International Law Quarterly

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Outgoing Chair's Message

In the Annual Report of our section, I outlined the section's significant developments during the past year, along with special acknowledgments to executive council members who were instrumental in assisting our section to realize significant goals during this period. As this is my final report as chair of the International Law Section, the Annual Report provides a summary of the goals achieved by the section during this past year, and as such, I believe its publication in our *Quarterly* is significant as a record of the achievements of our section this year. Thus, following is the Annual Report of the International Law Section for our members' review.

As the International Law Section approaches its 15 year anniversary as an integral section of The Florida Bar, I am pleased to report that the section has 1,000 members and looks forward to continuing a steady increase in membership.

The most significant accomplishment of the section this year was the development of criteria for the standards for certification for board certified international practitioners. Since 1993, the section has discussed and debated various proposals with regard to the criteria that would be utilized to create a certification program in international law. At the executive council meeting on January 25, 1997, under the stewardship of Leonard L. Rosenberg, former section chair, along with the advising counsel of Jake Schickel, chair, Board of Legal Specialization and Education; and President-elect Edward Blumberg, the executive council agreed on a proposal to establish standards for board certified attorneys in the area of international law; thus insuring the citizens of Florida will have an opportunity to choose a board certified international lawyer. The section's proposal was approved with minor changes by the BLSE at its March 1997 meeting. It was approved by the Board of Governors at its May meeting. The proposal will next be considered by the Florida Supreme Court in January 1998.

This section played a significant role in the American Bar Association Annual Meeting held in Orlando last August. Section members participated significantly in the planning of the meeting and through Chair-elect Edward M. Joffe, presented a program entitled "Fundamentals of International Business Law: An Introduction for the Non-Expert." Section executive council members Todd Kocourek, George C. J. Moore, Jeremy Page, and Laura Quigley were featured speakers at the seminar. In addition to the presentation by Mr. Joffe, section council member, Larry Gore, presented a program entitled "Travel Law: A World of Opportunities." Both programs were warmly received by both section members and Bar members attending the annual meeting.

The section instituted an exchange program between The Florida Bar and the Barcelona Bar Association. Past section chair, William H. Hill, Jr., was instrumental in establishing the section's relationship with the Barcelona Bar Association and in instituting the exchange program. Barcelona attorney Marta Martin was the first participant in this program. Ms. Martin participated in internships with Becker & Poliakoff in Ft. Lauderdale and Akerman, Senterfitt & Eidson in Miami.

The section continued its commitment to quality continuing legal education by sponsoring and co-sponsoring CLE seminars throughout the

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year. The first CLE seminar presented this year was held on November 8, 1996 in Miami and focused on international litigation. The seminar was well received by international practitioners and was chaired by the section's CLE Chair Ricardo Cata. Mr. Cata also coordinated a seminar entitled "International Banking" presented on April 25, 1997. On December 10, 1996, the section co-sponsored a program describing the financial services and investment opportunities available in the Turks and Caicos Islands. Former section Chair George C. J. Moore coordinated this well attended program.

Finally, on February 20-21, 1997, our section co-sponsored the 18th Annual Immigration Law Update with the South Florida Chapter of the American Immigration Lawyers' Association in Miami. As usual, the seminar was a resounding success with over 300 practitioners in attendance who learned the latest updates by specialists in the area of immigration law.

The section was an active participant in the 1997 International Day, March 12, 1997, presented in Tallahassee by Florida Secretary of State Sandra B. Mortham. As a co-sponsor of this event, section members were provided a valuable networking opportunity with leaders from around our state in the international arena.

The Travel Law Committee of the International Law Section under the leadership of Larry Gore continued to be a thriving, active committee. The committee hosted the International Forum of Travel and Tourism Advocates (IFTTA) in the Florida area for their 11th Congress. As recognition of this most significant event, the section sponsored a cocktail reception for IFTTA members on April 17, 1997 at the Biscayne Bay Marriott.

A continuing goal of our section is to maintain active liaison with foreign bar associations. During 1996 and 1997, the section continued to actively pursue and maintain relationships with various foreign bars. Section representatives attended meetings of the American Bar Association, International Bar Association and the Barcelona Bar Association.

This year, the section established a special committee to review the Foreign Legal Consultancy Rule, which is scheduled to sunset on January 1, 1998. The committee, after careful deliberation, recommended to The Florida Bar Board of Governors that the sunset provision be lifted in order to allow the continued certification of foreign legal consultants in our state. Having now been approved by the Board of Governors, the proposal will now be referred to the Supreme Court.

Additionally, our section began an active participation in Enterprise Florida, Incorporated during this year. Pursuant to Florida Statutes, the chair of the International Law Section (or his or her designee) is a member of the Board of Directors of the International Trade and Economic Development Board of Enterprise Florida, Inc.; a non-profit private board whose purpose is to advise and assist in promoting and developing international trade and investment; marking the State of Florida for potential investment; and creating, expanding and retaining Florida businesses. Section council member, Todd Kocourek, was instrumental in obtaining International Law Section recognition, such that the chair of the section was named a continuing member of the aforementioned Board.

It would be inappropriate to conclude this report without thanking the executive council for working together to realize the section's goals. The members of our executive council not only expend their time but also their own financial resources in furtherance of the section's activities which have contributed to the growth and development of this significant practice area. I would also be remiss if I did not send a special thanks to our section coordinator, Kim Tomlin. Ms. Tomlin's advice and guidance was invaluable in the fulfillment of my duties as section chair. Special thanks to our board liaison, John Cardillo, for his continued efforts on our section's behalf. As I pass the gavel to our Chair-elect Edward M. Joffe, I extend a special thanks for his assistance during this year.

Larry S. Rifkin, Chair

International Law Section Opens Website

The International Law Section has opened an Internet website devoted to the activities and history of the Section. Detailed discussions of Section projects (such as Foreign Legal Consultant Rule Sunset) and Legislative positions/new legislation (e.g., new Florida International Notary law) are available, as well as full text of section records such as the Section Bylaws and Agreements with foreign Bar organizations. The site also boasts a growing archive of back issues of the International Law Quarterly (in Adobe Acrobat format), including full text and photos of Vol.1, No. 1 and other issues from the earliest days of the Section.

The Section website will become increasingly important as a means of communication between the ILS and its membership and among members themselves. It will eventually contain a complete document archive (including all back issues of the Quarterly), and will provide a method for timely and complete communication of relevant information to Section members. The Section website will also provide a forum for fuller and more timely participation by members in such important practice matters as Bar certification in International Law or changes to the Foreign Legal Consultant program. The ILS website can be found at: http://www.dos.state.fl.us/ils and comments are welcomed and solicitated at the website.

Brazil's New Arbitration Law: Outstanding Features

by Paul E. Mason, President
Commercial Dispute Resolution Center of the Americas, Miami, Florida
for The Florida Bar International Law Section's *International Law Quarterly*

During the fall of 1996, our Center was contacted by the Brazilian Senate with a request to provide some comments about the new Brazilian Arbitration Law, Law No. 7307/96. In the course of preparing the comments, we decided to translate the full text of the Law into English for Center clients and other interested parties. I made the observations in this article while translating the Law, and then revised them after consultation with some very knowledgeable Brazilian colleagues.

In terms of the overall context of our comments, these are limited to how the Law's provisions regulating arbitration compare with arbitration practices in the U.S. and internationally. Of course a law such as this one must first and foremost fit comfortably into the country's existing internal legal system, but I must leave any analysis on that score to experts on Brazilian domestic law.

Before getting to specific technical points, I wish to observe that this law is an excellent development for Brazil and the community of nations. It gives a very important basis of codified legal support to the concept of arbitration, as well as very specific instructions about how the arbitration is to be carried out. This law, plus Brazil's recent ratification of the 1975 Panama Convention on Inter-American Commercial Arbitration regarding enforcement of foreign arbitral awards, means that from the codified law standpoint, Brazil is harmonizing its system with those of its sister nations in this very important area of arbitration.

