly, following Shari'ah is what God intends for man and woman to do, and doing so is therefore the path of purity, as symbolized by the cleansing water, the way of salvation for the Muslim.[22]

There are two primary and three secondary sources of Shari'ah. The two primary sources are the Qur'an and the Sunnah, and the secondary sources are based on the writings and opinions of the Islamic legal scholars.[23] The secondary sources are consensus of the legal scholars, deduction from analogy, and the use of individual reasoning by those scholars.[24] The Islamic scholars, or *Ulama*, are the ones who provide these foregoing secondary sources, based on their interpretation of the Qur'an and the Sunna, which they apply to the specific question at issue, in the context of the circumstance.

The second primary source of the Shari'ah, the Sunnah, is generally the way in which the Prophet Mohammed led his life and practiced his faith, which is to say the same thing, since leading one's life in accordance with God's will is considered practicing the faith. Eventually, after the death of their Prophet, people wrote down what he said and did, calling it Sunnah, which is often translated as practices or traditions.[25] They wrote such things down in reports called Hadiths.[26] After the Qur'an, the Sunnah is the most important source of Islamic law.[27] The term Shari'ah can therefore be translated as Islamic Law or revealed law.[28] It was considered the law, but an all-encompassing law. The Islamic legal scholars determined in the tenth century that the law was complete and no changes should, would or could be made. Thereafter, the legal scholars did not seek to interpret the law.[29]

If followed, Shari'ah informs nearly every aspect of the Muslim's daily life.[30] There are two very important areas in which the Muslim view of the law differs from that of the average American, or indeed, Western view in general. First, the idea of collectivism versus individualism, and second, the concept of rendering unto Caesar or not "that which is Caesar's".

The Christian tradition, which informs much of the social and commercial framework of the West, gives rise to a fairly broad misunderstanding within the West of the significance of Shari'ah and its all encompassing nature.[31] It may be difficult for Christians and secularists with a Christian background to understand fully the concept of divine law.[32]

> The Christian view, which governs man socially and politically, is indicated in the well-known saying of Christ, "Render therefore unto Caesar things which are Caesar's." This phrase has actually two meanings of which only one is usually considered. It is commonly interpreted as leaving all things that are worldly and have to do with the political and social regulations to secular authorities of whom Caesar is the outstanding example. But more than that it also means that Christianity, being a spiritual way, had no divine legislation of its own, it had to absorb Roman Law in order to become the religion of a civilization. The law of Caesar, or Roman law, became providentially absorbed into the Christian perspective once this religion became dominant in the West, and it is to this fact that the saying of Christ alludes indirectly. The dichotomy, however, always remained. In Christian civilization law governing human society did not enjoy the same Divine sanctions as the teachings of Christ. In fact this lack of a Divine Law in Christianity had no small role to play in the secularization that took place in the West during the Renaissance. It is also the most important cause for the lack of understanding of the meaning and the role of Shari'ah on the part of Westerners and many modernized Muslims.[33]

So it is that Christians are in-

structed to follow the secular law of the place in which they live, and religious faith is separate from government.[34] Islam did not give to Caesar that which was Caesar's, because in the Islamic view, virtually nothing was Caesar's to begin with. What was considered in the Christian view to be the domain of Caesar was to be integrated into the complete Islamic view of the world, encompassing political, social and economic life. Religion included all of it. Law in Islam is a part of revelation, and religion—which comes from revelation--informs daily life with rules for nearly everything. In other words, whereas Christianity separated the spiritual from the mundane, Islam did not.[35]

This has significant consequences in the differing worldviews of what law is and how life is to be ordered. Because in the West, the law has no Divine roots, man can change it. The law as understood in Islam, that is Shari'ah, because of its Divine provenance, cannot be changed by man. It is therefore unlike the laws of legislatures, as most non-Muslims understand the concept of law. A Christian might violate an unjust law and not expect to be punished in the afterlife, whereas a violation of Islamic law might well bring punishment in the afterlife.[36]

This whole body of Islamic law lays the foundation for and informs the Muslim concept of lawful and ethical behavior. When viewing the Muslim culture and the Shari'ah, it is also important to understand the difference between group behavior and individual behavior, or what has been termed collectivism versus individualism. In a collectivist society, the group is more important than the individual.

