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Message From the Chair

Achieving the ILS Mission to Lead Globally

Welcome to the Fall 2017 issue of the International Law Quarterly!

As the activity level for the International Law Section and The Florida Bar picks up following the summer months, I extend my greetings to all section members in and outside the state of Florida. We had an eventful summer highlighted by a very productive annual meeting in Boca Raton and the kickoff of our committees’ work for the year ahead. In September, Hurricane Irma impacted almost the entire state and caused tremendous human and economic damage. The Florida Bar and the International Law Section responded in the storm’s wake by facilitating the work of members looking to assist their communities and by providing resources to lawyers who themselves needed help in the aftermath of the storm.

The members of the International Law Section are also global citizens and ambassadors for our legal community. The devastation caused by multiple hurricanes in the Caribbean has spurred action to help those impacted beyond our own shores. In the coming weeks, the International Law Section will be hosting a relief event featuring a silent auction to benefit charities working in Puerto Rico and the Caribbean. I urge you to come out and support these important efforts with your generosity.

Hurricane Irma also caused the postponement of the ILS Retreat previously scheduled for the end of September. The new dates for our section’s retreat at the Hyatt Regency Coconut Point Resort & Spa in Bonita Springs are 18-20 May 2018. Because of the proximity of the revised retreat dates to The Florida Bar Annual Convention in June 2018, the ILS annual meeting will take place during the retreat in Bonita Springs, and not in Orlando in June. While this is a departure from our traditional calendar, we are excited about the opportunity that the joint retreat-annual meeting presents. Please mark your calendars now and be on the lookout for registration details very soon.

As many of you know, it is one of my goals as chair to expand the section’s visibility and membership in Central Florida and North Florida. To that end, the International Law Section is planning a lunch in Orlando in November with leaders from the international legal community in Central Florida to urge them to engage with us and to learn from them how we can do a better job of attracting membership outside South Florida. In the same vein, the section

Meet Your ILS Chair

Arnoldo “Arnie” Lacayo, a partner with Sequor Law in Miami, focuses his international practice on financial fraud and asset recovery. He has experience litigating complex disputes in both state and federal courts and regularly represents multinational corporations, sovereign governments, liquidators, receivers, and other foreign officeholders in matters pending in U.S. courts. In addition to serving as 2017-18 chair of The Florida Bar International Law Section, Lacayo is active with the International Association of Young Lawyers (AIJA) and its litigation commission, where he serves as U.S. national representative and vice president, respectively. Lacayo also serves as regional officer for North America in the International Bar Association (IBA) Asset Recovery Subcommittee.
will be participating in the 2018 Legislative Reception in Tallahassee in January so that we can engage with The Florida Bar Board of Governors and members of the judiciary, the Legislature, and the Bar in North Florida. Beyond that, planning is underway for events in Jacksonville and Tampa in 2018. Please stay tuned.

Which brings me to the section’s mission to *Lead Globally with Information, Innovation, and Insight*. This issue of the *International Law Quarterly*, focused on international dispute resolution, highlights Florida’s established and widely recognized role as a hub for international dispute resolution. That role did not materialize from geography alone. Making Florida a hub for international dispute resolution involved hard and concerted work over the years by this section’s members and leaders. It involved the planning and delivery of world-class continuing legal education programming; vigilance against legislation that would hamper the state’s ability to attract international dispute resolution work; and proactive support in favor of legislation, rules, and even court structures that support Florida’s preeminent place as a hub for international dispute resolution.

Other nations, states, and financial centers are working to emulate Florida’s success, and the work of promoting Florida as a hub for international dispute resolution is never done. The Florida Bar International Law Section is committed to amplifying the message that Florida is the place for international dispute resolution and international legal services as a whole, whether it be through this publication, recognized throughout the Bar for its quality and substance, through our redesigned and widely expanded website (internationallawsection.org), or through our various social media platforms.

Under the leadership of Pamella Seay of Port Charlotte, the section is well on its way to publishing the International Law Handbook and Desk Reference in 2018. This important resource will serve as the go-to source for international legal practitioners in and outside Florida and will serve to showcase the international expertise that resides here.

Additionally, on 16 February 2018, the section will present its flagship CLE program, iLaw 2018, building on the extraordinary success of the 2017 event and partnering again with the AAA’s International Centre for Dispute Resolution (ICDR) to present cutting edge transactional, litigation, and arbitration topics. On the following day, the section will partner once again with JAMS to host law schools from across the state, and some from other states, in the 2018 Richard DeWitt Memorial Vis Pre-Moot. This commitment to future members of this section and to our state’s law schools has paid huge dividends over the years in fostering specialization and expertise in international commercial arbitration, as well as recognition outside Florida.

Similarly, work to establish board certification in the area of international litigation and arbitration is ongoing. When coupled with the existing international law certification, the second certification will help to cement Florida as a hub for specialized international dispute resolution services.

It is an honor to lead this section in these exciting times. I congratulate the editorial board for this phenomenal issue of the *ILQ* and for helping the section deliver on its mission.

Arnoldo B. Lacayo
Chair
International Law Section of The Florida Bar
From the Editors . . .

One of the core missions of the International Law Section of The Florida Bar is to promote Florida as a destination for international dispute resolution. This marketplace historically has been dominated by the traditional powerhouses of New York, London, Paris, and Hong Kong, with relative newcomers such as São Paulo and Singapore. The ILS strongly believes that Florida has all of the necessary attributes to become the go-to seat for these international disputes. To that end, the ILS organizes the yearly iLaw Global Forum on International Law, which is the region’s premier international law conference; deploys its Legislative Committee to promote legislation that will further its core missions and oppose contrary legislation; provides continuing education programming on this subject to the members of our judiciary and to practitioners; and promotes the International Law Quarterly as a robust platform for international practitioners to publish articles that will educate and inspire our readers and showcase Florida for what it is: the home of sophisticated international law practitioners and jurists.

With this context in mind, in the Fall 2017 ILQ, we return to the topic of international dispute resolution and are certain that you will find these articles to be timely, relevant, and informative.

Mariela M. Malfeld, Jonathan E. Haag, and Alvin F. Lindsay kick off the Fall 2017 ILQ with an in-depth look into construction disputes and how they figure prominently in the field of international arbitration.

Clarissa Rodriguez and Laura Reich then provide us with a detailed discussion of an area of international dispute resolution that is not often discussed: the issues that arise in the attempts to recover artwork that was stolen in the context of international conflicts.

Luis O’Naghten and Andrew Riccio then analyze Pemex and Thai Lao Lignite, two decisions from the Second Circuit Court of Appeals that have had a significant impact in the world of international arbitration, particularly with regard to the issue of the enforcement of annulled arbitral awards.

Next, Tiffany N. Comprés addresses the recent criticism by a number of countries regarding certain aspects of investment treaty arbitration in an article that is certain to be of interest for those who practice in this very specialized field.

Angel Valverde follows with an interesting and practical discussion on the perils of conflicting translations in the
From the Editors, continued

context of international arbitration proceedings and proposes a common sense solution to resolving such issues.

The issue of enforcement and vacating of arbitral awards makes its way back into this issue, this time with an in-depth discussion of inconsistencies relating to Eleventh Circuit precedent presented to us by Juan C. Garcia, Juliana de Valdenebro, and Daniela Tagtachian.

As the final feature article in the Fall 2017 ILQ, Justin Brenner discusses Florida law shareholder derivative issues in the context of litigation involving foreign and domestic parties.

Larry Rifkin leads off the general interest articles portion of the issue with a practical and informative discussion of the factors that must be considered when recruiting a foreign worker.

Next, building on the topics that we addressed in the Winter 2017 ILQ focused on international investigations, Filipe Magliarelli, Gregory A. Bates, and Leah Moushey provide insight into the tools that are available to Brazilian and U.S. prosecutors in the context of anticorruption prosecutions in their respective countries.

Loly Sosa and Osvaldo Miranda then bring our attention back to the topics we addressed in the Summer 2017 ILQ focused on Cuba.

Loly Sosa analyzes the significance of recent changes to U.S.-Cuba trade regulations and the Trump administration’s response to attacks on U.S. Embassy personnel.

Finally, Osvaldo Miranda discusses the in’s and out’s of forming a company in Cuba and provides practical advice on this challenging and timely topic.

No ILQ, of course, is complete without a summary of the international law developments in the globe’s various regions, and we thank our World Roundup contributors for keeping us up to speed on the latest topics of interest in Asia, Latin America, Russia, and the Middle East.

We hope you will find the Fall 2017 ILQ informative. Let’s continue to make Florida the go-to destination for international dispute resolution.

Finally, we look forward to your contributions to the Winter 2018 ILQ, which will focus on international issues involving maritime and admiralty law.

Sincerely,
Rafael R. Ribeiro – Editor-in-Chief
Javier Peral – Editor
Loly Sosa – Editor
Stand Out From the Crowd With Board Certification

They were lawyers, but in their other lives they were also musicians, chefs, world travelers, teachers, candidates, artists, judges, FBI agents, fishermen, and photographers. It was a diverse crowd that attended the August meeting of the Tallahassee Bar Association, and they were there to discuss Florida’s board certification.

They were not just talking about it. They had a panel of board certified specialists (BCS) who had lived it.

“I was already working on my application for board certification in appellate law,” revealed Christine Graves, BCS appellate law, Carlton Fields Jorden Burt PA, “when I attended an interview with a potential client. They were looking at a few different firms, but we had a great meeting and I felt pretty confident. When they called back, they said that they had gone with another attorney. He explained that in the final decision, the only outstanding difference was that the other lawyer was board certified. That certainly gave me a boost to get it done!”

Other panelists had different stories to tell. Joseph R. Boyd, BCS marital and family law and real estate, Boyd & Durant PL, remembered a time when the only board certified attorneys in Florida practiced in Tallahassee or Orlando. Mr. Boyd has been certified since 1987. “There were a lot of cases going back and forth between Tallahassee and Orlando. We all knew that if a client in one city hired a board certified attorney, then the other side was going to hire one, too. How could they not?”

More and more, board certification is becoming a benchmark for clients trying to decide which attorney to hire. With more than twenty-six practice areas of certification in Florida, it’s easier for clients to find a board certified lawyer for their specific legal problem.

Do you want to stand out from the crowd?

Joe Bodiford, BCS criminal trial, Bodiford Law PS, challenged the audience, saying, “Imagine a football stadium packed full of attorneys, and the client stands...
on the fifty-yard line. How are you going to stand out from the crowd?”

Florida’s certification program will make you stand out, but it’s a process, and according to Steve Sellers, BCS civil trial, business litigation, and construction law, Dudley, Sellers, Healy & Heath PLLC, it’s worth it. Over a span of eight years, Mr. Sellers became certified in three different areas. “It’s not easy. You must study. But I will say that studying for the exams benefited my practice. I learned more and refreshed a lot.”

Florida’s certification program was designed to help the public in choosing a lawyer in a specified area, and no one is going to tell you that becoming board certified is an easy process.

But the effort will pay off.

Francine Ffolkes, Florida Department of Environmental Protection, has been board certified in state and federal government and administrative practice since 2008. “Clients aren’t the only ones who are looking for attorneys who are board certified. Some firms and agencies give bonuses to lawyers who make the effort and become certified.”

Some Florida insurance companies also offer discounts on their premiums in recognition of the knowledge, skill, and professionalism required to obtain board certification from The Florida Bar.