Perhaps the most outstanding feature of this Law is contained in its Article 3, which eliminates the prior law's requirement of a *compromisso* (a separate post-dispute agreement to arbitrate) by stating that a *cláusula compromisória* (contractual arbitration clause for future disputes) may form an equally valid legal basis for the arbitration. Under prior practice, in Brazil (as well as certain other Latin countries), a recalcitrant party could avoid arbitration altogether, even if he had signed a contract containing a clearly-worded arbitration clause, by simply refusing to execute a post-dispute *compromisso*. Under the new Law, this evasive technique may no longer be available.

The Law does go to great lengths in telling parties how to carry out specific activities, for example, Art. 13 regulating the selection of arbitrators. The Law is so very specific in part because this is the nature of civil-Roman law systems, where codes and regulations fill many of the openings which in common law countries are dealt with by the parties themselves in their contracts. The relevant laws on arbitration in the U.S. (Federal Arbitration Act, Arbitration Act and International Arbitration Act of the State of Florida, for example) do not regulate how arbitrators are chosen, leaving this process open to the parties by their own contracts, which may in turn refer to and thereby have this process determined by the rules of an arbitral organization such as the International Chamber of Commerce (ICC), Commercial Dispute Resolution Center of the Americas in Miami (Center), or American Arbitration Association (AAA). Even if the parties choose not to use an arbitral organization to make their arrangements, then the United Nations Committee on International Trade Law/UNCITRAL rules may be applied to cover this area.

Many of the items in Articles 13 *et seq.* are normally handled by the Rules of a private arbitral institution/Center rather than by legislation. (There are Brazilian arbitration centers in São Paulo, Curitiba, & Rio de Janeiro for domestic disputes, with international arbitration Centers such as the Commercial Dispute Resolution Center of the Americas in Miami, established to resolve transnational commercial disputes between parties from different countries). For instance, issues arising in Arts. 12 & 13 regarding the arbitrators' fees are to be settled by the courts. Because this will bring the parties back to the courts they are trying to avoid by using arbitration in the first place, using an institution/Center can allow a little more flexibility to the parties to regulate their own process.

At first blush, it may appear that the Brazilian legislation only envisions so-called "ad *hoc* arbitration" (without using any institution/Center) because so many aspects normally dealt with by a center are instead provided for in details of the legislation. However, arbitral institutions *are* mentioned in several of its Articles, including Art. 13 which provides for the selection process for arbitrators. It is not clear how Art. 13(3) (giving the parties the choice of establishing their own process for choosing arbitrators) works together with Arts. 13(1) and (2) (re nomination of arbitrators by the parties, or made by the court if the parties do not agree). Do (1) & (2) operate only if the parties go *ad hoc*, and *not* under 13(3)?

Another example of the detailed regulation of the process contained in the legislation itself is Art. 24, providing for how decisions will be made and expressed by the arbitral panel. In arbitration practice generally, this aspect is normally governed by the rules of the sponsoring organization rather than by legislation.

In Art. 21, para. 4 mandatory conciliation (a version of mediation) is provided for, but by the same people who will act as arbitrators of the case if the conciliation fails to produce results. Our experience in the U.S. is that often, for the conciliation to have a chance to be successful, it is prefer-

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able to have a different person act as conciliator than the arbitrator. Otherwise, the parties will be looking past the conciliation to make their arguments to the same person who will make a binding arbitral ruling. Also, there may be certain matters of a confidential nature that parties would share with a conciliator on an informal non-binding basis, but would not wish to disclose to arbitrators in a more formalistic setting.

In most respects the new Law is very procedure-oriented, like many civil law code provisions—far more than the U.S. Federal Arbitration Act or U.S. state arbitration laws. For instance, procedures for conducting the arbitration hearings are highly regulated in Arts. 22,23, and others, with less discretion left to the arbitrators to control the process than in the U.S. and internationally.

A very important question: under this Law, it is not very clear whether the procedures for nullification of an arbitration award set out in Art. 32 are indeed the *exclusive* grounds for a party to overturn or set aside an arbitration award. In other words, can an arbitral award be *appealed* in court, based on *other* grounds such as fraudulent conduct by an arbitrator or improper influence on an arbitrator by a party? Usually these are the ONLY grounds on which an arbitral award may be appealed or nullified according to U.S. and common international commercial arbitration practice. Without this kind of *clear limitation* on the grounds to appeal or nullify an award, the finality of the arbitration is not ensured, so a key advantage to arbitration (its finality) would be lost.

Art. 35 regarding foreign arbitral awards is a very good time-saver in that it reduces the mandatory homologation (ratification) of the foreign award by the Brazilian Federal Supreme Court to a one-step process from the old two-step process. Prior practice, as regulated by the Court's Internal Rules, had also required judicial confirmation of the award in the country where the award was rendered. Homologation of Brazilian domestic awards appears to be no longer required.

We did not see anything generally negating the tradition of a respondent's avoiding receiving the formal notice of arbitration, and then trying to set aside the arbitral award by claiming lack of service of that notice. However, Art. 39, sole paragraph does address this issue for *foreign* arbitral awards by eliminating that variation on this procedural defense.

To summarize, the key general features of the new Law are: creating a positive legal framework to support arbitration, and along with Brazil's ratification of the Panama Convention, placing Brazil directly within the international treaty system for enforcement of foreign arbitral awards. The most important specific aspects include the elimination of: the post-dispute *compromisso* requirement, the prior double-homologation rule for foreign arbitral awards, and for foreign arbitrations, the evasion of notice practice as a valid defense.

Harmonizing Brazilian law with long-honored worldwide traditions of international commercial arbitration will intertwine Brazil more closely with the legal and trade practices of many other nations. These steps will in turn help bring the benefits to Brazil of economic globalization, where international movement of capital, labor, products and services is accomplished more freely.

January 30, 1997

Paul E. Mason has been appointed the first President of the Commercial Dispute Resolution Center of the Americas, based in Miami. The Center is supported by the Florida Partnership of the Americas, born of the December 1994 Summit of the Americas and follow-on Trade Ministers Meetings, where the stimulation of inter-American trade and investment was given high priority.

International Law Section Seeks Legislative Issues

The International Law Section saw several successes during the 1997 Regular Session of the Florida Legislature. As a result of its successful advocacy before the state Legislature, the section now has several official means for bringing International Law concerns to the attention of the Executive Council, including a permanent seat (as provided by s. 288.9412, F.S.) on the state's International Trade and Economic Development Board.

Now is the time for members of the section to identify internationally-related state law issues for consideration as International Law Section legislative positions. Issues and proposed positions are reviewed by the Section's Legislative and Governmental Relations Committee and then presented to the full Executive Council of the Section. Members with porposals or issues of concern should contact: Section Legislative Chair Todd Kocourek(850/222-5198, todd@ibm.net) to bring issues to the legislative/governmental relations process.

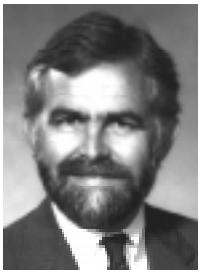
Travel Law Committee Report

Professor John Dyer, Professor Emeritus, University of Miami, announced that he will be lecturing on "How to Succeed in the Import-Export Business" during the special transatlantic crossing of the S.S. Norway, August 16-Sept. 1, 1997 from Miami and New York.

Additional speakers and topics during the crossing may be obtained through Larry Gore, International Law Section, Travel Law Committee Chair, 954/493-7400.

IRS Answers Commonly Asked Questions About ITINs[1]

Submitted by Richard A. Jacobson



What is the purpose of an ITIN?

Individual Taxpayer Identification Numbers (ITINs) are used for account identification purposes during the processing and review of U.S. federal income tax returns. The issuance of an ITIN does not affect an individual's immigration status, authorization to work in the U.S., or qualify the individual for the Earned Income Tax Credit.

Who needs an ITIN?

Anyone required to file a U.S. tax return who does not have and cannot obtain a valid social security number (SSN) must apply for an Individual Taxpayer Identification Number (ITIN). Individuals listed on a tax return as a dependent or a spouse also must obtain an ITIN if they fail to qualify for a SSN.