Individualism gives rise to the idea of rights--particularly individual rights being more important than, in fact often transcendent over, obligations. Few Americans talk of their obligations; all speak of their rights, and spend a lifetime defending them and clamoring about them. For the Muslim, "the individual is responsible for the common welfare and for the prosperity of his or her society. This responsibility is not only to the society but also to God". This gives the individual a feeling of inescapable responsibility.[37]

Cooperation became a Muslim way of life. The Qur'an reinforced this. This sense of community values is omnipresent in the Qur'an and the Shar'iah. Prayers, which are required of all Muslims,[38] can be said in a solitary fashion, but the Prophet Mohammed admonished Muslims to pray in communal groups.[39] In other words, the community is important, and individualism is not rewarded. The Islamic approach to value maximization places the emphasis on striving for the greater good of society, rather than simply the pursuit of profit for the self.[40] This is based on the Qur'anic concept of justice. This understanding of justice admonishes one not to be greedy, and one should not have an excessive love for money for the sake of money or for the sake of oneself alone, since such an excess would tend to prevent one from being kind and just.[41] Further, the Qur'an admonishes Muslims to adhere to the contracts that they have made,[42] to "fulfill your obligations"[43] and to "work righteousness."[44] Judges will often interpret cases in accordance with these principles.

Throughout the Qur'an, one finds the concepts of justice in social and commercial dealings,[45] reasonable distribution of income, sanctity of contract, private ownership and earning money the hard way. Simple human memory is fallible, and so the Qur'an admonishes Muslims to write down their contracts, in the presence of witnesses.[46] Most Western systems of law, especially Common Law systems, have what is known as a law of contract. However, most commentators do not believe that there is an Islamic law of contract, rather perhaps a law of contracts, and the Arabic term for contract, *'aqd'*, covers obligations of every nature, much like the concept of obligations in Mexican law[47], or in the Civil Law tradition in general.[48] This covers two-party transactions involving an offer and an acceptance, but also obligations of every nature.[49] So when the Qur'an says: "You, who believe, fulfill contracts"[50a] and "You who believe, be faithful to your contracts,"[51] the injunction is a highly general one to simply do that which you say you will do.[52] Under this view, all commercial activity is governed by two principles: submission to the moral order of God, and refraining from doing harm to other people.[53] Not only to refrain from doing harm, but actively to do good within the community.[54]

As should be clear from the foregoing, economics and the way of conducting business are regulated by Shari'ah.[55] In the Muslim world, mankind's duties take priority over its rights.[56] Thus, while the Qur'an clearly permits ownership, economic activity and profit,[57h] those who profit from economic activity and those who are in possession of property or wealth, must take into account the interests of society as a whole.[58] And Muslims are exhorted to be honest in their commercial dealings. It is reported that the Prophet Mohammed said: "A trustworthy and an honest and truthful businessman will rise up with martyrs on the day of Resurrection."[59] This is an enormously important concept, inasmuch as the honest merchant is likened to the martyr who has fought or struggled in *jihad* and given up his or her life in such struggle.[60] One sees in this concept that if a person conducts his or her trade honestly during a lifetime, that person will have taken part in an "economic jihad" so to speak.[61] Further implications of this are that it is the basis for a strong Muslim work ethic.