Today, more and more clients are looking for the certification designation when hiring a lawyer, especially when the other side has already hired a board certified specialist. In a diverse field of more than 118,000 Florida lawyers, board certification can make you stand out from the crowd.

Exam dates, application deadlines, and study guides can be found on The Florida Bar’s website at www.floridabar.org/certification.
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Trading Loafers for Work Boots: The Enduring Role of Construction Disputes in International Arbitration

By Mariela M. Malfeld, Jonathan E. Haag, and Alvin F. Lindsay III, Miami

Sky trains, super bridges, ocean-connecting canals, airports, power stations, refineries, pipelines, tunnels, and mega projects of all types cost billions to construct and rarely involve parties from only one country. With staggering damages for late or faulty delivery, these projects often lead to the world’s costliest disputes. But when the owner of a project in Mexico, for example, hires contractors from South Korea and engineers from Germany, no party wants to give up “home field advantage” and resolve those disputes in the court system of the other’s home country. Thus, international arbitration becomes a vital tool for those building the great projects of our time.

How Construction Arbitration Fits Into the General World of International Arbitration

International arbitration, in general, has seen a dramatic growth trajectory over the last twenty years. In the year 2000, 1,810 international arbitrations were filed with the world’s top 12 arbitral institutions—a number that rose to 2,634 in 2012.¹ The keynote speaker at a major arbitration symposium recently remarked that international arbitration has taken off “explosively” in the last decade, and that “this is a golden age for international arbitration.”² But what role does construction play in this golden age of international arbitration?

Thanks to Dispute Resolution Data (DRD), we now have some answers. DRD is a company that has been able to collect all case data (except party names) for at least the last five years from the two largest arbitral institutions, the International Chamber of Commerce and the American Arbitration Association. DRD augments that data set with similar data collected from parties and other arbitral institutions from more than 136 countries. Simply put, there is no more complete assimilation of arbitration statistics anywhere. DRD graciously allowed us to explore its database in order to help us understand the contours and role of construction disputes in international arbitration, and the results may surprise even some longtime arbitration practitioners.³

Most impressively, construction case-types account for a full 9% of all arbitration cases filed, second only to the 27% involving the generic world of “commercial contracts,” and far above other case-types, like education (1%), business ownership (6%), financial services & banking (5%), health care (3%), hospitality & travel (5%), and insurance & reinsurance (4%).
Moreover, claim amounts in construction cases far exceed the average. The average claim amount for all case-types filed in arbitration is $12.3 million, with 29% of those cases including a non-monetary claim. The average claim amount in construction cases is $19.8 million, with 32% of those cases also including non-monetary claims.

Construction claims are also slightly more likely to draw a counterclaim and are far more likely to draw a successful counterclaim than the baseline average of all case-types. Counterclaims are filed in 15% of all case-types, with 13% of those counterclaims eventually prevailing. In construction, 17% of all cases filed result in counterclaims, with 27% of those counterclaims prevailing.

A related search shows that the initial claimant prevails an average of 69% of the time in all international arbitration case-types, but only 56% of the time in construction disputes. Plainly put, the size, complexity, and active involvement by all parties in construction projects preclude the condition where one side usually wins.

Perhaps because of this, construction cases are far more likely to continue through a final hearing and award. Of all case-types filed in arbitration, 38% result in an award, and 54% are settled or withdrawn (with the remaining 8% being administratively closed or dismissed for other reasons). In international construction arbitration cases, however, nearly half, 49% of cases, proceed to final award, with 43% being settled or withdrawn (and 8% being administratively closed or dismissed). These numbers are also borne out in the length of the arbitration process, which averages 60.1 weeks in international construction cases versus a 13% shorter length of 52.0 weeks for all international arbitrations.

Interestingly, the data also tell a story about the role of mediation in international construction arbitration. DRD reports that of all arbitration cases that are mediated, as many as 80% are successfully concluded in the mediation. In construction, however, mediation is far less effective, with only 33% of cases that are mediated resulting in a successful conclusion by mediation. Notably, in “all” case-types, 44% of the time the mediator is appointed by the arbitral institution, but in construction, where industry expertise is usually a prerequisite, the parties appoint their mediators 100% of the time.

Virtually all of the above takeaways are even more impressive when considering that the construction data remain part of, and are therefore considered in, the “all” case-types comparisons, effectively “helping... continued on page 41
The Art of the Arbitration: Examining Europe’s Unfinished Business in Restituting Nazi-Looted Art

By Clarissa A. Rodriguez and Laura M. Reich, Miami Shores

Through forced sales and looting, the Nazis displaced 20% of Europe’s art by the end of World War II. Experts estimate that more than 650,000 works—including paintings, sculptures, and drawings, or nearly one-fifth of Europe’s entire art collection—have at one time been stolen. After World War II, European and Allied Forces did attempt to return works of art to their original owners, but the pressing need to rebuild Europe took precedence and overwhelmed immediate restitution efforts. Instead, thousands of pieces of art were simply returned to their country of origin. Thus, for more than seventy years, many stolen works of art have been displayed in plain sight in national museums, galleries, and other art institutions while many other looted works remain tucked away in private collections.

Until the 1990’s, the attention given to art restitution was insignificant at best. Several European countries lacked any legislation or formal restitution process, which caused confusion and created many road blocks for original owners hoping to reacquire stolen artwork. With the reunification of Germany in 1990, the end of the Cold War, and the rise of the Internet, which provided worldwide databases for lost art searches, today many Holocaust survivors and their heirs have a second chance to recover lost family possessions.

Locating the missing artwork is only the beginning. Families also face the daunting restitution process. “Claims regarding the return of stolen artwork often come in one of two forms: (1) those against museums; or (2) those against private collectors.” Restitution efforts, on the other hand, come in countless forms. Domestic legislation, treaties, international law, and private agreements all affect restitution efforts, yet they do not provide a comprehensive legal solution for returning Nazi-looted artwork and compensating the owners’ families. This article examines Europe’s unfinished business in restitution cases of Nazi-looted art by way of litigation and through international alternative dispute resolution. Although a plethora of cases exists, the ones highlighted here best showcase the reasons legal scholars, experts, and the international legal community are starting to lean more heavily on arbitration and alternative dispute resolution over traditional litigation in the art restitution area.

It is true that in the absence of the parties’ consent to arbitration, a party seeking restitution and compensation must litigate. And while litigation presents the potential opportunity to witness public justice for crimes against humanity, the potential drawbacks are significant. Litigation in this area is not only riddled with procedural obstacles and technical defenses, but it is also extremely protracted and, like all litigation, wildly unpredictable.

Legal scholars contend the courtroom is hampered by “paradigmatic, adversarial, and judicially effected decisions” that do not allow cases to be heard on their merits before being summarily dismissed on everyday common law defenses. In the United States, numerous Nazi-looted art cases have not made it to trial as a result of being dismissed on preliminary motions. Such was the case in Orkin v. Taylor, which concerned Vincent Van Gogh’s Vue de l’Asile et de la Chapelle de Saint-Rémy.
The provenance of this piece revealed that Margarete Mauthner, a German art dealer of Jewish descent, owned the painting from about 1907 to 1939, when she fled Germany to South Africa. In 1963, Elizabeth Taylor made a very public purchase of Van Gogh’s *Vue de l’Asile et de la Chapelle de Saint-Rémy* to add to her prized art collection. Taylor purchased the painting at an auction for $260,000. Then, in the early 2000’s, Mauthner’s heirs, the Orkins, discovered that Taylor owned the Van Gogh that had once been in their family’s possession. The Orkins attempted to negotiate the art’s return, but Taylor refused. The Orkins filed suit for recovery of the painting, and in 2005 pled theories of specific recovery, replevin, constructive trust, restitution, and conversion. The District Court for the Central District of California dismissed the Orkins’ claim on the grounds that (1) the plaintiffs’ cause of action had expired in 1966, three years after Taylor purchased the painting in London, because California law did not include the “discovery rule” before 1983; and (2) even if the discovery rule applied to this case, the facts demonstrated that the plaintiffs did not exercise the requisite diligence because Mauthner’s heirs should have discovered the whereabouts of *Vue de l’Asile et de la Chapelle de Saint-Rémy* in 1963 when it was acquired at a highly publicized auction. The District Court for the Central District of California dismissed the Orkins’ claim on the grounds that (1) the plaintiffs’ cause of action had expired in 1966, three years after Taylor purchased the painting in London, because California law did not include the “discovery rule” before 1983; and (2) even if the discovery rule applied to this case, the facts demonstrated that the plaintiffs did not exercise the requisite diligence because Mauthner’s heirs should have discovered the whereabouts of *Vue de l’Asile et de la Chapelle de Saint-Rémy* in 1963 when it was acquired at a highly publicized auction. The Ninth Circuit Court of Appeals upheld the district court’s dismissal.

The Ninth Circuit Court of Appeals upheld the district court’s decision; however, it came to a different conclusion with respect to the accrual of the cause of action. The Ninth Circuit held that the discovery rule did apply to pre-1983 events, but the cause of action accrued when the plaintiffs knew or should have known the facts giving rise to the claim, *i.e.*, in 1963 (when the painting was acquired at a highly publicized auction) or in 1970 (when Taylor was listed as owner of the painting in a *catalogue raisonné*) or in 1986 (when it was exhibited publicly at the Metropolitan Museum of Art in New York, in an exhibition entitled “Van Gogh in Saint Rémy and Auvers”) or in 1990 (when Taylor publicly tried to sell the painting). Ultimately, the Orkins appealed to the U.S. Supreme Court, which denied certiorari.

The international art community now often argues in favor of the non-application of the “statutes of limitation” defense in misappropriation cases, particularly when associated with crimes against humanity, as a form of respect for the moral and ethical concerns implicated in such cases. Arguably, the outcome of *Orkin v. Taylor* might have differed if it had been arbitrated, mediated, or negotiated via conciliatory procedures available in several European commissions on looted art, or under models offered by the bodies established in some European countries. At the very least, arbitration generally offers a speedier resolution than going to court.

The most glaring example of a protracted court battle over Nazi stolen art involves the twenty-six-year battle of the ownership of the *Sumpflegende* (“Swamp Legend”) (1919) by Paul Klee. *Swamp Legend* originally belonged to Sophie Lissitzky-Küppers and her first husband, Paul Küppers. Küppers died in 1922, and Lissitzky-Küppers moved to the Soviet Union with her second husband, a Russian Constructivist artist named El Lissitzky. Lissitzky-Küppers owned an impressive art collection that she loaned to the Hanover Provinzial Museum in 1926. When the Nazis rose to power, they targeted *Swamp Legend* and classified it as “degenerate art.” Lissitzky-Küppers’ entire collection was seized along with 20,000 other works in German museums. In 1937, the Nazis featured a “Degenerate Art” exhibition in Munich, Germany. *Swamp Legend* was then purchased by Hildebrand Gurlitt. Records show *Swamp Legend* was sold three times between 1962 and 1982, before it was purchased by the city of Munich and the Gabriele Münter Foundation.