As of January 1, 1997, the IRS will no longer accept "SSA 205c," "applied for," "NRA," or blank space where the SSN should be entered. Each person listed on a tax return must have a valid number—either an SSN or an ITIN. If a return requesting a refund is filed without an SSN or ITIN for the primary filer and spouse, the refund will be delayed until the taxpayers obtain valid identification numbers. If a dependent SSN/ITIN is missing, the exemption will be denied and the refunds will be adjusted accordingly. Taxpayers who have previously been assigned an IRS temporary identification number ("900-number") must now apply for an ITIN. Individuals eligible for an SSN should get one.

Who are the most likely candidates for an ITIN?

A resident or nonresident alien who does not have and cannot get an SSN and who is:

- required to file a U.S. tax return;
- claimed as a dependent of a U.S. person on his or her U.S. tax return;
- the spouse of a U.S. person who elects to file a joint U.S. tax return;
- claimed as an exemption by a spouse on a U.S. tax return; or
- filing a U.S. tax return only to claim a refund.

How do I apply for an ITIN?

To obtain an ITIN, the taxpayer must complete IRS Form W-7, *Application for IRS Individual Taxpayer Identification Number*. The taxpayer may complete and sign a Form W-7 for a minor dependent, but other dependents and spouses must complete and sign their own Forms W-7. Documentation substantiating foreign/alien status and true identity of the individual is required. The required documentation, along with the Form W-7, may either be mailed to the Philadelphia Service Center (PSC) or presented at an IRS walk-in-office.

Individual and bulk copies of Form W-7 may be ordered by calling 1-800-TAX-FORM (continental U.S. only). You may use a personal computer to download the Form W-7 from the IRS bulletin board, accessible at modem number 703-321-8020, or by accessing our World Wide Web site at http://www.irs.ustreas. gov. Form W-7 is generally available at IRS local offices throughout the U.S. and abroad.

No IRS office is nearby and I'd prefer not to send my original documents by mail, is there another procedure I can use to apply?

The IRS is developing a procedure that will enable ITIN applicants to have their documentation reviewed by locally-based "acceptance agents." Acceptance agents are individuals or entities—including certain government agencies, educational organizations, financial institutions and accounting firms—who have entered into formal agreements with the IRS. These agreements permit the agents to help applicants obtain ITINs by reviewing their documentation and forwarding the completed Form W-7 to the IRS Philadelphia Service Center for processing.

What other options are available for applicants living abroad?

Applicants living abroad may visit any U.S. embassy or consulate where their original documents will be examined for authenticity and notarized for a fee. However, embassy and consulate officials will not act as acceptance agents and will not review Forms W-7 for completeness, nor advise the applicant whether the documentation is adequate for IRS approval.

What documentation is required for applying for an ITIN?

All documents must be originals or *certified* copies from the issuing agency or custodian of the original document. For example, if an applicant's birth was registered at a local level, and the original document is now in possession of a government agency, that agency may provide a copy and certify that it is a duplicate of the original. A notary public cannot make this certification. However, the IRS is currently reviewing the status of notarization and may announce exceptions for certain forms of documentation.

Generally, the applicant will need at least two identity documents in order to validate both identity and foreign status. One of the documents should include a recent photograph. If one document—such as passport—can validate both identity and foreign status, it will be considered acceptable.

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What are the requirements for a dependent to obtain an ITIN?

If an adult is applying for a minor dependent, the documentation must establish the relationship between the dependent and the adult, e.g., a birth certificate or adoption papers. These documents must state that the individual claimed as a dependent is, in fact, related to the adult making the application.

The documentation must also prove that the dependent lives in the U.S., Canada, Mexico, Japan or South Korea. Examples of such documentation include: school records, doctor's records, letters from clergy, U.S. baptismal certificate, day care records, or a birth certificate that shows the dependent's relationship to the taxpayer. Proof of the current existence of the dependent individual is also required

For dependents living in Canada, Mexico, Japan, or South Korea, the documents should show the place of residence and the name of the parent or guardian. Dependents living in these countries can no longer get SSNs and must apply for ITINs. They may apply for an ITIN at their nearest IRS office or at certain U.S. consular offices.

The documentation for a dependent must include:

- father's and mother's full names (mother's name at birth, not her married name);
- date and place of birth of the applicant;
- applicant's full name at birth;
- recent photograph (within past five years)— if child, and no photo is available, other documents, such as school or medical records, that prove where the child currently lives may be acceptable;
- signature of applicant—or if the applicant is a minor, of the legal guardian or delegate.

To be consistent with the requirement that minor children age 14 and over file their own returns to report income (even investment income), ITIN applicants age 14 and over may sign their own Forms W-7.

IRS Publication 501 contains complete details for who qualifies to be claimed as a dependent.

What are acceptable forms of identification for ITIN applicants?

Examples include, but are not limited to:

- Passport;
- Foreign voter registration card if a photo is included;
- Foreign military identification card;
- U.S. visa (border crossing card—Canada & Mexico only);
- INS documents I-94, I-20 ID, I-95A, I-184, I-185, I-186, I-144, I-586;
- National Identity Card;
- Baptismal certificate;
- Marriage certificate;
- Driver's license or State I.D.;
- Birth certificate;
- School documents

How long does it take to get an ITIN?

Generally, it takes about six weeks from the time you apply until you receive the ITIN, so taxpayers should submit their application several months before the tax return is due. Depending on the local mail system, applications mailed from abroad may take considerably longer than those submitted from within the U.S. Taxpayers may call the IRS Philadelphia Service Center on (215) 516-4846 to check on the status of their application if receipt of the Form W-7 has not been acknowledged after 14 days.

Form W-7 should not be filed with the taxpayer's Form 1040. Failure to timely apply for all the needed ITINs will not be considered a valid excuse for late filing of a tax return.

If a refund is delayed because an inappropriate TIN was used, can an ITIN be applied for and used to release the refund?

Yes. The IRS Service Center in Philadelphia will process the Form W-7 and issue the ITIN. Taxpayers may, however, bring their applications, with supporting documentation, to an IRS walk-in office or have them sent to the Service Center via an Acceptance Agent when the procedures are approved. Once the ITINs are associated with the tax return the refunds can be issued.

Which aliens are eligible to receive SSNs?

Certain foreign nationals by virtue of their status are authorized to work in the U.S. with no restrictions as to the location or type of employment. Although they have the right to work, some must apply to the Immigration and Naturalization Service (INS) for an Employment Authorization Document (EAD). Any nonresident alien holding an EAD is eligible to get an SSN.

What can I use to show the IRS that Social Security will not provide me with an SSN?

A copy of SSA's letter indicating that you are not eligible to receive an SSN. This is available only upon request to the SSA and is not required as part of the ITIN application process.

Can an undocumented alien obtain an ITIN?

The International Law Quarterly is prepared and published by the International Law Section. The opinions presented in the articles are solely those of the individual contributors.

Articles between 10 and 20 pages involving the various disciplines affecting international trade and commerce may be submitted on computer disk with accompanying hard copy, or on typewritten, double-spaced 8 1/2x11" paper (with the use of endnotes, rather than footnotes.) Please contact Jeremy Page if you have questions concerning the newsletter.

Yes, if needed to fulfill a U.S. federal income tax obligation and with acceptable documentation. The undocumented alien need only provide proof of identity and a U.S. address to qualify.

Under what circumstances would the IRS deny an ITIN to someone who also cannot get an SSN?

When the individual cannot satisfactorily provide documentation to validate his or her identity or foreign status.

What should an employer do when a job applicant tries to use an ITIN for employment?

The employer should advise the applicant that the ITIN is not a valid ID number for work purposes and the he should contact SSA to get an SSN if he is legally entitled to work in the U.S. If the employee cannot get an SSN, the ITIN should be used for IRS reporting purposes.

Does filing a Form W-8 with a bank relieve the nonresident alien from getting an ITIN?

No. If a return must be filed to report income from U.S. sources other than bank interest, or if the interest received from the bank account is effectively connected with a U.S. trade or business, an ITIN is still required.

Should a bank accept a Form W-8 that does not include an ITIN?

Yes. However, currently proposed regulations under Internal Revenue Code section 1441 will encourage the use of the ITIN in banking situations since the Form W-8 will be valid indefinitely (or until circumstances or status changes requiring a new Form W-8 when it is submitted with an ITIN. It will not have to be renewed every three years. Banks paying U.S. income other than portfolio interest and dividends on publicly traded stock will require an ITIN on Form W-8 in order to obtain reduced tax treaty withholding rates. Please note, however, that these proposed regulations are not yet effective.