Business motives are held in high regard. A Muslim is supposed to work and use his or her resources in order to multiply them.[62] The honest businessman then is accorded a lofty place in the mind of the Muslim. Muslims are prohibited from false advertisement of the goods or services that they sell; they must disclose defects of which they are aware, and must not use sexual appeal, emotional appeal or false testimonies in the promotion of their goods or services.[63] The Qur'an admonishes the Muslim to "give just weight and full measure,"[64] to give time to the debtor who is having difficulty paying,[65] and to take oaths seriously.[66]

Islamic tradition and philosophy, in line with the concept of collectivism, generally consider knowledge to be the common heritage of people, so that the idea of the protection of intellectual property rights, which is commonly accepted as fundamental to Western commercial law, is not encouraged.[67] Of course, this viewpoint has changed in many countries recently because of a need to conform certain internal laws to that which

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is widely accepted as necessary to protect foreign investment and the export of goods protected by patents, trademarks and copyrights.[68] Since Islamic Law prohibits gambling,[69] insurance policies are frowned upon, and prohibited in some jurisdictions.[70] In Saudi Arabia, Islam permeates all aspects of life, and the Shari'ah forms the basis of the legal system, and God, or Allah, is frequently referred to in conversation.[71] Sovereign immunity is generally an unacceptable concept in Islamic law.[72]

We find that many of the principles behind the rules of commerce for the Muslim and that of the average US lawyer are similar, though they come from different sources and are viewed in a different way by their adherents. The laws in the various Muslim countries are different from one another in a variety of ways, but to a large extent, shared religion, and similar culture give rise to certain similarities in the legal structures throughout the region.

It is important to know as much as possible about the various peoples of the world with whom we interact. It is doubly so in our globalizing world. In the world of today and tomorrow, the US lawyer will be called upon to interact with a variety of people and cultures. Because of geopolitical forces and the horrors of war, because of expanded commercial links, because of oil, and because of links among humanity that globalization provides, it is important that US lawyers understand how to work with the people of the Muslim world. In order effectively to do that, it is essential to understand the things that motivate and inform the actions of Muslims. It is important to understand Shari'ah and Islam and the behavior that stems from them. I hope this article provides the initial food for thought on these subjects.

AUTHOR'S NOTE: It must be disclosed to the reader at the outset that the author was not raised as a Muslim, and was not raised in a Muslim society or a Muslim or Arab country. Accordingly, what is contained in this article is based on the observations of an outsider looking in – to be sure, an outsider who has lived for decades with and among Muslims, but an outsider nonetheless. It is for this reason that the author makes an apology in advance for any offense that the content of this article might cause for misreading, misinterpreting, or the faulty reporting of Islam, the Qur'an *or the Shari'ah, or indeed of Christianity of Judaism. Many parts of this paper have appeared in Frederick V. Perry, "Shariah, Islamic Law and Arab Business Ethics," 22 Conn. J. Int'l. L. 1 ( ).*

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Endnotes:

1 See A. James Barnes, Terry M. Dworkin and Eric L. Richards, *Law for Business* 3 (9th ed. 2006).
2 John H. Willes and John A. Willes, *International Business Law: Environments and Transactions* 56 (2005).
3 *See e.g.*, Fauzi M. Najjar, "The Application of Sharia Laws in Egypt," *Middle East Policy,* Vol. 1, Issue 3 (1992), at 62.
4 Richard Schaffer, Beverly Earle and Filiberto Agusti, I*nternational Business Law and Its Environment* 59 (2005).
5 In Arabic, "Allah" means "God". Both words, "God" and Allah", will be used interchangeably throughout this study to denote the same concept. *See* Sachiko Murata and William C. Chittick, *The Vision of Islam* 46 (1994).
6 *Id*. at xiv.
7 Karen Armstrong, *A History of God* 139-140 (1993); *see also* Seyyed Hossein Nasr, *Ideals and Realities of Islam* Ch. 2 (2000).
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13 *See* The Constitution of the United States of America, Preamble.
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18 Ray August, *Public International Law* 11 (1995), citing 7 *Human Rights Law Journal* 231 (1989).
19 Abdur Rahman I. Doi, *Shari'ah: The Islamic Law* 2 (1997).
20 *Id*.
21 Qur'an, 65:18.
22 See Sachiko Murata and William C. Chittick, *The Vision of Islam* at 22-23.
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29 David M. Neipert, *Law of Global Commerce* 27 (2002).
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31 *Id*.
32 *Id*.
33 *Id*. at 86-87.
34 David M. Neipert, *Law of Global Commerce* at 27.
35 See Fauzi M. Najjar, "The Debate on Islam and Secularism in Egypt," 18 *Arab Studies Quarterly* Issue 2 (Spring 1996), quoting Muhammad Imara, who believed that Christian dualism gave rise to secularism in Europe.
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41 *Id.,* citing Ahmad Ibn Muhammad Ibn Miskawayh, *The Refinement of Character* (1968).
42 Qur'an 2:177.
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48 See Manuel Bejarano Sánchez, *Obligaciones Civiles,* (5th ed. 1999).
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50 Qur'an 5:1.
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and Liberality," *Journal of Islamic Studies* 13:3 at 258 (2002).
53 Mohammad Saeed, Zafar U. Ahmed, Syeda_M. Mukhtar, "International Marketing Ethics From An Islamic Perspective: A Value Maximization Approach," 32 *Journal of Business Ethics* No. 2, at 131 (2001).
54 "And (as for) those who believe and do good, We will make them enter into gardens beneath which rivers flow, to abide therein for ever; (it is) a promise of Allah, true (indeed), and who is truer of word than Allah?" Qur'an 4:122.
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57 "To men is allotted what they earn, and to women what they earn". *The Holy Quran,* King Fahd Holy Qur'an Printing Complex, Al-Madinah, Saudi Arabia , Revised and edited by The Presidency of Islamic Researches, IFTA. 4:32.
58 Tariq Ramadan, *Islam, the West and the Challenges of Modernity* at 147.
59 Abdur Rahman I. Doi, *Shari'ah: The Islamic Law* at 350.
60 The term *Jihad* simply means "struggle".
61 *Id.*
62 "The holders back from among the believers, not having any injury, and those who strive hard in Allah's way with their property and their persons are not equal; Allah has made the strivers with their property and their persons to excel the holders back a (high) degree, and to each (class) Allah has promised good; and Allah shall grant to the strivers above the holders back a mighty reward." Qur'an 4:95.
63 Mohammad Saeed, Zafar U. Ahmed, Syeda M. Mukhtar, "International Marketing Ethics from and Islamic Perspective: A value Maximization Approach," 32 *Journal of Business Ethics* No. 2, at 131 (2001); *see also* Qur'an 43:80.
64 Qur'an 6:152.
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67 David M. Neipert, *Law of Global Commerce* at 31.
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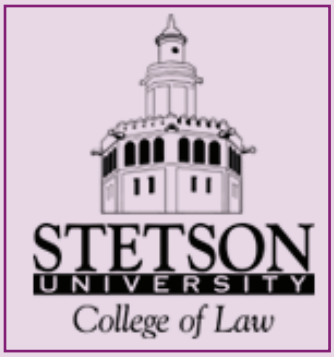
Ninth International Wildlife Law Conference



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7:45 a.m. – 8:15 a.m.
Late Registration / Continental Breakfast

8:15 a.m. – 8:30 a.m.
Opening Remarks
Lourdes Martinez-Esquivel, Esq., Chapter Chair, S. Fla. Chapter of American Immigration Lawyers Association ("AILA"), Coral Gables

8:30 a.m. – 9:30 a.m.
Winning Strategies for L's and E's
Moderator: Jack Finkelman, Esq., Miami
Jeffrey Bernstein, Esq., Miami
Efren Hernandez, Esq., Chief, Business and Trade Services Branch, Service Center Operations, Washington, D.C.
Jeffrey Gorsky, Esq., Chief, Legal Advisory Opinion Section, Visa Office, Washington, D.C. (invited)

9:30 a.m. – 10:30 a.m.
Dancing Your Way Around the H-1B Shortage
Moderator: Naomi Schorr, Esq., New York, NY
Special Counsel, Kramer Levin Naftalis & Frankel LLP, New York, NY
Dinesh Shenoy, Esq., Minneapolis, MN
Efren Hernandez, Esq., Washington, D.C.