Lissitzky-Küppers attempted to recover her art collection until her death in 1978 in Siberia, where she had been...
Together the *Pemex* and *Thai Lao Lignite* Decisions Clarify U.S. Law Regarding Enforcement of Annulled International Awards

By Luis O’Naghten, Miami, and L Andrew S. Riccio, New York

**Introduction**

In its 2016 *Pemex* decision, the U.S. Court of Appeals for the Second Circuit confirmed a district court ruling enforcing an international arbitral award despite the fact that the award had been annulled by the courts at the seat of the arbitration. The *Pemex* decision, although well-reasoned, caused a great deal of commotion in the international arbitration community. The commotion came about because the New York Convention, which governs the enforceability of international arbitral awards, provides that properly annulled awards are not to be enforced. Indeed, significant scholarly opinion regards an award that has been properly annulled at the seat of the arbitration as ceasing to exist. Given the importance of the United States to international commerce, the *Pemex* decision created uncertainty and unpredictability in the international arbitration framework that had been carefully crafted by the New York Convention. A year later, in its *Thai Lao Lignite* decision, the Second Circuit came to the opposite conclusion and refused to enforce an arbitral award that had been annulled by the courts at the seat of the arbitration.
An essential component of legal stability is the predictability of judicial decisions. Litigants rely on past decisions, rules of construction, statutory language, and standards of review to make informed decisions about how to proceed with a case. The United States judiciary is among the most relied upon judiciaries in the world, whether because of convenience, stature, or influence. The significance of this is seen in the fact that New York law is frequently chosen as the substantive law of contract among parties of any nationality, and New York is likewise a common venue for dispute settlement. New York is also a global financial services hub, meaning that assets belonging to entities and individuals from around the world are housed there. This sets up New York as a prime venue for the enforcement of international arbitration awards and foreign judgments. This article discusses how the seemingly opposite results of the Pemex and Thai Lao Lignite decisions provide clarity and certainty regarding the issue of enforcement of annulled decisions and can be read to be in concert with the New York Convention.

The New York Convention

International arbitration is, by design, the international mechanism for binding dispute settlement. The dispute rarely ends with the award, however. It is what the party with an award can do with it that makes arbitration appealing. The predictability of the judiciary’s review and the enforcement of foreign arbitral awards are essential to the proper functioning of an international arbitral system.

Arbitral institutions do not employ sheriffs or marshals that can be rented out to help the winner enforce the award. The only option is to seek the assistance of courts in jurisdictions that can exercise power over the debtor party’s assets in order to satisfy the award. The New York Convention was designed specifically to promote the enforcement of international arbitration awards. To this end, the New York Convention has been regularly referred to as the most successful international treaty dealing with private international law. With 5 official languages and 157 states adopting it, the New York Convention is widely used in the recognition of arbitration agreements and the enforcement of awards in courts around the world.

Each country that has adopted the New York Convention applies the treaty according to its internal laws and rules of interpretation. But the purpose of such a widely accepted treaty is the homogenization of the recognition and enforcement of international arbitral awards. Article V, in particular, requires reliable application by the courts; otherwise arbitral awards could lose practical significance.

The “enforcement” provisions of the New York Convention come into play when a party takes an award to any jurisdiction other than the seat of the arbitration (the country in which the arbitration was held). Article V of the New York Convention provides enforcing courts with seven reasons it may choose to refuse enforcement of the award. Article V (1)(e) deals specifically with annulled awards. It states:

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country where the arbitration took place, i.e., the primary jurisdiction. As previously mentioned, many commentators believe that an award... continued on page 54
The Death of Investment Treaty Arbitration for the U.S. and the EU: Tempest in the Making or Much Ado About Nothing?

By Tiffany N. Comprés, Miami, New York, and Paris

Rumors of the death of investment treaty arbitration (ITA) have abounded for years, yet ITA persists. Lately, however, the public has become more vocal about its distaste for ITA in the context of recent trade agreement negotiations, particularly those between the European Union (EU) and the United States. These negotiations inspired significant criticism of ITA from government representatives and other public figures alike. Perceived either rightly or wrongly as anti-democratic, ITA has become the target of opponents of free trade and other groups, to the point of threatening the treaties themselves. Consequently, proposals to remove traditional mechanisms of international arbitration from investment treaties have been gaining considerable traction.

This article will first provide a brief background on ITA. Part II will discuss the U.S. perspective on ITA, using the current renegotiation of the North American Free Trade Agreement (NAFTA) as a polestar. Part III, forthcoming in the next issue of International Law Quarterly, will address the EU’s evolution in the context of its current negotiations with Japan.

Part I: A Brief Primer on the Purpose, History, and Challenges of Investment Treaty Arbitration

ITA is a system that allows foreign investors to directly sue the nation hosting their investment in private arbitration if the investors believe the host state has wrongly diminished the value of the investment. Unlike contract-based arbitration, the right to investor-state arbitration originates from treaty law—generally free trade agreements (FTA’s) and multilateral or bilateral investment treaties (BIT’s). Arbitration often takes place under UNCITRAL rules or under the auspices of the International Centre for the Settlement of Investment Disputes (ICSID) in Washington, D.C., which is part of the World Bank. Approximately 3,000 international investment agreements are presently in force.

At its core, ITA allows investors to seek redress when their investments are expropriated by host states. ITA grew from the concern that in host countries with less-developed judicial systems or delicate political circumstances, or where the rule of law was otherwise not strong, investors might not be able to rely on local courts for redress. These countries might particularly...
need investment, yet investors might shy away without a neutral party to decide potential disputes with the host state.¹ Even in developed nations, the use of an independent arbitral tribunal ensures “that a foreign investor does not have to bring action before a court of [a] state” that “has infringed its property in a discriminatory manner.”² Depoliticizing investor-state disputes also reduces state-to-state conflicts.³

ITA has drawn controversy since at least the 1990’s. Direct investment is an ever-increasing portion of international trade, making these issues more pertinent than ever. The primary accusation against ITA is that it undermines democracy by preventing sovereign nations from legislating in the public interest.⁴ Critics accuse ITA of being a secret system beyond the rule of law.⁵ In addition, the rise of third-party arbitration funding, in which outsiders pay investors’ costs and expenses in bringing ITA claims against host states, has led to charges that predatory funders are reaping disproportionate awards that must be funded by the host-nation’s taxpayers.⁶ There are other criticisms as well, such as concerns regarding the independence of arbitrators, lack of consistency, cost (which places a disproportionately heavy burden on low-income countries), and very limited appeal rights.⁷

Although many of these criticisms rely on outlier cases that are not representative of most ITA matters, these are real questions that cannot be ignored if ITA is to continue as a legitimate process grounded in democratic accountability. Many of these critiques are fair assessments of the imperfect procedural system that is ITA. The most vexing issue is a substantive one: how far should investor protections go?

Despite these challenges, the depoliticization and simultaneous distance from business interests that ITA offers are no small feat. The finality and enforceability save time and costs, and ensure effectiveness.⁸ The decentralized system is also nimbler than a permanent... continued on page 58
Are You Dealing With Conflicting Translations in an International Arbitration Proceeding? You May Need an Expert Witness

By Angel Valverde, Miami

Introduction

One of the staples of an international arbitration proceeding is that it often involves different legal systems, cultures, and languages. The parties and the arbitral tribunal frequently communicate in different languages, including languages different from the one used in the transaction underlying a dispute. Successful understanding of the language used by the parties and the arbitral tribunal is key for resolution of a dispute and subsequent enforcement of an arbitral award. This article explores the difficulties of dealing with conflicting translations of documents and communications in an international arbitration proceeding, and addresses a possible solution: the use of an expert witness. Parties often rely upon the aid of an expert witness who is able to identify the proper meaning and translation of an original document.

A Practical Example

An American company is doing business in Venezuela with a Venezuelan company. The companies enter into a contract for the distribution of goods from the United States to Venezuela. The contract is written in Spanish, the official language of Venezuela, and includes an arbitration clause that establishes that the language of the arbitration will be English, and London, United Kingdom, will be the place of arbitration. The arbitration clause does not mention how the parties will deal with translations of documents related to the dispute. Unexpectedly, the parties become entangled in a breach of contract dispute, and resort to arbitration. Most of the documents related to the dispute are written in Spanish with no original translation to English. Thus, the parties must translate most of the relevant documents. The claimant presents a relevant translated document that portrays a different legal outcome than the translated version provided by the respondent. Both parties have employed reputable translation companies, and none of the members of the arbitral tribunal speaks Spanish. The question becomes: how should the parties and the arbitral tribunal deal with the discrepancies between the two translated versions of the same significant document? The answer may lie in the employment of independent expert witnesses by the parties or by the arbitral tribunal.

Overlooking the Language of the Dispute

The people in charge of drafting arbitration agreements
often overlook the procedural language, leaving its designation as a secondary question without considering the possible consequences to the parties.\footnote{2} The language of the arbitral proceeding is a matter of significant importance and could have a major impact on the final decision of the arbitral tribunal.\footnote{3} As a matter of fact, the language of the arbitration will influence the overall dispute, i.e., designation and availability of potential arbitrators (whether they know the original language of the documents that are the subject of the dispute); the overall costs of the arbitration (costs associated with translations and translators); and the enforcement of interim and final awards (whether the awards need to be translated to the official language of the jurisdiction where they are going be enforced).

Most institutional rules authorize the arbitral tribunal to select a language for the proceedings if the arbitration agreement does not specify it.\footnote{4} Generally, the tribunal will lean toward designating the language of the contract that contains the arbitration agreement as the language of the arbitration proceedings.

Further, parties to an arbitration agreement should consider carefully the language to be used during the proceedings. The selection of the wrong language may cause the arbitral tribunal and the parties to experience “lost in translation.” And the result of being lost in translation could be wasted time and money for the parties, key evidence missing from the arbitration, and losing the case.\footnote{5}

The potential consequences of overlooking the procedural language and bad translations in an arbitration were reflected in the dissenting opinion of Professor Brigitte Sterns in one of the largest investor-state awards, \textit{Occidental Petroleum Corp. v. Ecuador}.\footnote{6} In that case, the proceedings were conducted simultaneously in English and Spanish. In her dissenting opinion, Professor Sterns signaled that had the translations “[b]een correct and the original Spanish texts been really taken into account, the conclusions arrived at by the majority would have been impossible to sustain.”\footnote{7} Professor Sterns shed light on the consequences of overlooking the language and the translations of relevant documents in an international arbitration. Thus, Ecuador may have lost a case over a “lost in translation” issue.\footnote{8} Perhaps a different result would have occurred had the parties and the arbitral tribunal appointed an expert witness to deal with the discrepancies of the translations.

The Use of an Expert Witness to Resolve the Conflict Over Translations

If a case is entangled in conflicting translations, this may present a good opportunity to use an independent expert witness. Issues of fact, such as the appropriate translation of a document, can be determined by the arbitral tribunal after hearing and considering an expert opinion.\footnote{9} The arbitral tribunal may appoint its own expert, or the parties can present expert evidence to the tribunal.\footnote{10} In the case of conflicting translations, the arbitral tribunal is entrusted with evaluating the opinions of an expert witness after he or she has been tested by cross examination or some other method, such as hot tubbing.\footnote{11} As mentioned before, the power to appoint an expert witness is generally derived from the arbitration agreement, or from the incorporation of institutional rules of arbitration.\footnote{12}

Another consideration is the timing for the appointment of an expert witness. If the parties are aware of issues with the language of the arbitral proceeding, it may be beneficial for them to appoint an expert witness at an early stage of the proceedings. By doing so, the parties will be provided with an early assessment of potential issues that they may encounter in regard to the translation of documents, and they can take advantage of the expert’s views and prepare the most effective case management.\footnote{13} Overall, an expert witness can deliver forensic expertise on the language of the dispute, and the timing for the expert’s participation will also be relevant to the successful resolution of a dispute.
A Legal Framework Is Only as Good as Its Implementation: The Conflation of Grounds for Denying Enforcement and Vacating Arbitral Awards in Industrial Risk

By Juan C. Garcia, Juliana de Valdenebro, and Daniela Tagtachian, Miami

After an international arbitration tribunal issues a final award, several scenarios could occur. The losing party could comply with the award voluntarily, in which case there is no need for post-award litigation. In a different scenario, the losing party may refuse to comply, in which case the winning party may promptly seek to enforce or confirm the award in any jurisdiction where the losing party has assets that could be used to secure the payment of the award. Finally, the losing party could try to annul, vacate, or set aside the award before the courts of the seat of the arbitration.