Will an ITIN be required for claiming tax treaty benefits?

Currently, an individual claiming a tax treaty benefit must be a tax resident of the country whose treaty benefit is being claimed and must provide the withholding agent a Form 1001 (this form currently does not require a tax identification number). Proposed regulations under IRC section 1441 would require an individual to provide the withholding agent a Form W-8 with an ITIN to receive the treaty benefit, except in the case of dividends on publicly traded stock.

Endnote

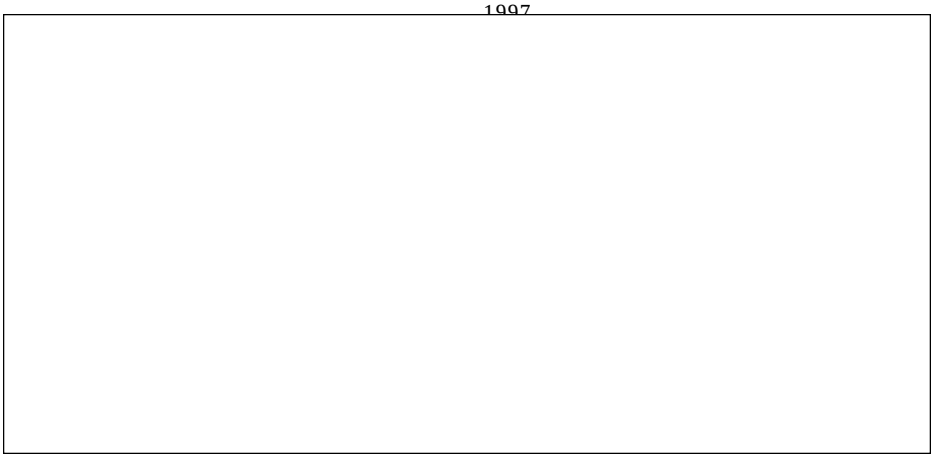
[1] *IRS International Tax Forum*, Winter 1997.

Florida Lawyer Set to Practice in France

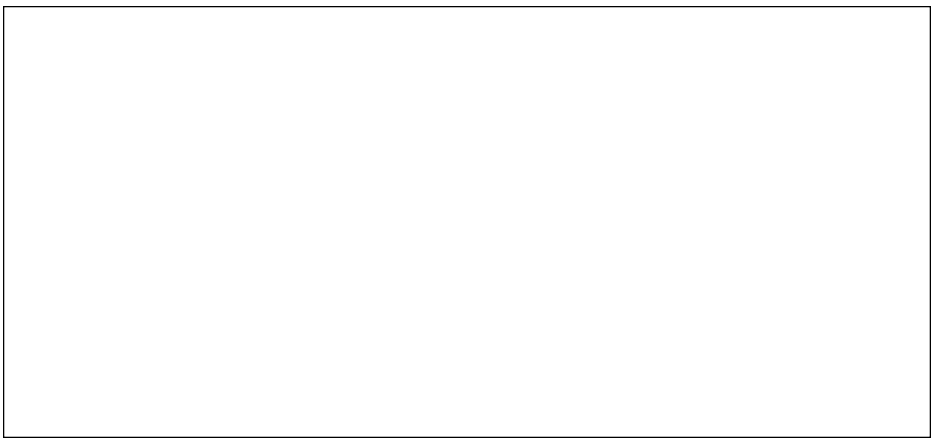
Paris, FRANCE—David S. Willig, an international lawyer based in Miami, was admitted to practice at the Bar of Paris, France, following his successful completion of examinations in French law.

Mr. Willig is a multilingual attorney also admitted in Florida and the District of Columbia, and is the editor of the Comparative Juridical Review, a bilingual journal of international and comparative law published since 1964.

With the Paris office now established, Mr. Willig continues plans to utilize his French bar admission for developing the firm's practice in other parts of the European Union.



David S. Willig swears in before the Bar of Paris, as Bâtonnier (Bar President) Bernard Vatier bows his head solemnly.



David S. Willig is congratulated by Bâtonnier (Presidente) del Colegio de Abogados Bernard Vatier, mientras el Alguacil del C.A. André Fourcade observa.

International Tax Briefs

by Laura A. Quigley

This column covers selected current international tax issues.

The New Foreign Trust Rules And Compliance

The new law, known as the Small Business Job Protection Act of 1996 and signed by President Clinton on 8/20/96, creates many new hurdles for foreign trusts. Some of these hurdles are as follows:

(1) exacting more taxes and reporting compliance rules on U.S. persons, as grantors, transferors, executors, owners or beneficiaries;
(2) causing tension among trustees, grantors and beneficiaries;
(3) mandating that foreign grantors and trustees know the U.S. tax rules at the time of the creation of the trusts;
(4) creating uncertainty until these new rules can be analyzed and guidance can be achieved through IRS pronouncements or case law.

Because of the new law every foreign trust should be reviewed if there is or may be a U.S. beneficiary. This 1996 Act has now come close to a full circle in the foreign trust arena.

Before 1976, a U.S. grantor could create a foreign accumulation trust with U.S. beneficiaries in a low or non income tax country which held foreign assets. With this, no U.S. tax occurred until distributions were made to the beneficiaries. Then the Tax Reform Act of 1976 added Section 679 which taxed income accumulated in the foreign trust to the U.S. grantor. It also imposed an interest charge of 6% on a U.S. beneficiary for that distribution if the foreign trust income was not taxable to the grantor.

After 1976, U.S. persons continued to create foreign trusts for the non tax trust benefits, such as asset protection and confidentiality for the owner's assets. The uses of foreign trusts for tax benefits still remained for nonresident aliens who created their foreign trusts with foreign assets or U.S. tax-exempt income assets for U.S. beneficiaries. This tax benefit occurred because these trusts were treated as grantor trusts, taxable to the grantor.

Inbound Grantor Trusts

Before the 1996 Act, Sections 671-679 of the Internal Revenue Code generally made the U.S. or foreign grantor the owner of the trust assets. Now, the 1996 Act has reversed this and makes the grantor trust rules inapplicable where the foreign person would be considered the owner of the principal of the trust. Thus, the income distributions of the trust to the U.S. beneficiaries subject these beneficiaries to the accumulation distribution charge. This causes many inbound grantor trusts to be reclassified as foreign nongrantor trusts.

To escape the foreign nongrantor trust rules and thus be a grantor trust, the foreign trust must be revocable solely by the grantor or only with the consent of a related or subordinate party, who is controlled by the grantor. Section 672 provides a list of these parties, such as the grantor's spouse, father, mother, issue, brother, sister, employee, controlled corporation, et al.

This foreign nongrantor trust status can also be avoided, if the trust corpus or income can only be distributable to the grantor or the grantor's spouse. Grantor trust status is also allowed where the trust's purpose is to pay compensation for services rendered.

Grantor trust status will still apply to trusts in existence as of 9/15/95, except transfers after 9/15/95. Grantor trust status also applies for purposes of determining whether a corporation is a passive foreign investment company (PFIC) under Section 1296.

Finally, grantor trust status will apply for controlled foreign corporations (CFC), because they are treated as domestic corporations. Thus, the U.S. persons are subjected to tax under the CFC rules.

The IRS has broad recharacterization powers on transfers in an attempt to avoid these rules. However, if a foreign person actually pays tax in the foreign country on income which is now also taxable to the U.S. beneficiary, the taxes paid by the foreign grantor are to be considered paid by the U.S. beneficiaries using the foreign tax credit rules.

Outbound Grantor Trusts

Under Section 679, if a U.S. person transfers, directly or indirectly, property to the foreign trust, they shall be treated as the owner of that portion of the trust property, for any taxable year in which the trust has a U.S. beneficiary, unless the transfer is a sale or exchange for full and adequate consideration, i.e., fair market value. Now any obligations of the trust, any grantor or beneficiary or person related to them or any guarantees by such persons are ignored for purposes of the fair market exception rule.

Two areas that create additional transfers to foreign trusts occur when a nonresident alien individual transfers property, directly or indirectly, to a foreign trust and then becomes a U.S. resident within five years after the transfer or where a U.S. citizen or resident transfers property to a domestic trust which then becomes a foreign trust.