10:30 a.m. – 10:45 a.m. **Break**

10:45 a.m. – 11:45 a.m.
Moving Up the EB Ladder With Labor Certification
Moderator: Jeannette Mirabal, Esq., Miami
H. Ronald Klasko, Esq., Philadelphia, PA
Susan Hahn, Esq., Miami
Efren Hernandez, Esq., Washington, D.C.

11:45 a.m. – 1:30 p.m.
President's Luncheon (included in registration fee) sponsored by LawLogix
Linda Swacina, District Director USCIS, Miami

Federal Law Update
Ira Kurzban, Esq., Miami

1:30 p.m. – 2:30 p.m.
Developments in Adjustment and Consular Processing
Moderator: Michael Shane, Esq., Miami
David Berger, Esq., Miami
Bruce Marmar, Special Assistant to the District Director, USCIS, Miami
Jeffrey Gorsky, Esq., Washington, D.C. (invited)

2:30 p.m. – 3:30 p.m.
Coping With Enhanced Employer Enforcement
Moderator: Dawn Lurie, Esq., McLean VA
Timothy Murphy, Esq., Miami
Luis A. Cordero, Esq., Miami

3:30 p.m. – 3:45 p.m. **Break**

3:45 p.m. – 4:15 p.m.
Dealing with ONET Zones
Moderator: Larry Rifkin, Esq., Miami
Geoff Forney, Esq., Philadelphia, PA
Romy Kapoor, Esq., Atlanta, GA

4:15 p.m. – 5:15 p.m.
PERM and Backlog Processing– Where Are We Now?
Moderator: Ron Klasko, Esq., Philadelphia, PA
Geoff Forney, Esq. Philadelphia, PA
Romy Kapoor, Esq., Atlanta, GA
Anis Saleh, Esq., Miami

5:15 p.m. – 6:30 p.m.
Reception – Talk to the Experts

FRIDAY, FEBRUARY 23, 2007

9:00 a.m. – 12:00 p.m.
Morning Session Track I and Track II
Break: 10:30 a.m. – 10:45 a.m.

TRACK I—BUSINESS AND FAMILY TRACK

9:00 a.m. – 11:45 a.m.
Putting What You Learn To Use In Real Life: Dealing With The Difficult Cases
Moderator: Eugenio Hernandez, Esq., Miami
H. Ron Klasko, Esq., Philadelphia, PA
Tammy Fox-Isicoff, Esq., Miami

TRACK II—ENFORCEMENT TRACK

9:00 a.m. – 9:45 a.m.
Business Immigration Law for the Court Practitioner
Moderator: Jeffrey A. Devore, Esq., Palm Beach Gardens
David Berger, Esq., Miami

9:45 a.m. – 10:30 a.m.
Developments in Asylum and CAT
Moderator: Lourdes Martinez-Esquivel, Esq., Coral Gables
Stephen Knight, Esq., San Francisco, CA
Randy McGrorty, Esq., Miami

10:30 a.m. – 10:45 a.m. **Break**

10:45 a.m. – 11:45 a.m.
Contesting Removability and Applying for Waivers
Moderator: Stuart Karden, Esq., Palm Beach Gardens
Antonio Revilla, III., Esq., Miami
Alex Solomiany, Esq., Miami

11:45 a.m. – 12:00 p.m.
Q & A

12:00 p.m. – 1:45 p.m.
Luncheon (included in registration fee) sponsored by Mellon Bank
Dr. Emilio Gonzalez, Director, USCIS, Miami

Hot Topics Update
Awards

1:45 p.m. – 2:45 p.m.
BIA and Federal Court Update: Strategies for Dealing With Bad Precedent– Business and Enforcement
Moderator: John Pratt, Esq., Miami
Hon. Earle B. Wilson, Immigration Judge, Miami
Lucas Guttentag, Esq., San Francisco, CA
Leon Fresco, Esq., Miami

2:45 p.m. – 3:15 p.m.
Impact of Real ID on our Practices
Lucas Guttentag, Esq., San Francisco, CA

3:15 p.m. – 3:30 p.m. **Break**

3:30 p.m. – 4:00 p.m.
Federal Court Redress for Adjudication Delays
Moderator: Rebecca Sharpless, Esq., Miami
Linda Osberg-Braun, Esq., Miami