A request to enforce the award is different from a request to set aside the award. For example, each process serves a different purpose, different courts may have jurisdiction over each request, and different rules apply to each proceeding.

The enforcement of an international arbitral award is typically governed by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). The New York Convention is often considered the foundational legal instrument of international arbitration, given that it allows for foreign awards to be enforced just like any other judicial decision. Article III of the New York Convention mandates the courts of state parties to recognize and enforce arbitration awards rendered in any of the other contracting states. Contracting states also have an obligation not to “impose substantially more onerous conditions” than those stated in the convention for the enforcement of the award. A party may seek to enforce an award in any jurisdiction in which the losing party has assets. Article V of the New York Convention also lists the narrow, and rather limited, grounds for a court to refuse the enforcement and recognition of an arbitral award.

The annulment of an arbitral award is an entirely different process. This process consists of a party petitioning to vacate the award so that it ceases to have
any legal effect (at least in that jurisdiction). Contrary to enforcement proceedings, an award can only be annulled in the local courts of the seat of the arbitration, and the grounds and process to vacate the award are determined by the arbitration law of the seat. Therefore, the grounds to annul an award will likely vary from one jurisdiction to another, and could be different from the grounds listed in Article V of the New York Convention to refuse the enforcement of an award.

In the United States, a majority of courts have properly analyzed the enforcement and annulment of arbitral awards separately, and have properly applied the different grounds that can be raised to refuse the enforcement of an award and those to vacate an award. Despite the jurisprudence, the U.S. Court of Appeals for the Eleventh Circuit has conflated the two concepts, incorrectly holding in *Industrial Risk Insurers v. M.A.N. Gutenhoffnungshutte* that a party seeking to annul an award can only raise the grounds available to refuse enforcement or confirmation of a foreign award, as if annulment and refusing enforcement are the same concept. See *Industrial Risk Insurers v. M.A.N. Gutenhoffnungshutte*, 141 F.3d 1434 (11th Cir. 1998), *cert denied*, 525 US 1068 (1999).

This article will discuss the consequences of the Eleventh Circuit’s approach, focusing on the grounds to refuse enforcement or confirmation of a foreign award and the grounds for annulling an award provided by the federal arbitral framework in the United States.

The Federal Arbitral Framework in the United States

The federal arbitral framework of the United States is codified by the Federal Arbitration Act, Title 9 of the United States Code (FAA), which consists of three chapters. The first chapter (9 U.S.C. §§ 1-16) (Chapter One), enacted in 1925 and codified in 1947, covers domestic arbitrations and provides the grounds for annulment of an arbitral award. The second chapter (9 U.S.C. §§ 201-208) (Chapter Two), added in 1970, incorporates the New York Convention and applies to all international, non-domestic, or foreign awards.

Section 202 of Chapter Two defines that an award shall be deemed foreign or non-domestic if it has an international element (i.e., “involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states”), even if the award arises out of a relationship between two U.S. citizens.

Congress included in Chapter Two a provision (9 U.S.C. § 208) to give guidance as to how to resolve a conflict between the chapters of the FAA. This provision states that Chapter One is applicable when it does not conflict with Chapter Two. When there is a question if Chapter One and Chapter Two overlap, Section 208 provides that “Chapter 1 [of the FAA] applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter [Chapter 2] or the [New York] Convention as ratified by the United States.” This section has been referred to as the “residual clause” because it allows Chapter One to fill in the gaps for Chapter Two, as long as there is no conflict with Chapter Two (which includes the New York Convention).

Finally, the third chapter (9 U.S.C. §§ 301-307) (Chapter Three) was added in 1990 and incorporates the Inter-American Convention on International Commercial Arbitration (also known as the Panama Convention). The following chart summarizes the FAA and its subsections.

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As will be discussed, the FAA provides a different framework for enforcement proceedings and for annulment or vacatur proceedings.

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Navigating Shareholder Derivative Issues in International Litigation

By Justin Brenner, Miami

The lines between foreign corporations and Florida corporations are blurred more than ever. Florida corporations hold foreign assets, and foreign corporations are formed to hold Florida assets (particularly real estate). Florida and foreign corporations can have Florida and foreign shareholders, directors, and officers. So, when litigation arises regarding these corporations and the shareholders’ and directors’ rights and duties, the already complex arena of shareholder derivative litigation is further complicated by issues of international litigation. This article addresses some of the recurring issues in shareholder derivative litigation involving foreign corporations or assets.

The Internal Affairs Doctrine

The first question that must be addressed when dealing with shareholder derivative litigation is to determine what law applies. Florida applies the internal affairs doctrine. The internal affairs doctrine is the general rule applied in the United States.

The internal affairs doctrine is a choice of law rule that applies the substantive law of the state or country of incorporation to issues involving a corporation’s internal affairs. “The internal affairs doctrine is a conflict of laws principle which recognizes that only one State should have the authority to regulate a corporation’s internal affairs—matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders—because otherwise a corporation could be faced with conflicting demands.” Edgar v. MITE Corp., 457 U.S. 624, 645 (1982); see also First Nat. City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611, 622 (1983) (stating that the internal affairs doctrine “achieves the need for certainty and predictability of result while generally protecting the justified expectations of parties with interests in the corporation.”). In corporate litigation, the internal affairs doctrine applies to issues such as shareholders’ rights or directors’ fiduciary duties. Section 607.1505(3), Florida Statutes, codifies Florida’s internal affairs doctrine, stating that “[t]his act [i.e., the Florida Business Corporation Act] does not authorize this state to regulate the organization or internal affairs of a foreign corporation authorized to transact business in this state.”
Derivative Issues in International Litigation, continued

There is limited authority that the internal affairs doctrine is not an absolute rule, but instead is a presumption that can be overcome in an “unusual case.” See Mukamal v. Bakes, 378 Fed. Appx. 890, 897 (11th Cir. 2010). In Mukamal, the Eleventh Circuit appeared to accept the concept that Florida might apply its own substantive law if the state has an “overriding interest” in applying its own laws to the dispute. Id. Mukamal did not identify what would be required to find that such an overriding interest exists, and regardless, found that the internal affairs doctrine applied. Id. The secondary source that the Mukamal court cited in support of the “overriding interest” possibility references only two cases, both of which involved corporate forms that changed their state of incorporation during the time frame at issue in those litigations. See Restatement (Second) of Conflict of Laws § 6. Despite Mukamal leaving open the possibility that the internal affairs doctrine may not apply in certain unidentified circumstances, no Florida case appears to have found such an “overriding interest” that exists sufficient to overcome the internal affairs doctrine.

When Is a Claim a Shareholder Derivative Claim?

The difference between a direct claim and a shareholder derivative claim can be case-dispositive. A direct claim is one where the plaintiff-shareholder sues to enforce his or her own rights. On the other hand, a derivative claim is one where the plaintiff-shareholder sues in the place of the corporation to enforce the corporation’s rights. The difference is not merely procedural; it determines the bottom line. In a direct claim, the plaintiff gets any financial recovery. In a derivative claim, the corporation gets any financial recovery. A plaintiff-shareholder’s claim will be dismissed for lack of standing when the shareholder attempts to bring directly a claim that actually belongs to the corporation.

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The PERM Dilemma—How to Properly Draft and Conduct Recruitment for a Labor Certificate

By Larry S. Rifkin, Miami

A permanent labor certification issued by the U.S. Department of Labor (DOL) allows a U.S. employer to hire a foreign worker to work permanently in the United States. In most instances, before the employer can submit an immigrant petition to the Department of Homeland Security’s United States Citizenship and Immigration Services (USCIS), the employer must obtain a certified labor certification application from DOL’s Employment and Training Administration (ETA). DOL must certify to the USCIS that there are not sufficient U.S. workers “able, willing, qualified and available” to accept the job opportunity in the area of intended employment and that employment of the foreign worker will not adversely affect the wages and working conditions of similarly employed U.S. workers. DOL uses a system known as PERM (Program Electronic Review Management) to allow employers to file applications for such labor certifications. This article provides an overview of the three steps involved in the labor certification process, providing guidance to attorneys as to the statutory requirements and advice on common issues encountered during each step.

Prevailing Wage Determination

Under the Immigration and Nationality Act (INA), the hiring of a foreign worker cannot adversely affect...
the wages and working conditions of U.S. workers comparably employed. The prevailing wage rates are defined as the average wage paid to similarly employed workers in a specific occupation in the area of intended employment or, as applicable, by a collective bargaining agreement (CBA) negotiated at arms-length between a union and an employer.

As the first step in the permanent labor certification process, the employer makes a “prevailing wage request” for the specific job description to DOL via its website, http://icert.doleta.gov. To request a prevailing wage determination (PWD), employers or their counsel must complete the ETA Form 9141 and submit it to the National Prevailing Wage Center (NPWC). Electronic filing through the aforementioned website is preferred. The prevailing wage request provides DOL with information about the proffered job, such as minimum job requirements (e.g., education, experience, etc.), job duties, and the worksite location. The sponsoring employer must set forth clearly defined job duties as well as educational and/or experience requirements to qualify for the position.

After reviewing ETA Form 9141, the NPWC assigns the proffered position the most relevant standard occupational classification (SOC) code/occupational title classification, based on the job duties and requirements submitted on ETA Form 9141. Finally, NPWC selects one of four possible wage levels for the occupational title classification assigned based on the employer’s job requirements (i.e., tasks, knowledge, skills, education, training, and experience) that are generally required for acceptable performance in that occupation. The prevailing wage issued, normally expressed as an annual salary, is the minimum salary the employer can pay the foreign worker upon approval of the application for permanent residence. The employer does not have any obligation to pay the prevailing wage prior to this point.

The current processing time to receive a prevailing wage request as of this writing is eighty-two days. The final prevailing wage determination also specifies the validity period of the prevailing wage or in other words, the timeframe in which this determination may be used for the subsequent part of the labor certification application process. The timeframe is no less than ninety days and no more than one year from the determination date. To use a prevailing wage determination with the rate provided, employers must file the labor certificate application or begin the recruitment period within the validity period specified.

Attorneys counseling employers on the labor certification process should be aware of some issues that may occur during the prevailing wage determination. One of the issues is the unpredictability of the process. As stated earlier, the DOL examiner may assign a prevailing wage within four range levels. Attorneys should counsel and prepare employers as to the minimum (Level I) and maximum (Level IV) wage ranges, which often differ by tens of thousands of dollars. It is also important at this step for the attorney to confirm that the employer’s current and projected financial documentation (e.g., income tax returns, financial statements, etc.) reflect the employer’s ability to pay the proffered salary. There is nothing worse than initiating the three-step labor certification process, which takes an average of nine months (under current processing times), only to discover at the immigrant petition stage that the employer does not have the financial ability to pay the proffered wage. The employer will have wasted its money, and the foreign worker, at a minimum, will have wasted his or her time waiting for this process, when he or she could have been pursuing other immigration alternatives.