An exception to the transfer rule is also added for property transferred to a charitable or deferred compensation trust. These rules are effective for transfers after 2/6/95.

Trust Residency

The 1996 Act now provides a two-part objective test for deciding if the trust is foreign or domestic. Both parts of the test must be met for the trust to be domestic.

The first part requires that a U.S. court must be able to exercise primary supervision over the administration of the trust. This would occur where the trust specifies that any U.S. states' laws will govern the trust.

The second part requires that one or more U.S. fiduciaries have the authority to control all substantial decisions of the trust. This provision is effective for tax years beginning af-

ter 12/31/96, but the trustee can elect to follow this new rule for tax years ending after 8/20/96.

Caution must be used, as the change of a domestic trust to a foreign trust causes the change of status to be deemed a transfer of assets to the foreign trust. This subjects the trust to the 35% excise tax for appreciated assets under Section 1491, unless one of the exceptions applies.

Reporting Requirements For Foreign Gifts

The 1996 Act now requires a U.S. person who receives more than $10,000.00 a year to report this to the IRS. A foreign gift is a gift from a non U.S. person, from foreign or U.S. sources, unless it is for qualified tuition of medical payments or a distribution to a U.S. beneficiary properly disclosed in a return.

If the U.S. person fails to report without reasonable cause, the IRS may determine the tax treatment of the unreported gifts, subject only to judicial review if it is arbitrary and capricious. Additionally, the U.S. person pays a penalty of 5% of the amount of the foreign gift for each month the failure continues with a cap of 25% of the gift.

Information Reporting and Penalties

Before the 1996 Act, any U.S. person who created a foreign trust or transferred money or property to a foreign trust reported this to the IRS within 90 days of the event. Foreign trusts who had one or more U.S. beneficiaries also filed an annual return and any transfers subject to the 35% excise tax were also reported. Penalties for failures to do this reporting were about 5% and could use the reasonable cause exception.

The new law dramatically expands the reporting requirements related to foreign trusts and the failure to report penalties. The first reporting is done by responsible persons, such as the grantor, transferor or executor, which must report reportable events within 90 days of their occurrence.

Reportable events include the creation of or transfer of money or property to a foreign trust by a U.S. person, even if by reason of death or due to the death of a U.S. citizen or resident, if the deceased was treated as the owner of any portion of the foreign trust or the gross estate consists of foreign trust assets. Exceptions to reportable events exist for transfers made for fair market value, as limited by the obligations rules discussed above, and for transfers to deferred compensation and charitable trusts.

The second reporting is done by the U.S. person who is treated as the owner of any portion of the foreign trust under the grantor trust rules. This U.S. person must annually file a return on all trust activities and operations for the year and names a U.S. agent for the trust. This information is also given to each U.S. person who is treated as a partial owner or is a beneficiary of the trust.

Unless a U.S. person is authorized to act as the trust's agent with respect to requests by the IRS to examine records or produce testimony or handle any summons for records under Sections 7602-7604 concerning the tax treatment of any items related to the foreign trust, the IRS can determine the amount to be taken into account by the U.S. person under the grantor trust rules. This limited agent need not be an agent for any other purpose and this agent will not be deemed to be an office or permanent establishment of the trust in the U.S. or the engagement of a trade or business in the U.S.

Any U.S. person who receives, directly or indirectly, a distribution from a foreign trust must file an annual report. If adequate records are not provided, such distribution shall be treated as an accumulation distribution and the throwback rules will apply along with the interest charge of Section 668. If the foreign trust elects to have a limited agent for service of process, then this rule will not apply.

The severity of the penalties for noncompliance for reporting the reportable events includes criminal penalties and the civil penalty of 35% of the gross reportable amount in cases involving the creation of or transfer of property to a foreign trust or a distribution from a foreign trust to a U.S. person. If the failure to comply continues for more than 90 days after notice of the failure by the IRS, an additional civil penalty of $10,000.00 for each 30 day period occurs, but is limited to the gross reportable amount. This penalty also applies to the U.S. grantor of the foreign trust, but is limited to 5% of the gross reportable amount.

While there is a reasonable cause exception, the 1996 Act specifically states that the fact that a foreign jurisdiction would impose a civil or criminal penalty on the taxpayer for disclosing the required information is not reasonable cause. The reporting and enhanced penalties for the reportable events apply for events occurring or distributions received after 8/20/96. The U.S. grantor annual reporting and penalties apply to tax years of U.S. persons beginning after 12/31/95.

There are many open issues and questions. Hopefully the issuance of regulations by the IRS which are expected before 12/31/96 will answer some of the open issues and questions. See endnote 1.

The Proposed Section 1441 Withholding Rules

The IRS issued proposed regulations in April 1996 that will change the Section 1441 withholding on payments to foreign persons, the portfolio interest rules, the backup withholding rules and the wage withholding rules. This set of regulations works toward a comprehensive coordinated revision for all the withholding rules relating to payments to foreign persons.

These regulations do not change the withholding system at source but do change the withholding process. All persons making payments of U.S. source dividends, interest and other fixed and determinable annual or periodical income to foreign persons will now follow new procedures to avoid liability.

In general, U.S. withholding agents will now collect more information on the front end before reducing withholding and will report annually on more payments. Further, all foreign intermediaries will be required to make certifications to the withholding agents about the beneficial owner unless they are qualified intermediaries. This expands the current certifications outlined in the portfolio interest regulations.

The new rules for intermediaries will affect foreign financial institutions and securities clearinghouses that have brokerage accounts for their foreign customers. They will also affect foreign nominees and for-

continued ...

eign partnerships. The new rules on withholding on payments to foreign partnerships will help U.S. partners but may deny foreign partners their treaty benefits.

The withholding at source for payments to foreign persons started in 1936. The first set of rules implementing this withholding concept came about in 1956.

The IRS had three main goals for revising the Section 1441 regulations as follows:

(1) To eliminate the "address system"

(2) To coordinate Section 1441 with the subsequently enacted backup withholding and portfolio interest rules

(3) To update the regulations for Code, case and rulings changes.

The IRS and Treasury became concerned about the abuses that might be occurring with the address system. For example, the IRS and Treasury started receiving reports about the increasing amount of U.S. tax Swiss tax authorities were collecting on U.S. source dividends paid to post office boxes in Switzerland and then forwarded to persons residing outside of Switzerland.

To avoid or lessen this type of expanding abuse, a refund or certification system was considered by the IRS. With the read system, the 30% withholding would automatically apply and then the taxpayer would file for a refund showing their right to treaty benefits. With the certification system 30% would be withheld; unless the withholding agent received a certificate from the foreign treaty country tax authorities showing that the recipient had filed a tax return as a resident of that treaty country.

The proposed regulations are IRS's attempt to again eliminate the address system for obtaining treaty benefits through a certification system. Their first attempt to do this in 1984 met with much criticism.

Thus, those regulations were never finalized. However, due to the proposed regulations' certification system, these regulations are now consistent with Treasury's continuing goal to lessen treaty shopping.

Under the proposed regulations, a Form W-8 will be provided by the beneficial owner instead of Form 1001 so that a reduced treaty withholding rate can be obtained. Some requirements of the Form W-8 include statements that the beneficial owner is a resident of the treaty country and entitled to the treaty benefits and that they have complied with advance ruling requirements. The W-8 will also contain information, if applicable, giving the names and permanent addresses of the beneficial owners and taxpayer identification numbers (TINs), (except for dividends on publicly traded stocks and portfolio interest), that have been certified by the IRS. This W-8 will be signed under penalties of perjury.

Obtaining a TIN for a foreign person is already time consuming even without this new IRS certification process. This IRS process may be quite unwieldy, considering the number of foreign investors who are not engaged in a U.S. trade or business, even if you eliminate portfolio interest, publicly traded stock and bank deposit interest transactions.

The proposed regulations' requirement of TINs would allow the use of social security numbers, employer identification numbers or individual taxpayer identification numbers done by use of the Form W-7. For IRS to certify the TIN, they will require a certificate of residence or other documentary evidence proving residence.