4:00 p.m. – 5:00 p.m.
Dealing With the Impact of Crimes on your Client
Moderator: Mary Kramer, Esq., Miami
Rebecca Sharpless, Esq., Miami
Hon. Denise Slavin, Immigration Judge, Miami

SATURDAY, FEBRUARY 24, 2007

9:00 a.m. – 12:00 p.m.
MOCK HEARING
Mary Kramer, Esq., Miami, Respondent's counsel
Stuart Karden, Esq., Palm Beach Gardens, Respondent's co-counsel
Jeannette Mirabal, Esq., Miami, foreign national
Stephen Knight, Esq., San Francisco, CA
Hon. Rex Ford, Immigration Judge, Miami
Hon. J. Daniel Dowell, Immigration Judge, Miami
Jill Swartz, Esq., DHS counsel, Miami
Lori Tashman, Esq., DHS counsel, Miami
Lourdes Martinez-Esquivel, Esq., Miami, commentator
Rebecca Sharpless, Esq., Miami, commentator

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ing concern.[2] Such special measures include additional recordkeeping and reporting; information gathering on beneficial owners, correspondent accounts, or payable-through accounts; and prohibitions on opening certain correspondent accounts or payable through accounts (the "fifth special measure").[3] Section 312 of the Patriot Act requires financial institutions to conduct enhanced due diligence of correspondent accounts and private banking accounts that is reasonably designed to detect and report money laundering.[4] Section 313 of the Patriot Act prohibits defined financial institutions from opening or maintaining correspondent accounts for foreign shell banks.[5]

To date, Treasury has issued 15 proposed regulations or findings either designating certain jurisdictions, institutions, or transactions as primary money laundering concerns and/or invoking special measures. Two of these have been revoked, and five have gone to final rulemaking. As a result, Treasury has issued final rules invoking the fifth special measure against Burma, Asia Wealth Bank, the Commercial Bank of Syria, including the Syrian Lebanese Commercial Bank, the Myanmar Mayflower Bank, and VEF Banka.[6] Treasury also has issued regulations under sections 312 and 313 of the Patriot Act on enhanced due diligence for correspondent accounts and private banking accounts and the prohibition on establishing or maintaining correspondent accounts for foreign shell banks.[7] These regulations contain important definitions, including an identification of the types of financial institutions covered by the regulation, and other applicable standards.

Section 352 of the Patriot Act states that defined financial institutions must implement anti-money laundering ("AML") programs. All AML policies must (i) implement internal policies, procedures, and controls; (ii) designate a compliance officer; (iii) provide for ongoing employee training programs; and (iv) provide for independent audits to test the programs.[8] FinCEN has promulgated AML regulations for many industries, including financial institutions regulated by a Federal functional regulator or a self-regulatory organization (*e.g.*, the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, the FDIC, the Office of Thrift Supervision, the National Credit Union Association, the Securities and Exchange Commission, and the Commodity Futures Trading Commission), casinos, money services businesses; mutual funds; operators of credit card systems; insurance companies; and dealers in precious metals, precious stones, or jewels.[9] Certain other defined financial institutions are subject to a temporary exemption from the AML program requirement of the Patriot Act until such time as final regulations are issued by FinCEN.[10] These institutions include pawnbrokers; loan and finance companies; travel agencies; telegraph companies; sellers of vehicles; including automobiles, airplanes, and boats; persons involved in real estate closings and settlements; private bankers; commodity pool operators; commodity trading advisors; investment companies; and banks that are not subject to Federal functional regulators.[11]

Section 326 of the Patriot Act authorizes Treasury to issue regulations requiring financial institutions to implement a customer identification program ("CIP"). CIPs require financial institutions to (i) verify customer identities, (ii) maintain records, and (iii) screen customers against lists of known or suspected terrorists.[12] Unlike section 352 of the Patriot Act, which affirmatively requires financial institutions to establish AML programs, section 326 only directs Treasury to promulgate regulations "setting forth the minimum standards for financial institutions and their customers regarding the identity of the customer that shall apply in connection with opening an account at a financial institution."[13] FinCEN has issued regulations requiring certain financial institutions to implement customer identification programs, including banks, savings associations, credit unions, and certain non-Federally regulated banks; broker-dealers, futures commission merchants and introducing brokers; and mutual funds.[14]