Attorneys drafting the job description for ETA Form 9141 should set reasonable and acceptable minimum requirements that are not tailored to the alien’s experience. This is critical, as tailoring the position to the alien will result in an eventual denial. Similarly, the application will be denied if the minimum requirements for the position exceed what DOL determines is standard
A Comparison of Brazil and the United States: Prosecutors’ Toolkits in the Anticorruption Context

By Filipe Magliarelli, São Paulo; Gregory Bates, Washington, D.C.; and Leah Moushey, São Paulo

In May 2017, Brazilian conglomerate J&F Investimentos entered into a leniency accord with Brazil’s federal public prosecutor’s office (Ministério Público Federal or MPF), agreeing to pay approximately US$3.16 billion over the next twenty-five years based on allegations that the company systematically bribed government officials in exchange for business advantages. In a parallel agreement, J&F executives Joesley and Wesley Batista admitted to spending approximately US$190 million to bribe more than 1,900 politicians over the last decade. The two obtained immunity in exchange for paying a fine and cooperating with authorities.  

From a U.S. perspective, there is nothing remarkable about the subjects of a corruption investigation cutting a deal with authorities to reduce or avoid penalties. In Brazil, however—where a culture of impunity remains a formidable obstacle—many find it difficult to understand how the Batista brothers were able to engage in bribe schemes valued at nearly US$200 million and not receive even a day of jail time. 

The settlements with J&F and its principals serve as the latest examples of the evolution of the prosecutorial approach in anticorruption cases in Brazil. Despite the fact that the Brazil criminal system creates an obligation to prosecute, throughout the course of Operation Car Wash—the largest corruption probe in Brazil’s history—Brazilian authorities have demonstrated that their discretion as to how they prosecute is not dissimilar to the broad discretion offered to U.S. prosecutors. This shift in the approach adopted by Brazilian authorities, which mirrors U.S.-style settlements in the criminal, civil, and administrative contexts, leads to several implications for companies and individuals operating in the Brazilian market.

Comparing Enforcement Approaches in the United States and Brazil

The U.S. System

In the United States, the Supreme Court has held that “[w]hether to prosecute and what charge to file or
bring before a grand jury are decisions that generally rest in the prosecutor’s discretion.\textsuperscript{4} Among decisions that fall into this broad discretion include: foregoing or deferring prosecutions, selecting charges, and offering plea agreements.\textsuperscript{5}

This broad discretion also applies to the prosecution of corporate entities, including entities under investigation for violations of the Foreign Corrupt Practices Act (FCPA). A 2008 memorandum (the Filip Factors) by Mark Filip, then the U.S. deputy attorney general, established guidance that the U.S. Department of Justice (DOJ) should rely upon when determining whether to prosecute a company. The Filip Factors were later formalized in the U.S. Attorneys’ Manual on Principles of Federal Prosecution of Business Organizations.\textsuperscript{6}

The U.S. Securities and Exchange Commission (SEC) follows similar guidance in considering whether to pursue actions under the Securities and Exchange Act.\textsuperscript{7}

In addition to this wide latitude in determining whether to bring charges or commence an action, the DOJ and the SEC have a number of mechanisms at their disposal to resolve FCPA violations, including several that do not require judicial oversight (e.g., non-prosecution agreements and declinations with disgorgement).\textsuperscript{8}

\textbf{The Brazilian System}

As a preliminary matter, it is important to note that except in very limited circumstances,\textsuperscript{9} companies in Brazil cannot be criminally prosecuted. Therefore, it has become relatively common to see a company face administrative or civil penalties while the principals of the implicated company are criminally prosecuted.

In the Brazilian criminal system, there are essentially two types of criminal actions: a private criminal action and a public criminal action. Private criminal actions are permitted with regard to crimes that have a greater impact on the private interests of the victim rather than the public interest (e.g., crimes against honor).\textsuperscript{10}

With regard to public criminal actions, the \textit{Ministério Público} has the exclusive power and, more importantly, the obligation to initiate a criminal action when there is sufficient legal evidence to connect a person to the crime.\textsuperscript{11} In other words, Brazilian prosecutors do not have the wide discretion that U.S. prosecutors have not to bring charges. Nevertheless, criminal procedure laws and civil settlement mechanisms have evolved in Brazil, largely as a result of influence of foreign legal systems, especially those based on common law, to allow prosecutors more discretion.

\textbf{The Use of Settlements in Operation Car Wash}

In 2014, Brazilian authorities launched Operation Car Wash, a massive corruption investigation that began as an investigation into improper payments made to government officials at Petróleo Brasileiro S.A. (Petrobras), Brazil’s state-controlled oil company. The investigation has prompted Brazilian authorities to rely increasingly on settlement arrangements to unwind the complex bribe scheme.

As of 31 August 2017, the MPF has entered into 158 collaboration awards (\textit{acordos de colaboração premiada})... continued on page 80
On 16 June 2017 in Miami, President Donald Trump addressed the country, laying out a new approach to U.S.-Cuba policy after the opening of relations between the two countries during the Obama presidency. President Trump’s speech underscored that the current administration would revise its approach to Cuba, calling for a focus on human rights. With relation to trade policy, the White House demanded stricter enforcement of American tourist travel regulations and greater control over the circulation of U.S. dollars on the island, underscoring that it wished to continue economic interaction with the Cuban people and would focus on restricting the flow of money to the Cuban military, intelligence, and security forces. Recent difficulties between the two countries relating to national security, however, may signal a more drastic change in U.S.-Cuba relations. Ultimately, these new developments raise more questions than answers.

The Trump Administration’s Changes to U.S.-Cuba Trade Regulations

President Trump’s announcement focused mainly on Cuban human rights issues. While the Obama presidency focused on reconciliation between Cuba and the United States through economic and people-to-people exchanges, the Trump administration emphasized that Cuba will need to meet specific benchmarks to improve its relationship with the United States. These benchmarks include: scheduling free elections, recognizing freedom of assembly and expression, legalizing opposition political parties, allowing for greater religious freedom, releasing political prisoners, and authorizing the direct employment of Cuban workers. President Trump also demanded that the Cuban government turn in any fugitives it harbors that have eluded U.S. law enforcement efforts, as well as any individuals responsible for the 24 February 1996 shoot-down of a plane carrying four U.S. citizens flying over international waters near Cuba on a humanitarian mission.

Changes to the Cuba sanctions program will not go into effect until the relevant regulations are written. The U.S. Department of the Treasury’s Office of Foreign Assets Control will revise its Cuban Assets Control Regulations; the U.S. Department of Commerce will implement changes to its Export Administration Regulations; and the U.S. Department of State will issue a list of entities with which transactions will be prohibited. The regulation-writing process was allegedly initiated within thirty days of the June policy announcement.

Nonetheless, on a conference call preceding President Trump’s announcement, the White House stated that there would be no changes with relation to certain issues. Specifically, U.S. tourism to Cuba will remain
Foreign Assets Control (OFAC) has further clarified that the Trump administration retains an interest “in not negatively impacting Americans for arranging lawful travel to Cuba” and “in not negatively impacting American businesses for engaging in lawful commercial opportunities.” As such, OFAC stressed that, once the relevant regulations come into effect, newly restricted conduct initiated prior to the issuance of the regulations will be permitted.

That is, any travel-related arrangements or Cuba-related commercial engagement that involves direct transactions with entities affiliated with the Cuban military, intelligence, or security services and individual people-to-people travel will be permitted, so long as they were initiated or in place prior to the issuance of the regulations.

OFAC also explained that, in spite of the Trump administration’s ban on transactions related to certain Cuban entities, the policy changes will not affect remittance authorizations or limit the ability of sending or receiving authorized remittances, as these permit transactions with prohibited entities incidental to the sending, processing, and receipt of authorized remittances.

OFAC has also noted that the forthcoming regulations will be considered prospective and will not affect existing contracts and licenses.

The proposed regulations, which have not yet been published, suggest that the Trump administration was seeking a “principled” approach to U.S.-Cuba relations by balancing the benefits and drawbacks that U.S. involvement may have on the Cuban people. At the same time, the ban on transactions with Cuban military, intelligence, or security apparatuses seems consistent with President Trump’s focus on human rights, as it would arguably limit U.S. dollars from funding certain government activities.

Nonetheless, the logistics of implementing the ban on transactions with certain Cuban entities are difficult to predict, as most enterprises on the island—including

banned; Cuba will remain off the list of state sponsors of terrorism; the U.S. Naval Base at Guantanamo Bay and the newly opened U.S. Embassy in Havana, Cuba, will remain open; and regulations related to rum, cigars, cruise ships, air travel, and telecommunications access will remain unchanged. Further, upon issuance of the relevant regulations, persons subject to U.S. jurisdiction may continue to purchase airline tickets and may travel to Cuba by cruise ship or passenger vessel for authorized travel.

The White House stressed that two activities would be banned: direct transactions with entities related to the Cuban military, intelligence, or security services; and individual people-to-people travel. Individual people-to-people travel is “educational travel that: (i) does not involve academic study pursuant to a degree program; and (ii) does not take place under the auspices of an organization that is subject to U.S. jurisdiction that sponsors such exchanges to promote people-to-people contact.” Individual travel will still be allowed within the twelve approved categories that include humanitarian and religious travel; family visits; journalistic activity; professional research; and participation in public performances, clinics, workshops, and athletic and other competitions.

Notably, the ban on individual people-to-people travel will not affect group people-to-people travel. Group people-to-people travel differs from individual people-to-people travel in that the former takes place under the auspices of an organization that is subject to U.S. jurisdiction and requires travelers to “maintain a full-time schedule of educational exchange activities . . . intended to enhance contact with the Cuban people, support civil society in Cuba, or promote the Cuban people’s independence from Cuban authorities, and that will result in meaningful interaction between the traveler and individuals in Cuba.” Moreover, group people-to-people travel requires that an “employee, consultant, or agent of the group . . . accompany each group to ensure that each traveler maintains a full-time schedule of educational exchange activities.”

The U.S. Department of the Treasury’s Office of U.S.-Cuba Relations, continued... continued on page 85
Formation of Companies in Cuba

By Osvaldo Miranda, Miami

Introduction

This article summarizes all possible business associations in Cuba and shall serve as an essential tool for those who seek to invest in Cuba. The interest of U.S. investors to enter Cuba after 17 December 2014—as a consequence of the changes in the embargo regulations made by the Obama administration—seems constant despite the fact the embargo remains in place. On the other hand, Cuban foreign investment law encourages the partnership of foreign investors with local entities, mostly state-owned companies. (I refer to business associations herein as “company” or “entity.”)

To be successful, foreign investors and their legal counsel must understand the business landscape in Cuba. Understanding the way business is organized in Cuba should be considered a prerequisite to structuring any business project in or with the island. Cuba has atypical rules of business organization derived from the influence of a Socialist system that has been in place for approximately forty years, and more importantly, from the creation of custom-made business association rules, characterized mostly by the absence of an organized code of commerce.