The certificate of residence is issued by the Competent Authority or tax authority of the treaty country showing that the taxpayer has filed its most recent income tax return as a resident of the treaty country. The IRS may also certify the TIN based on the certification of a qualified intermediary. These qualified intermediaries will be preapproved by the IRS.

This documentation must be received by the withholding agent before the payment is made to the foreign investor. Thus, the delays of the process are doubly troublesome.

Withholding agents also have existing filing requirements using Forms 1042S and 1042. The proposed regulations change those requirements in several respects.

First, the Forms 1042 and 1042S are now due on 2/28 for the previous calendar year to match the due date for these forms with that of the 1099. Second, the proposed regulations provide that the 1042 is an income tax return rather than an information return. Thus, this may subject the withholding agent to all the penalties for failure to file income tax returns or filing incomplete returns and to substantial understatement penalties.

Finally, the proposed regulations give a list of items not required to be reported, which are items which are required to be reported elsewhere or require no withholding. This now coordinates the Form 1042S items with the information reporting/backup withholding system to avoid duplicative reporting.

The proposed regulations are scheduled to apply to payments made after 12/31/97. The proposed regulations also have some transition rules in anticipation of the significant new documentation requirements.

Thus, the proposed regulations eliminate the address system, provide streamlining between the reporting and withholding sections and remove old unworkable provisions. For instance, a positive in the regulations is seen in the allowance of withholding based on estimated earnings and profits and the elimination of over withholding on payments to foreign partnerships.

To the extent that payments are made to qualified intermediaries, the burden of collecting and reporting on multiple beneficial owners will decrease, but will subject the qualified intermediary to increased IRS scrutiny. For nonqualified intermediaries, their burdens of collecting and passing on the documentation will increase and they will also need to provide information on themselves to the IRS on portfolio interest payments.

For the beneficial owners of dividends and bank deposit interest, the requirement of more documentation to obtain treaty benefits is certainly more burdensome. However, they may be helped when investing in U.S. stocks and securities through a qualified intermediary, especially if IRS's agreement with the intermediary would allow the beneficial owner to become invisible by not requiring additional documentation from the owner and not requiring reporting on the beneficial owner to the IRS. See endnote 2.

Endnote

[1] Tax Management International Journal, Vol. 25, No. 12, December 13, 1996, The New Foreign Trust Provisions: Surprises for the Informed; Potential Litigation for the Uninformed, by Howard J. Levine, Esq.

[2] Tax Management International Journal, Vol. 25, No. 9, September 13, 1996, The Proposed Section 1441 Withholding Rules: Daughter of Portfolio Interest, by Diane L. Renfroe, Esq., Scott Mund, CPA, and Richard A. Gordon, Esq.

Laura A. Quigley is a member of the international business practice law firm of Hendry, Stoner, Sawicki & Brown, P.A. She practices tax, corporate and business law. In these general legal areas, she has developed niche areas in international tax, tax controversy and litigation/settlement tax.

NOTE: As of June 2, 1997, Notice 97-34, which is the guidance on the Foreign Trust Reporting and Compliance was released.

IFTTA Cruise: Education on the High Seas

by Drucilla E. Bell

The International Forum of Travel and Tourism Advocates held its Eleventh Annual Conference in Ft. Lauderdale, Florida, but that was actually just where the conference concluded. The conference started in Miami on April 27, at the Marriott, continued on board the "Leeward," of Norwegian Cruise line, into Key West on Tuesday (the first stop), into Cozumel on Wednesday (the second stop), then in Ft. Lauderdale on Friday and Saturday, at Nova Southeastern Shepard Broad Law Center and the Farewell dinner was at the Tower Club in Fort Lauderdale on Saturday night, May 3.

This year's conference was developed by Larry Gore and Seminars at Sea Travel, Inc., who served as host to travel and tourism attorneys from Argentina, Turkey, Israel, Canada and the U.S., with professors from Scotland, Great Britain, Ireland, Germany, and the U.S. Seminars were presented on admiralty law, the laws regulating Irish folk festivals, the extension of the Americans with Disabilities Act into the travel industry, travel regulation in developing democracies and a panel updated the group on the travel law developments in the European Union on board the "Leeward." Seminars on Traveling with oxygen dependent travelers and also Advance Medical Directives that should always be with you, were given at the Miami Marriott pre-boarding. At the conclusion of the conference, at Nova Southeastern Law Center, the group participated in a Mediation workshop.

When the group wasn't conferencing, there were lots of exciting and relaxing diversions. The ship itself contained stage musical shows every night, a Casino, duty-free shops, along with buffets in addition to regular meals to take care of one's appetite. Of course, there was a swimming pool, three jacuzzis, and a basketball court on the top deck.

Upon arrival in Key West, the group was introduced to and educated about the Southernmost place in the continental U.S. on the Conch Train tour, which made very productive use of our three hour stay there. Upon arriving in Cozumel, most of the group chose the tour of the Mayan ruins at Tulum. This is a rocky remnant of Mayan temples, constructed thousands of years ago in such a way that the sun would shine straight through the buildings on the equinoxes and solstices. The ruins are situated so that the Mayans only had to build three walls to protect their temples. The fourth side was on the Coast, which makes a beautiful setting for a tourist attraction. What foresight those Mayans had!! Then the group was treated to a lovely lagoon for swimming at Xel-Ha, some shops for buying postcards and souvenirs, then back to the ship to change for a meeting with the mayor of Cozumel. Mayor Victor Manual Vivas Gonzales met with us after a busy day. In fact, he was still taking phone calls and signing letters, after our arrival. He told us a bit of Cozumel history (starting at its earliest beginning) and when he reached 1974, Vice President John Downes thanked him for his time and attention, we took some group photos and headed back to the ship.

Administrative matters were handled at the meetings back in Ft. Lauderdale, and on the bus to the Hyatt Pier 66 where the group stayed after disembarking and after lunching at the Biltmore Hotel in Miami. One of the most hotly contested and debated issues is traditionally the location of the next conference and consistent with the past, it took two votes to decide that the next conference would be held in Istanbul, Turkey.

The Farewell dinner was held at the Tower Club in Ft. Lauderdale on May 3. With background music provided by a harpist, some singing by Jerry, Michael and Pim, and lots of toasts and more group photos, the evening was a perfect ending for a splendid IFTTA international conference.

Drucilla E. Bell is a sole practitioner in Clearwater, Florida, who emphasizes governmental and international law, specializing in international business transactions, immigration and professional licensing and permitting. She had been to Russia five times before her most recent visits made in conjunction with her teaching in Estonia. She has formed Florida corporations for a dozen private enterprises in Krasnodar, Russia and taught the business managers basics of Florida business entity law and international trade procedures. She is a member of the ABA, IBA and AILA. She is an adjunct professor at Stetson University College of Law and Eckerd College and serves on the Board of Directors for the Vietnamese-American Association of Tampa Bay.

IFTTA CRUISE: Education on the High Seas

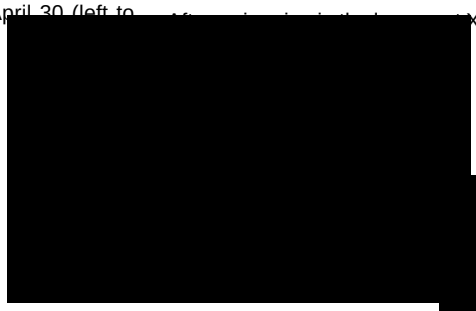
seph Harbaugh, Barbara Britake, Mary Hurtado, Dr. Michael Wukoschitz.

Carlos Fairstein, Dr. Michael Wukoschitz, Gerald Heifitz, Joseph Slavin, Drucilla Bell and Pim W.H. deVos.

Mayan ruins of El Castillo Tulum, near Cozumel on April 30 (left to

Xel-Ha on April 30 (left to right): Yoram

deVos, Pat Saks, Maria Luisa Fairstein, Gerald Heifitz, Murat and Feyza Dayioglu



Helen Douglas, Mural Dayioglu, David Grant, Yoram and Delia Avi-Guy, Feyza Dayioglu, and Joseph Harbaugh. Seated in front: Catharine Buie, Marc McDonald, Gerald Heifitz, Mary Hurtado, Pim W.H. deVos and Donna Gore.