Section 5318(g) of Title 31, United States Code, as amended by section 351 of the Patriot Act, provides that "[t]he Secretary [of Treasury] may require any financial institution . . . to report any suspicious transaction relevant to a possible violation of law or regulation." Although the requirements vary from regulation to regulation, suspicious activity reports ("SARs") generally must be filed for transactions that involve more than $5000 or other assets and the financial institution knows, suspects, or has reason to suspect that (i) the transaction "involves funds derived from illegal activities or is intended or conducted in order to hide or disguise funds or assets derived from illegal activities . . . as part of a plan to violate or evade any federal law or regulation or to avoid any transaction reporting requirement under federal law or regulation;" (ii) the transaction is designed to evade any requirements of the BSA or the regulations; or (iii) the transaction "has no business or apparent lawful purpose or is not the sort in which the particular customer would normally be expected to engage, and the [financial institution] knows of no reasonable explanation for the transaction after examining the available facts . . . ."[15] Section 351(a) of the Patriot Act provides a "safe harbor" from liability for financial institutions that make such SARs.[16] Section 351(b) of the Patriot Act prohibits financial institutions from disclosing their SARs to the suspicious party involved in the transaction.[17] Similar to section 326 of the Patriot Act, the basic statutory SAR requirement imposes no affirmative obligation on particular financial institutions to make SARs. Rather, it authorizes the Secretary of Treasury to impose such requirements by regulation. To date, FinCEN has issued regulations obligating the following financial institutions to make SARs: mutual funds, insurance companies, futures commission merchants and introducing brokers in commodities, banks, broker dealers in securities, money services businesses, and casinos.[18]

Section 5313 of Title 31, United States Code, requires defined financial institutions to report to FinCEN currency transactions in excess of $10,000.[19] Section 365 of the Patriot Act amended the BSA to impose a similar currency transaction reporting requirement on "any person who is engaged in a trade or business; and

continued, next page

who, in the course of such trade or business, receives more than $10,000 in coins or currency in 1 transaction (or 2 or more related transactions) . . . ."[20] FinCEN implemented regulations prescribing the manner in which currency transaction reports are to be made.[21]

Section 363 of the Patriot Act imposed new civil and criminal penalties for violations of sections 312 or 313 of the Patriot Act, (31 U.S.C. §§ 5318(i), (j)) or any special measure imposed under section 311. As described above, section 312 imposes enhanced due diligence obligations on financial institutions with respect to correspondent accounts and private banking accounts, and section 313 prohibits the establishment or maintenance of correspondent accounts for foreign shell banks. These changes are reflected in FinCEN's regulations.[22]

FinCEN's Civil Enforcement Activity Under The Patriot Act

Since the enactment of Title III of the Patriot Act, FinCEN has published 20 civil penalty assessments against defined financial institutions under the civil penalty provision.[23] These assessments were issued at the rate of two in 2002, five in 2003, two in 2004, five in 2005, and six in 2006. The amounts of the civil penalty assessments ranged from $30,000,000, which was assessed against a Netherlands bank, to a $10,000 penalty assessed against Frosty Food Mart, a money services business. Four of these assessments involved penalties of $20 million or more, all of which were against banks; two involved penalties of between $10 million and $20 million, both of which were against banks; five involved penalties of between $1 million and $5 million, which were against a mix of banks, broker dealers, money services business, and casinos; and the remainder involved penalties of less than $1 million. Many of the cases also involved "undertakings," which are agreements by the financial institutions found to have violated the law to take affirmative steps to come into compliance.