1. Company Types

State Companies: A state company is owned by the Cuban government and generally is formed by a ministry to carry on a business activity related to its field or industry (e.g., the Ministry of Energy can establish state companies to operate an energy plant or for energy distribution). A state company is not liable for the government’s liabilities, and the government is not liable for the state company’s liabilities. These state companies are generally used for public services, such as electricity, transportation, hydro projects, roads, and the like.

Wholly State-Owned Companies: A wholly state-owned company has registered shares that are held exclusively by other wholly state-owned companies or state companies. These entities generally are established to be partners with foreign investors or for Cuban entities doing business outside of Cuba.

Agricultural Cooperatives: Agricultural cooperatives are business associations composed of Cuban farmers who capitalize the agricultural cooperative with land and equipment. The partners of an agricultural cooperative each hold an equal interest in the cooperative. There are two types of agricultural cooperatives: (1) Agricultural Production Cooperatives (“CPA” using the initials under its Spanish name, Cooperativa de Producción Agropecuaria); and (2) Credit and Service Cooperatives.
(“CCS” using the initials under its Spanish name, Cooperativas de Crédito y Servicio). A CPA acquires the land and equipment contributed by its partners while a CCS acquires agricultural goods as a capital contribution.\(^3\)

**Non-Agricultural Cooperatives:** Non-agricultural cooperatives are associations of self-employed Cubans. The partners of a non-agricultural cooperative hold equal interests, regardless of their capital contribution or the terms of the cooperative’s articles of association or bylaws. There are two types of non-agricultural cooperatives: (1) grade-one cooperatives; and (2) grade-two cooperatives. Only individuals can be a member of a grade-one cooperative, and only cooperatives can be a member of a grade-two cooperative.\(^4\)

**Joint Ventures:** A joint venture is a company with registered shares with at least one foreign (i.e., non-Cuban) shareholder and one Cuban shareholder. These are formed exclusively to develop government-authorized investment projects in Cuba with foreign capital.

**Wholly Foreign-Owned Companies:** A wholly foreign-owned company is a company with registered shares that is wholly owned by foreign investors. These are formed exclusively to develop an investment project in Cuba with foreign capital. The formation of these companies is rarely approved by the government.

Cuban entities are not structured the way similar entities are structured in other jurisdictions. The Cuban Commercial Code of 1889 previously regulated standard business association structures, such as corporations, general and limited partnerships, and the like. In 1979, Decree-Law 24 repealed the application of this chapter of the Cuban Commercial Code to clear the way for the exclusive establishment of state companies. This was a policy and law created as a consequence of the Socialist Constitution enacted in 1976.\(^5\) After the collapse of the Soviet Union, Cuba modified its constitution in 1992 to allow for foreign investment, but it became very difficult to transact business between state companies and foreign companies. As a consequence, the government started forming companies (i.e., wholly state-owned companies) for the purpose of partnering with foreign investors. The same structure was then supplemented to allow for foreign investment in Cuba (i.e., wholly foreign-owned companies and joint ventures).

Agricultural cooperatives were the only cooperatives in Cuba until 2012, when self-employment became legal in certain job categories, at which time non-agricultural cooperatives were authorized.

**2. Licensing of Corporate Agents**

Companies are not required to have or maintain a registered agent in Cuba. Foreign companies with trade operations in Cuba can operate their businesses through a branch in Cuba or directly from abroad. Alternatively, a foreign company can use an agent in Cuba, but there is no requirement for such. Agency licenses and most branch licenses are granted by the Cuban Chamber of Commerce.\(^6\)

**3. Company Name**

There is no legal restriction on the registration of a company’s name; however, names are subject to intellectual property rights.

**4. Fees**

**4.1. Registration fees for wholly foreign-owned companies and joint ventures and certain wholly state-owned companies**

a) Mercantile Registry filing fee: CUC$400.00\(^7\)\(^8\)

b) Notary fee: CUC$500.00\(^9\)

**4.2. Registration fees for state companies and certain wholly state-owned companies**

a) Mercantile Registry filing fee: CUP$150.00\(^10\)

b) Notary fee: CUP$200.00\(^11\)

**5. Registered Office**

Every company must maintain a registered office in Cuba. The company address is essential information for... continued on page 90
CHINA

China codifies crackdown on ‘irrational’ outbound investment.

In August, the People’s Republic of China formally announced new rules pertaining to overseas investments, discouraging “irrational” acquisitions of assets such as in the real estate, hotels, and entertainment industries. The authorities set out three categories—banned, restricted, and encouraged—proscribing investments in certain industries and at the same time encouraging companies to support the country’s Belt and Road initiative. The State Council issued the following statement: “Profound changes are taking place in international and domestic situations, and Chinese enterprises face not just relatively good opportunities but also various risks and challenges in overseas investments.”

- Banned: Core military technology, gambling, sex industry, investments contrary to national security
- Restricted: Property, hotels, film, entertainment, sports, obsolete equipment, investments that contravene environmental standards
- Encouraged: Investments that further Belt and Road framework, enhance China’s technical standards, research and development, oil and mining exploration, agriculture and fishing

People’s Republic of China enacts Environmental Protection Tax Law.

The National People’s Congress enacted China’s first Environmental Protection Tax Law (the EPTL) in December 2016. The EPTL will replace the current Pollutant Discharge Fees (PDF) system, effective 1 January 2018. The EPTL provides guidelines for assessing taxes against entities that emit air and water pollutants, solid wastes, and noise pollution. While the EPTL also addresses certain tax provisions covered under the existing PDF system, notable changes include tax incentives and provisions establishing administrating authorities. The EPTL is intended to apply only to operators associated with business activities, not individuals or non-business related entities, such as government institutions and the PLA.

The EPTL specifies four categories of taxable pollutants: air, water, solid waste, and noise. The EPTL calculation mechanism is basically consistent with the PDF system. Tax is calculated based on the volume of the pollutants discharged, multiplied by the respective taxable item’s EPTL tax rate.

The EPTL provides two tax breaks to encourage polluters to reduce emissions of contaminants. If the pollutant emissions are 30% less than the permitted pollutant disposal standard, polluters may receive a 25% discount from the payable amount. If the pollutant emissions are 50% less than the stipulated standard, the payable amount will be subject to a 50% reduction.

JAPAN

Japan passes organized crime law.

The Japanese National Diet passed the Act on Punishment of Organized Crimes and Control of Crime Proceeds on 15 June 2017. The law, known as the “conspiracy bill,” criminalizes the plotting and committing of 277 acts and amends an existing law against organized crime syndicates. It bans the procurement of funds or supplies and the surveying of a location in preparation of any of these offenses. According to the law, two or more people who plan serious crimes, as part of activities of terrorist groups or other organized criminal groups, will all be punished if at least one member of the group plots or takes preparatory acts, such as preliminary inspections of relevant locations.

The law proscribes the plotting of serious crimes such as terrorism but also lesser offenses such as:

- Copying music;
- Conducting sit-ins to protest against the construction of apartment buildings;
- Using forged stamps;
- Competing in a motor boat race without a license;
- Human trafficking;
- Arson;
• Fraud;
• Drug-related offenses;
• Mushroom picking in conservation forests; and
• Avoiding paying consumption tax.

THAILAND

Thailand amends Petroleum Act and Petroleum Income Tax Act to comply with national energy stability plan and to secure Thailand's petroleum reserves.

Under the amended Petroleum Act and the Petroleum Income Tax Act, which became effective on 23 June 2017, the government has the authority to implement joint-production ventures (JPV's) and to enter into service contracts. While the government retains its exclusive rights to all petroleum, the discovery and manufacturing of all petroleum may be accomplished by concession, JPV's, or hire of service contracts. For joint-production ventures, certain conditions must be satisfied, e.g., minimum amounts of capital have been established and all expenses shall be borne by the private joint venture partner. All expenses relating to the petroleum business may be deducted from the overall revenues of petroleum products, but not exceeding 50% of the expenses per fiscal year. Each party to the JPV may sell its own products, but the private joint party in the JPV is eligible to sell on behalf of the government. With respect to hire of service ventures, all petroleum obtained under this type of contract will belong solely to the state. The amended Petroleum Tax Act supports the new JPV's and hire of service contracts and contains other revisions that support the interests of the producers. JPV's will be liable for a maximum corporate income tax of 20% of net profits.

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LATIN AMERICA

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Arbitration is increasing as a method of international dispute resolution in Latin America.

The continued globalization of business among countries increases cross-border disputes. Besides companies having globally expanded in past years, people and goods are also circulating among countries across the world, regardless of traditional borders. Consequently, lawyers and clients need to look outside the limit of their national jurisdictions since disputes with foreign elements have become common.

Basically, there are three main dispute resolution options: litigation, arbitration, and mediation. The most common option is litigation; however, innumerable procedures need to take place with respect to the enforcement of foreign decisions in Latin America countries, such as Brazil and Colombia. Foreign judgments must be submitted to several proceedings to be recognized by the Supreme and Superior Courts of these countries before they are submitted to enforcement proceedings.

The use of arbitration as an international dispute resolution method is increasing among Latin America countries. There are two main reasons for this. The first is associated with the fact that the majority of Latin America countries have international treaties related to arbitration for recognition and enforcement of foreign arbitral awards within the national territory. The second is due to the delay in rendering decisions by the judicial systems. In this sense, international arbitration is growing in popularity as a mechanism to resolve cross-border disputes.

With respect to international treaties, it is important to point out that most of the Latin America countries are signatories of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the New York Convention. Signatories include Colombia, Brazil, Argentina, Bolivia, Venezuela, and Peru. Besides being one of the main instruments in international arbitration, the New York Convention applies to the recognition and enforcement of foreign arbitral awards and the referral by a court to arbitration. For this reason, while a court decision is enforceable in the country where it was issued, the arbitral award may be enforced in all countries that have signed the New York Convention. Besides the New York Convention,
another important convention relevant to commercial arbitration between the United States and most Latin American countries is the Inter-American Convention on International Commercial Arbitration, also known as the Panama Convention.

In relation to Brazil, the Brazilian Arbitration Act (Law No. 9,307) was enacted on 24 September 1996, and it applies to all arbitral proceedings seated in Brazilian territory. On 27 May 2015, Brazil amended its Arbitration Act through Law 13,129, enacted on 26 May 2015. Among other things, the law provides clarity as to the subject matter that can be arbitrated in Brazil and further restricts the participation of national courts in arbitral proceedings. In addition, Law 13,129/2015 has established that all government bodies are now authorized to apply arbitration procedures to legal matters regarding alienable rights. As a result, infrastructure sectors such as oil, gas, and electricity have used arbitration as the principal means of dispute resolution.

The role of the judiciary system is equally important in supporting arbitration and, as a result, foreign arbitral awards. The new Brazilian Civil Procedure Code (Law 13,105 enacted on 16 March 2015) clearly defines the Brazilian competence-competence model and provides, in its article 485 (VII), that the judicial process shall be extinguished without the analysis of the merits of the case if the judge recognizes the existence of an arbitration agreement or the arbitral tribunal declares its own competence. Nevertheless, it is important to highlight that foreign arbitral awards must be subject to recognition proceedings before the Brazilian Superior Court of Justice in order to be enforceable in Brazil. In this sense, while the Brazilian Superior Court of Justice recognizes most foreign arbitral awards, the court remains alert against decisions that clearly violate Brazilian policies.