Tower Club Farewell Dinner, May 3: Gerald Heifitz and Yoram and Delia Avi-Guy.

In Mayor of Cozumel office evening of April 30 (left to right): Larry Gore, Oscar Jorge Fink Serra (Presi-

Tower Club Farewell Dinner, May 3: Mural and Feyza Dayioglu and Dr. Michael Wukoschitz.

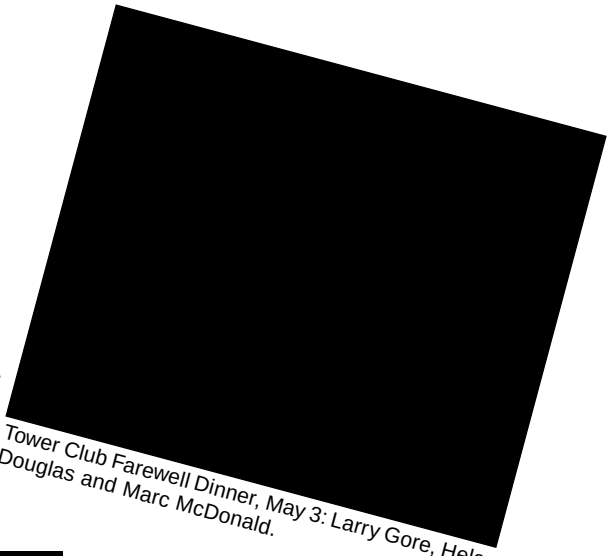
Mary Hurtado, Michael Wukoschitz, Joseph Slavin, Drucilla Bell, Yoram and Delia Avi-Guy, and Dr. Klaus Tonner and Marion Bruggeman; seated John Downes andMayor Victor Manuel Vivas Gonzalez.

Salvin, Yoram and Delia Avi-Guy; Drucilla Bell, Pim W.H. deVos, Dr. Klaus Tonner and Marion Bruggeman; Captain Edward Fink and Joanne Fink. Seated, John Downes and Mayor Victor Manuel Vivas Gonzalez.

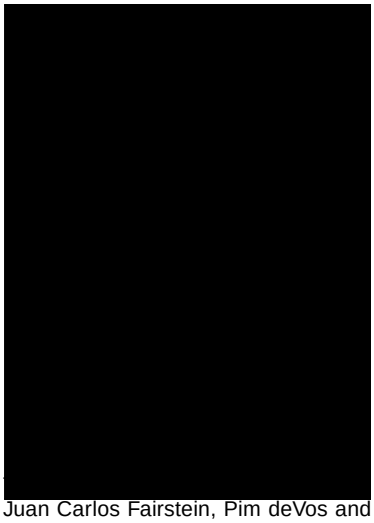
(Second half of above photo) In Mayor of Cozumel office evening of

Farewell Dinner at Tower Club in Fort Lauderdale, May 3 (left to right): Russell and Janet Carlisle, Pat Saks, Maria Luisa and Juan Carlos Fairstein, Drucilla Bell, Michael Wukoschitz, John Downes, Larry Gore,

Tower Club Farewell Dinner, May 3: David Grant, Russell Carlisle and Joseph Harbaugh.



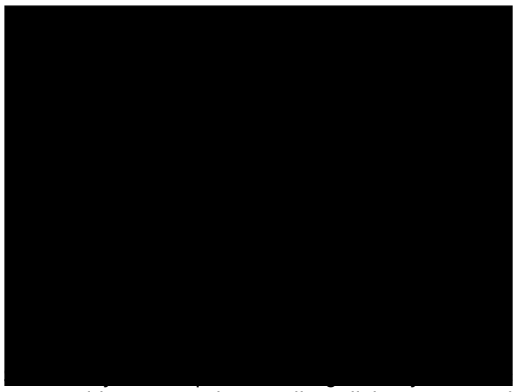
Tower Club Farewell Dinner, May 3: Larry Gore, Helen Douglas and Marc McDonald.



Juan Carlos Fairstein, Pim deVos and Maria Luisa Fairstein.

Pim deVos, Mary Hurtado, John Downes, Gerald Heifitz, Pat Saks and Michael Wukoschitz.

Tower Club Farewell Dinner, May 3: Joseph Harbaugh, Maria Luisa Fairstein and Drucilla Bell.



McDonald, Janet and Russell Carlisle, Yoram and Delia Avi-Guy.

Teaching in a Private Law School in Estonia

My opportunity to teach in Estonia came from Dr. W. Gary Vause, the Director of the Alternative Dispute Resolution Center at Stetson University College of Law in St. Petersburg, Florida. In addition to his position at the Resolution Center and teaching at Stetson, Dr. Vause is also on the International Board of Directors for Concordia International University Estonia. In the fall of 1992, I had the opportunity to meet with the founder and Rector of Concordia when he visited the Stetson Campus in St. Petersburg, Florida. At that time, I had fantasized about the possibility of visiting Estonia, but did not dream that the actual opportunity would present itself so soon. Friends and acquaintances were excited, puzzled and generally curious about my latest undertaking. The news of my pending adventure met with mixed reactions, from "What a marvelous opportunity!" to "Who did you upset to get this job?" or words to that effect.

Concordia International University Estonia was established in Tallinn, Estonia, in July, 1992, by Attorney Mart Susi and his wife, Marianne, in partnership with Mr. and Mrs. John Buuck, of Wisconsin. The approval for its establishment was given and its Charter was registered at the session of the Estonian Government on September 2, 1992. The academic operation began in the Fall term 1993, with a Bachelor level program in International Business. Its initial goal was to provide to Baltic students a high grade business education in the western style to enable them to compete internationally, especially in the European Union. In September, 1996, the law program started with an initial enrollment of 150 students, offering a comprehensive education emphasizing international law, European Union and local law. All courses are taught in English, except that courses in local law will be taught in the native language.

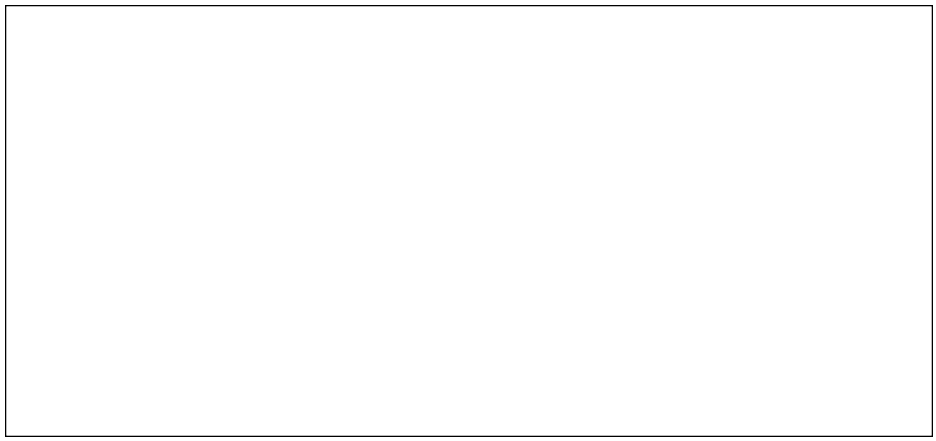
September 2, 1996, was the grand opening of the law school, with three American law professors teaching three law courses: Legal Encyclopedia, History of Legal Thought and Comparative Legal Systems. Dr. John Palmer is a very experienced retired law professor from Columbus, Ohio, who had also taught in Istanbul. Dr. John Miller also had his MBA, is also an attorney in Tallahassee, Florida, and had taught for a year in the International Business program at Concordia. I had the distinction of being the only practicing American lawyer who was teaching at Concordia. I taught Comparative Legal Systems.

As a professor of law from a western common law style school, I was not what the students expected. As Baltic law students at the bachelor level, they were not what I expected. I didn't realize that their whole education had been lectures from professors who made them regurgitate on exams, and usually as a group effort. Consequently, even a modified Socratic method sent them into catatonic spasms.

I noticed when I first inspected the law school class rooms that the desks were placed in two's, in fact, the rows were two desks side by side. The academic dean informed me that students go all through school with a "buddy" with whom they share books, notes and are accustomed to sharing information during exams, if their crib notes and cheat sheets don't work.