In all but one case, the violations were considered by FinCEN to be willful. FinCEN either made this finding explicitly, or the finding is reflected in the amount of penalties. According to FinCEN, a willful violation means that the financial institution acted with a reckless disregard for its obligations under law or regulation.[24] In the one case that did not involve an explicitly willful violation, the financial institution failed to take reasonable measures to prevent foreign shell banks from using the institution's correspondent accounts or ensure that its correspondent accounts were not being used by the foreign bank to provide banking services indirectly to a foreign shell bank. These violations are subject to penalties without a finding of "willfulness."[25]

The types of financial institutions assessed with civil penalties were banks, both domestic and the U.S. branches of foreign banks; securities broker-dealers; money services businesses; and casinos. The most frequent violations were the failure to file suspicious activity reports and currency transaction reports, the failure to implement anti-money laundering programs and customer identification programs; and the failure to keep records. The suspicious activities that the penalized financial institutions failed to detect included large cash deposits, including those made through the night deposit box or carried into the bank in paper bags; immediate withdrawals of the cash deposits by wire transfer; transactions structured to avoid recordkeeping or currency transaction reporting requirements; large deposits of sequentially numbered money orders and travelers checks; inconsistencies between the nature of the customer's deposits and the customer's business; substantial account activity by foreign government officials and politically exposed persons; indications of illegal activity on the part of the institution's customers; account activity by persons designated by the Office of Foreign Assets Control as blocked persons under one or more sanctions regime; and transactions involving "shell" companies. The violations frequently were detected through the routine examination of these financial institutions by their federal functional regulators, such as the Federal Reserve or the Office of the Comptroller of the Currency.

Conclusion

Since the enactment of the Patriot Act five years ago, FinCEN has promulgated regulations with respect to financial institutions it believes pose the most significant risk for money laundering and terrorist financing. These institutions are now in an enforcement climate and would do well to learn from FinCEN's civil penalty assessments to ensure that their compliance programs prevent violations of the law. Other defined financial institutions are currently exempt from FinCEN regulation or are unregulated altogether. Enforcement against these institutions is not now a serious concern. Nevertheless, these institutions should expect FinCEN to repeat its "regulate-then-enforce" approach to its administration of the law and would be well-advised to monitor FinCEN's regulatory activities, comment on FinCEN's notices of proposed rulemaking and advanced notices of proposed rulemakings, and be prepared to implement the appropriate compliance programs once the final rules become effective.

Endnotes:

1 Originally published in Metropolitan Corporate Counsel, October 2006.
2 31 U.S.C. § 5318A.
3 *Id*.
4 31 U.S.C. § 5318(i).
5 31 U.S.C. § 5318(j).
6 31 C.F.R. §§ 103.186-103.188; *FinCEN; Amendments to the BSA Regulations -- Imposition of Special Measure Against VEF Banka, as a Financial Institution of Primary Money Laundering Concern*, 71 Fed. Reg. 39554 (Jul. 13, 2006).
7 31 C.F.R. §§ 103.175-103.178.
8 31 U.S.C. § 5318(h).
9 *See* 31 C.F.R. §§ 103.120-103.140.
10 31 C.F.R. § 170.
11 *Id*.
12 31 U.S.C. § 5318(l).
13 *Id*.
14 31 C.F.R. §§ 103.121-123 and 103.131.
15 31 C.F.R. 103.18(a)(2).
16 31 U.S.C. § 5318(g)(3).
17 31 U.S.C. § 5318(g)(2).
18 31 C.F.R. §§ 103.15-.21.
19 19 U.S.C. 5313(a); 31 C.F.R. § 103.22.
20 31 U.S.C. § 5331.
21 31 C.F.R. § 103.30.
22 31 C.F.R. §§103.57, 103.59.
23 31 U.S.C. § 5321.
24 *In The Matter Of Gulf Corporation; Assessment Of Civil Penalty*, FinCEN No. 2005-1, *citing Appalachian Resources Dev. Corp. v. Bureau of Alcohol, Tobacco, & Firearms*, 387 F.3d 461 (2004).
25 31 U.S.C. §§ 5318(i), (j), 5318A, 5321(a)(7).

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