The Abengoa case is one example of the Brazilian Superior Court of Justice’s role in ensuring the integrity of arbitration in Brazil. The Superior Court of Justice rendered a decision in April 2017 in a case involving the companies Abengoa and Adriano Ometto Agrícola. The court refused to recognize an arbitral award rendered in New York because the court understood that the chairman of the arbitral tribunal failed to disclose a potential conflict of interest, compromising the arbitrator’s independence. As a result, the court held that an arbitral award rendered by a tribunal whose chairman lacks independence cannot be recognized in Brazil, as it violates the national public policy.

Other factors that certainly exert influence on the decision of companies to agree on arbitration rather than mediation or litigation are related to the arbitration advantages such as confidentiality, speed, neutrality of the forum, enforceability, and flexibility, due to the possibility of agreement regarding the applicable law, procedures, and language. As a result, the conclusion that many companies are reaching is that the only viable method to settle an international dispute is arbitration and, as a result, the inclusion of arbitration clauses in international agreements is vital for these companies.

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MIDDLE EAST

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Saudi Arabia loosens engineering ownership requirements.

In an attempt to liberalize its business regulations so as to attract more investors and diversify its economy away from oil, Saudi Arabia is allowing foreign companies to own engineering service firms in full, without requiring them to partner with a Saudi-owned firm. Previously, foreign engineering firms were required to partner with a Saudi engineering firm. To qualify, the foreign engineering company must have existed for at least ten years and be multinational, with operations in at least four countries.

Oman eliminates exclusive distributorship law.

After coming under heavy scrutiny and receiving complaints for fostering monopolistic practices, the Sultanate of Oman has abolished the exclusive agency for products law. Under the prior law, there could only be one exclusive distributor for the import of products into Oman. The new commercial agencies law allows multiple agencies for distribution of the same product and also has no restrictions on import of any goods by distributor agents. Many believe the new law will foster greater competition.
UAE set to introduce new arbitration law before end of 2017.

With the United Arab Emirates (UAE) becoming more and more the go-to arbitration hub in the Middle East, the UAE is set to introduce a new federal arbitration law. Currently, the UAE has no formal dedicated arbitration law. Rather, arbitration is governed by articles in the UAE Civil Procedure Code. While the new law has yet to be fully released for comment, one of the key differences between the new law and the current arbitration civil procedure articles would be the time saved for ratification and enforcement of arbitration awards. Under the proposed new law, there would be no court action needed to ratify the arbitration award. Rather, the arbitration award would be readily enforceable as if it were a court judgment. A party, however, could move to vacate the award within thirty days after it was rendered. The main objective of the new law is to eliminate the two to three years of post-award litigation to confirm an award.

Saudi Aramco unlikely to list on U.S.-based stock exchange.

By the close of this year, Saudi Aramco is set to have one of the biggest initial public offerings in recent history; however, it is now appearing less likely that the offering will be on a New York exchange—despite Saudi Arabia’s preference to do so. Legal counsel for Saudi Aramco has advised the Saudi government that listing on any U.S. exchange would provide the most litigation exposure and risk for Saudi Aramco. The London Stock Exchange is the new front-runner to get Saudi Aramco’s initial public offering.

ICC opens first regional office in the Middle East.

The International Chamber of Commerce (ICC) will open a new arbitration center in the Abu Dhabi Global Market (ADGM), Abu Dhabi’s financial free zone located in the Al Maryah Island. The ICC-ADGM Arbitration Centre will be the ICC’s third representative office worldwide—joining Shanghai and São Paulo—in addition to the ICC’s case management offices in Hong Kong and New York. The ICC-ADGM Arbitration Centre will compete for Middle East arbitrations with the DIFC-LCIA, the offshore arbitration center established in Abu Dhabi’s neighboring Emirate of Dubai, as well as “onshore” institutions such as the ADCCAC and the DIAC.

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RUSSIA

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Court takes new approach to settling Russian disputes in England and Wales via doctrine of forum non conveniens.

Russian businessmen and other foreigners may be required to sue in England under English or other law if their families permanently reside in that country. This precedent was created by the High Court of London while handling a dispute between two Russian entrepreneurs about payments after the termination of a joint business between the two in Russia.

Plaintiff Ruslan Bestolov initiated the proceedings in the High Court of London. He claimed that the defendant did not pay him the full amount for his share in the business of buying and operating mining projects in the Yakutia region in the Russian Federation. Defendant Siman Povarenkin insisted that the case was not subject to the British courts.

On 28 July 2017, the London court decided the proceedings would be held in the UK. This runs contrary to the fact that the defendant is a Russian citizen and a tax resident; he was living in Russia for more than 180 days a year, and his business was also located there. The businessman was in the UK for not more than eighty days a year, for family matters exclusively. The court explained that its decision was based on the fact that the defendant had a “substantial connection” with the UK in that his wife and children were permanently residing in London (at least during school times). Similarly, he had a temporary residence permit in the UK and housing. Further, he and his wife had spent a considerable amount of money to secure an investor visa for her. Thus, the defendant had a “family home” in England and a permanent place of residence in the UK.

The court also mentioned the 2007 lawsuit of Mikhail Cherny against Oleg Deripaska, in which the court, on the contrary, found that the existence of a house in Deripaska’s name was not enough to establish residency, given the duration and nature of his visits.

London is a common venue for litigation by Russian billionaires. This is because the majority own real estate in the UK and spend a significant part of their time there, and most of the share agreements concerning Russian assets are concluded under British law. Businessmen such as Roman Abramovich, Oleg Deripaska, and Suleiman Kerimov, among others from Russia, have
sought legal settlement of their cases before the London courts.

**The Federal Tax Service of Russia establishes measures for the identification of beneficial owners of legal entities.**

On 31 July 2017, the Russian government issued a resolution that approved the rules for the submission by legal entities of information about their beneficial owners and the measures taken to establish information regarding their beneficial owners (hereinafter referred to as the “disclosure rules”).

According to the disclosure rules, only the Federal Tax Service of Russia and Rosfinmonitoring (the Federal Financial Monitoring Service of the Russian Federation) can request information about the beneficial owner from the legal entity in electronic form, that is, via telecommunication channels or through electronic document circulation operators, and on paper. In the case of electronic communications, Rosfinmonitoring will use the information and technological infrastructure of the Federal Tax Service for this purpose.

Upon receipt of the request, the legal entity shall provide information about the beneficial owners within five working days from the date of receipt of the request. Information about the beneficial owners shall be presented by the date indicated on the request.

The obligation of legal entities to disclose information on their beneficial owners was enacted on 21 December 2016. The term “beneficial owner” was included in the law in order to implement the recommendations of the Financial Action Task Force on Combating Money Laundering and Terrorist Financing (FATF). The law, for the purpose of fulfilling disclosure obligations under the beneficial owner, is understood to mean an individual who ultimately directly or indirectly owns a legal entity (has more than 25% interest in the capital) or has the ability to control its actions.

A legal entity is entitled to request the information necessary to establish its beneficial owners from individuals and legal entities that are founders or participants of this legal entity or otherwise controlling it. In addition, individuals and legal entities that are founders or participants of a legal entity or otherwise supervising it, in turn, are required to provide this legal entity with the information it needs to establish its beneficial owners. If the beneficial owner is not identified, the sole executive body of the client may be recognized as the beneficial owner. A foreign trust with beneficial owners is also included in the number of persons required to disclose their beneficial owners upon request from Russian legal entities.

It is worth noting that the obligation to disclose information concerning beneficial owners does not apply to state bodies, state corporations, or organizations in which the Russian Federation, constituent entities of the Russian Federation, or municipal entities have more than 50% of the shares (stakes) in the capital.

Finally, the Supreme Court, in the determination of 17 July 2017, No. 302-KG17-8315, allowed tax inspectors to inspect working computers of employees of audited taxpayers during on-site tax inspections.

**Yana Manotas Mityaeva** is an attorney focused on real estate and business law. A native Russian speaker and fluent in English, she has experience in assisting multinationals with their real estate and corporate holdings, private asset protection, and estate planning across borders. She is vice president of the Russian-American Bar Association of Florida.
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SECTION SCENE

International Law Section Lunch and Learn

~ Featuring Edward H. Davis, Jr. ~

16 August 2017
Fiduciary Trust International
Coral Gables, Florida

Founding shareholder of Sequor Law, Edward H. Davis, Jr., discussed financial fraud and corruption throughout the world during the ILS Lunch and Learn on 16 August. Ed focuses his practice on the representation of individual, corporate, and institutional victims of fraud throughout the world. In the course of his practice, he conducts financial fraud investigations, prosecutes civil claims for fraud, and pursues misappropriated assets. Today’s nature of money flow allows for stolen funds to be instantaneously transferred; Ed has pursued such funds in jurisdictions across the globe including Japan, the Bahamas, Latin America, Switzerland, and Liechtenstein, among others.
those numbers come closer to the construction-alone results. In any event, the DRD’s data confirm that construction is one of the most important areas in the world of international arbitration, leading in case value, complexity, and the need for eventual resolution by a tribunal. As such, arbitration practitioners would do well to understand the unique nuances specific to international construction disputes.

**How are international construction disputes different?**

Based on the figures, international construction disputes are, and will continue to be, an integral part of the international arbitration community. But what makes them different from any other type of commercial arbitration? What do in-house and outside counsel, along with the “business people,” need to consider as they face an international construction arbitration?

International construction disputes are different from other types of international commercial disputes in several legal aspects, in addition to the fact that they are generally more technical and complex. Unique legal considerations include the prevalence of escalation clauses, and the requirement for cohesive dispute resolution procedures, while the distinctive technical aspects of international construction disputes often result in the absolute need for strong expert witnesses.

**International construction arbitration is typically the final step of a multistep escalation clause.** Before arbitration, international construction disputes are usually subject to meetings and/or negotiations by project-level leadership, followed by the same between party executives, and then mediation. Each of these steps can vary in effectiveness depending on a myriad of factors, including any number of financial, political, and personal influences, among others. Common examples include limitations of project-level personnel to resolve a dispute above a certain dollar value, the potentially unfavorable optics of a foreign-owned entity “caving” to a local company (thereby setting a detrimental precedent), or a party’s or a participant’s judgment is clouded by “taking it personally.”

Given that construction project personnel have often been working together and “head-to-head” on a nearly nonstop basis during a stressful, fast-paced, multiyear project, both project- and executive-level personnel are often highly invested in the success of the project, including the resulting dispute resolution process. This energy can be an asset in enduring a potentially grueling arbitration process, but can also affect judgment during the voluntary dispute resolution processes.

Effectiveness aside, each of the pre-arbitration encounters between the parties does present an opportunity both to present a party’s position and supporting evidence and to collect information regarding the opposing party’s position, evidence, and potential defenses. Despite the important role these sessions may play in a later arbitral proceeding, legal counsel (in-house and/or outside) may not be involved, particularly in project-level negotiations. This can present challenges later in the dispute resolution process if the parties have inadvertently weakened a position, but can also allow the parties to narrow the disputed issues to be resolved in arbitration.

The prevalence of dispute escalation clauses in construction contracts should be carefully followed by the legal team, and the “personalities” that come with the construction industry should be carefully managed along the way.

**The quantity and relationship of parties on an international construction project require consistency in dispute resolution mechanisms.** There are usually multiple parties to a project, which may not all necessarily be in privity with one another. Generally, the project owner will retain a general contractor or an engineering firm, which in turn contracts (either directly or by agency) with various subcontractors to perform the work. These subcontractors may contract further with other “third tier” subcontractors for certain aspects of the work.