During my first class, I distributed a syllabus and assignment sheet. This explained the "rules to live by" in my classroom, along with pages of material expected to be read and digested before class meetings. Both in the syllabus and orally, I explained that I would be teaching them a new language, "legalese" and a new way of thinking. I explained in the syllabus that class participation was required and that those who came to class unprepared would write a paper on the matter covered in class. It was also explained that there would be no eating, drinking, paging or cell phone ringing in my class. Cheating would not be tolerated and only exams previously re-scheduled or missed because of an emergency could be postponed. No one seemed shocked or faint, and I was left with the feeling that we had effectively communicated.

About two weeks into the semester, however, after some students had dropped my course and I had assigned a few papers to unprepared students, I was summoned to the Academic Dean's office. Apparently, a small representative group of black leather jacketed female students had gone to her complaining that my course was too difficult, there was too much complex reading and that I punished the unprepared by making them write papers. A representative



This is the ESMAR Building. Law School is upstairs; Post Office and Bank are downstairs. ESMAR (fish processing company) is also upstairs but it's administrative offices so it's ok!

group of the young fellows had gone to the Rector, with similar complaints, made in Estonian. As I suspected, those who found English most difficult, were finding legalese impossible! And critical, analytical thinking was a challenge to those accustomed only to regurgitating, with great cooperation. As I explained to both the Rector and the Dean, I was willing in any way to work with the students: they could come to my office during office hours; they could e-mail me with questions, ask questions in class, but there was a certain amount of material that had to be covered in order for them to learn the basics of Comparative Legal Systems. To quote a very experienced law professor: They could get smarter, study harder, or find another career!

I was told that they would not ask questions in class and often they would not answer for fear of looking stupid to their peers. In Estonia, appearance is everything ! This was the explanation for the black leather jackets, the cellphones, BMW's, probably part of the reason for attending Concordia and definitely the reason for getting the diploma. The knowledge and the course work didn't matter, as long as you had the diploma. It was the diploma that you needed to qualify for the job, not the knowledge. With the small size of the country, and the small population, everybody has contacts to line up the jobs they want so the only hurdle is getting the diploma to meet the minimum requirement.

When I gave my first exam, I tried to be very vigilant, checked every multi-lingual dictionary, had them remove all papers from their desks and kept an eagle eye. After passing out the exams, I explained that there would be no talking. I would have to assume they were cheating because I couldn't understand them. In spite of that, I found two of my best students consulting. I gave them "F's" just as I had promised. They couldn't believe it—I was bombarded by sobbing students, promising me anything if I would not give them their first F. They promised they had only consulted on one question—couldn't they take the exam again?!?!? Somehow that was supposed to cure the dishonesty. I had allowed the students who hadn't done quite so well to do special projects on their own governments and how they saw them developing along civil law traditions. The flunking students begged to do a project. My hardest time while teaching was to stand up to these students, who I knew to be bright and yet had cheated, when they really had the least to gain by doing so. Just as the Dean had promised, once that was done, the whole school knew before the day was over that "Dr. Bell is not to be trifled with." Some of my students came to me after the second quiz and told me that the students were very accomplished "cheaters" and that my efforts were good, but that I should also make them leave all books, notebooks and bookbags in the front of the class and also walk around, as students were expert at exchanging the dictionaries with supplemented ones that they kept in their bookbags. Other professors caught students preparing cheat sheets for my class in their classes.

Dealing with legalese was not the only language problem encountered by the class and myself. Initially I thought, just as in the U.S., Estonia was going through a Presidential election when I first arrived. However, their President is elected by Parliament, which could not get a majority together for any one of the candidates, so the Parliament had to gather with the local representatives from all over the country. As I understood, if this group could not get a majority for any of the candidates, after three votes, then the Parliament would have to be dissolved. Another Parliamentary election would then try to obtain a majority for one of the presidential candidates. First, I asked the students "How do you tell who is running?" This question meant nothing to them, because no one "runs" for president. The electors are not the populace, but the government. The candidates seem to develop from the various parties and declare themselves. They have many panels and debates on television, in two weeks before the election, and then Parliament votes. When I expressed doubt that this process could ever "elect" a President in the present situation, my students assured me that after two votes, if no one had a majority, the oldest candidate would win. Amazingly, he did. Lennart Mari was the oldest candidate, and he won after two votes.

When I congratulated them on once again electing a non-Communist leader, they were baffled. There were rumors of Communist connections for all the candidates and the students explained that anyone with any position and any leadership knowledge had to have been a member of the Communist party. All of a sudden, the blundering leaderless menageries in the anti-communist governments made sense—and the ultimate proof I found in the answer to my final exam essay question in which I asked for the "most efficient" legal system and a number of people answered: "Socialist," because of the effective and efficient way it controlled life and those who chose to participate, eliminating those who didn't!!

Language was also a challenge in teaching and making explanations, as I found that the students would take a legal term, change its form and

continued...

Faculty and staff photo taken at the ceremony for opening of law school, August 30,1996.

Teaching in Estonia
from preceding page

expect it to retain the legal meaning. For example, in the Civil Law Chapter on legal terminology, "original" and "derivative title" had to be differentiated. I explained that regarding land, "original title" would come from the state and "derivative title" would come from the previous owner. Since they weren't that familiar with land, I decided a better example would be a car. The "original title" would come from the manufacturer and then the "derivative title" would be transmitted from the previous owner. If the previous owner had a loan unpaid on the car, then the next owner would assume or pay that off, to own the entire interest in the car. On the exam on the civil law, I asked the difference between "original" and "derivative title." Many students answered that the original title comes without transmission—this made me think back to my explanation and I realized that they probably didn't understand that "transmission" was part of a car!!

It occurred again, when I was teaching the trial procedure in the common law part of the course, where the British legal system was used to exemplify the Common Law. In that system, the "brief" is the summary of the case that the Barrister has when he goes to trial. It is the witness statements, the pleadings, everything that the lawyer has the night before trial to prepare from to present the case. However, since only about 2% of the cases go to trial, these are often not given to the Barrister until he is on his way to Court. On the exam, I asked what percentage of the cases go to trial. One answer I received: "Only 1 to 2%, the rest are left in their briefs." Very true!!

Along with two days of three classes each, I taught an evening class and a group of "distance students" whom I only saw three times during the semester. For them, I prepared homework questions that the students could follow as they read the material, answer and return to me, before they returned for their next session on campus. I prepared three sets of questions: Civil Law, Common Law, and Socialist Law Tradition. I used the homework questions for review questions for the day and evening students. Eventually, I took these same questions to develop into quizzes and exams on the respective sections of the material. I was determined to prepare the students for "law school essay" questions, so I started out with short answer questions. That was when I realized how deficient some of the students' English really was. So the next exam I gave mostly multiple choice and true-false, with a few short answer. On the final exam, I gave half of the points in multiple choice and true-false, with the other half in two essay questions. I gave them four essay questions; they were required to answer #1 and could choose one of the other three, and I gave them all of the essay questions two weeks before the day of the multiple choice exams in class.

I realized in the Civil law part of the course, that the Civil law is not normally taught in the Socratic method. That is the only thing taken by the Common Law from the Civil Law Tradition, specifically Legal Science, from the German methodology of approaching law according to the scientific method. The Civil Law is taught from the general rules and then applying them to situations. Whereas the common law is taught in a problem solving method, how the case is solved by applying the law in problematic situations, specific cases. What we call, the case law approach is actually from the Civil Law Tradition, but they insist on the lecture method for teaching Civil Law, explaining the rules and theories in general, scholarly terms.

In conclusion, my brief time teaching at Concordia was an incredible educational enlightening experience, not just to teach the law students, but getting to know them, becoming aware of the experiences that they were going through in the process of their developing democracy, how this affected and actually created the experience that they would have and take with them from the law program that was just in its embryonic stage when I participated as a very small but I hope memorable part of it.

International Law Section Building Internet E-Mail Directory

The International Law Section is developing a directory of Internet e-mail addresses of its members. Information of interest to members of the Section (including the Quarterly) will soon be available on the Internet or delivered via e-mail to those members who have registered their addresses. Addresses provided for the directory will be used only for International Law Section business.

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