All the while, the owner may also have direct purchase agreements with vendors and/or suppliers (common for large and/or long-lead equipment purchases). With these stakeholders working on often unique multibillion-dollar projects, usually over the course of years, it is no wonder construction arbitration is thriving.
In a hypothetical situation in which the owner/developer has recorded multiple defects in the work, it may determine that some are due to defective work and others are due to defective design. Naturally, the owner will pursue the claims against the designer and the contractor. For a myriad of reasons, the owner may find it more advantageous to present related claims against the contractor and the designer in a single action.

Although it may not happen in a majority of situations, it is not uncommon to reach the stage of preparing a claim for arbitration and then realize that the forum, consolidation, joinder, or choice-of-law provisions are inconsistent among contracts of the essential parties. It can be alarming to realize that the architect and the owner agreed to be subject to the laws of Austria, with the seat of arbitration in Vienna, and then find that the contractor and the owner agreed to arbitrate in Paris with New York law applying. Typically, these inconsistencies result from the power that one contracting party has over the other, but can be nonetheless difficult to sort out years after the contracts are inked.

Moreover, large-scale construction and engineering firms tend to rely on form subcontracts that they have refined over the course of many years. The forms typically account for flow-down of responsibilities outlined in schedules, plans, and specifications, but may not account for dispute resolution provisions in the prime contract with the owner. Not only can this lead to incompatible arbitration provisions, but at times may lead to alternative dispute resolution fora altogether. Counsel involved in the contract negotiation phase of an international construction project should consider consistency in regard to the following areas:

- **Seat of arbitration.** The contract should specify a seat, i.e., where the arbitration will be held. That seat should be in a country that is both neutral and will provide a sound and reliable legal mechanism for enforcing or vacating awards. Various states of the United States, England, France, Belgium, and Switzerland are among the popular choices.

- **Choice of law and language.** The parties should consider a well-developed and accessible applicable law, irrespective of where the contract is being performed.

- **The arbitral body.** The parties may consider indicating which arbitral body will govern the dispute. In conjunction, the parties should consider referring to the rules of the arbitration that will apply.
• Consolidation and joinder. Similarly, most arbitral bodies have rules that govern the circumstances under which consolidation and joinder are permissible. The ICDR Rules, for example, allow the consolidation of different arbitrations if the parties agree. The parties should address what, if any, consolidation is acceptable.

• The parties who fail to consider these aspects may risk simultaneous and overlapping arbitrations and inconsistent outcomes.

International construction arbitration typically focuses on three categories of dispute. For all their complexity, most construction disputes involve one or more of the following categories of dispute:

1. Project schedule delay, when the project or a discrete aspect of the project took longer to complete than originally planned or allowed for, creating an impact on another party;

2. Defective design and/or services, when a party does not provide the agreed-upon work product or does not provide the agreed-upon work product to the standard set forth by the agreement between the parties; and

3. Cost overruns, either as a result of items (1) and/or (2) above, or general cost overruns to the original or agreed-upon budget as a result of other factors.

The seemingly limited number of dispute categories can lead legal teams to assume a related arbitration will be “easy” or “straightforward.” This is typically not the case. International construction arbitrations are often related to the largest, most remote, and most complex construction and engineering projects in the world. (Think *Modern Marvels* meets *Survivor.*) As such, “simple” issues can quickly evolve into a convoluted, multifaceted, and interdependent web of disputes.

The simple yet complex nature of international construction arbitration requires specific knowledge and experience in order to increase the likelihood of success. Legal teams and outside consultants advising on international construction disputes should be familiar with both the type of construction project in dispute as well as the international arbitration process itself.

Similarly, the arbitration panel members hearing these types of cases are (or should be) carefully selected based on their background in construction and engineering disputes and their knowledge or experience with the relevant type of project. In fact, most of the top arbitral institutions have created specific rules focused on construction arbitration.

The technical nature, complexity, and magnitude of international construction projects, and the resulting high stakes of such projects, require specialized experience of the legal teams, advisors, and fact-tries working on such matters.

International construction arbitrations rely heavily on expert witnesses. As outlined above, international construction arbitrations are often set to resolve complex technical issues, as opposed to solely legal issues to be decided in the course of an ordinary commercial dispute. The technical issues in dispute require not only specialized knowledge in the technical area, but also experience in the forensic investigation of such matters, which typically can only be fulfilled by an expert witness.

Additionally, international construction projects are often led and executed by a community of expatriate construction management “mercenaries” who seemingly float around the world from one remote project to the next. These individuals waste no time in moving on to their next mandate following the conclusion of their last. As a result, finding key members of the project management team to provide fact testimony can prove difficult; if they can be found, these potential fact witnesses may be unavailable or unwilling to serve in that capacity.

The technical nature of disputed issues and the often limited availability of fact witnesses lead to the heavy reliance on expert witnesses in international construction arbitration. Expert witnesses commonly opine on several key aspects:

• Technical engineering or design issues, such as the failure of a plant to meet performance standards set out in the contract (e.g., a gold mine produces only 90 gold bars per day instead of the 100 specified);

• Management issues, such as the overall diligence of a party to manage the project as a whole or a specific aspect such as engineering or procurement;
Construction Disputes, continued

• Schedule delay to the overall project or to a discrete portion of the project, as may be relevant to the specifics of the case; and

• Damages as a result of the above or other issues that may have occurred on a project.

It is not uncommon to have several expert witnesses from each side provide testimony to an international construction arbitration panel. The heavy dependence on expert witnesses in international construction arbitration necessitates special consideration from the legal team in selecting and managing the expert witnesses. For example:

• The parties should exercise diligence when selecting an expert, ensuring that he/she possesses the requisite experience and qualifications for the mandate, as any given expert could “make or break” the case.

• The legal team must manage the scope and breadth of each expert’s testimony, carefully weaving together testimony of multiple experts and fact witnesses to put forward the desired case and making sure the experts are not drifting outside of their expertise.

• The parties and their legal teams should be mindful also to manage the costs incurred for expert testimony, which could upset the initial estimated risk/reward of an arbitration.

Construction Disputes: “Digging In” and “Setting Foundations”

The numbers speak for themselves: construction disputes are here to stay. International construction disputes are the second largest case-type across international dispute parties and institutions; have, on average, a claim value that is 61% higher than all other case-types; and proceed to award nearly 30% more often than other case-types.

Practitioners and users alike should consider several aspects of international construction disputes that are (generally) different as compared to common commercial disputes, including the increased importance of consistent dispute resolution clauses and the prevalence of escalation clauses. Similarly, technical issues are, almost universally, a central component to international construction disputes, thereby requiring special consideration for in-house and outside expert support of the dispute process.

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Endnotes
3 The authors wish to thank Diana Droulers of Dispute Resolution Data for her gracious assistance in searching DRD’s proprietary database for the information cited herein that highlights the role of construction in international arbitration.
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banished by the Russians due to her German heritage. In 1992, her children took up the cause, but they also lost repeatedly. Even after Germany signed onto the 1998 Washington Principles, instructing public museums to seek justice for the original owners of art looted by the Nazis, the city of Munich argued that “those principles were applicable only to art taken from Jews, not works seized as part of the ‘degenerate art’ purge.”

Over the following twenty-five years, German culture ministers began strenuously urging Munich to rethink its resistance to returning the painting. In 2009, the German cultural ministers recommended submitting the case to a German government panel known as the Limbach Commission, which adjudicates disputes over Nazi-looted art in public collections. The mayor of Munich continued to reject this proposal. The case would have continued indefinitely except that in 2017, a researcher uncovered documents from 1938 showing that the Nazis intended to return the art seized from Lissitzky-Küppers and other people of foreign citizenship (such citizenship Lissitzky-Küppers had acquired when she married a Russian). Only then did the city enter into a settlement agreement with Lissitzky-Küppers’ heirs. Notably, the Münter Foundation, the Ernst von Siemens Art Foundation, and the Cultural Foundation of the German Federal States offered to help underwrite the reimbursement for the heirs, a favorable outcome that might have been accomplished more quickly for all parties. While Swamp Legend is perhaps an extreme example of protracted litigation, with particularly stalwart parties, the average art dispute case lasts seven to twelve years.

Litigation, while always unpredictable, is wildly unpredictable in stolen art restitution cases. The legal differences in the United States from state to state regarding property rights, good-faith purchasers, varied statutes of limitations, and methods of adjudication practically ensure no two rulings are the same. For example, in the cases of Saher and Movsesian, both cases were designated as “related cases” and were heard by the same three-judge panel on the same day. Yet the same three-judge panel ruled differently for each case under the same statutes.

Saher v. Norton Simon Museum of Art concerns Lucas Cranach the Elder’s two-part Adam and Eve (circa 1530), currently in the collection of the Norton Simon Museum in Pasadena, California. Adam and Eve are two sixteenth-century oil paintings looted in 1940 from the collection of noted Dutch Jewish art collector and dealer Jacques Goudstikker. Goudstikker fled the Netherlands during the Nazi invasion of Holland and managed to take a small black leather notebook with a detailed inventory of most of his collection. Because of the notebook, the Goudstikker family established a claim for nearly 200 looted paintings in the Netherlands. After discovering Adam and Eve in Pasadena, Marei Von Saher, the sole heir of Jacques Goudstikker, attempted settlement discussions with the museum that failed. In May 2007, Saher filed a complaint in federal court in the Central District of California seeking to recover Adam and Eve. Saher alleged that her claim was timely pursuant to a

Swamp Legend by Paul Klee (1919)
California statute that extended the limitations period for the recovery of Nazi-looted art in museums and galleries until 31 December 2010. Nevertheless, the museum’s motion to dismiss was granted, and the court held that the California statute was unconstitutional and infringed upon the federal government’s power to make and resolve war. Saher appealed, and the Ninth Circuit affirmed that the California statute was an unconstitutional infringement on the federal government’s exclusive power to conduct foreign affairs. The Ninth Circuit also reversed the lower court’s decision in part, however, concluding that Saher’s claim was not time-barred on the face of the complaint and that she should be allowed to amend her complaint to allege timeliness.

During this same time, the case of Movsesian v. Victoria Versicherung AG was also appealed to the Ninth Circuit. It presented similar statute of limitations issues for the victims and heirs attempting to recover on insurance claims regarding the Armenian genocide perpetrated by Turkey. In Movsesian, the Ninth Circuit also considered and ruled unconstitutional the same California statute. Indeed, the decisions in Saher and Movsesian were handed down nearly simultaneously, and both plaintiffs filed petitions for rehearing. Saher’s petition was denied within four months of filing. Subsequently, the California Legislature extended the statute of limitations for all stolen art claims—not just Holocaust-era claims—to six years from the time of “actual” discovery of the location of the stolen artwork. Accordingly, Movsesian’s petition was granted fourteen months after filing. Saher then filed a supplemental brief to the Supreme Court citing the different rulings of the Ninth Circuit, and in 2014, the Ninth Circuit, based on the new statute, reversed the decision in Saher. Ultimately, on remand, the Central District of California again entered judgment against Saher.

Even if the decision in Saher stands, this case highlights that litigating with inconsistent jurisprudence can result in inconsistent results. The cases brought by Mauthner, Lissitzky-Küppers, and Saher are part of a compendium of cases involving Nazi-looted art that received unfavorable—and some would say tragic—results in court. And yet, there are no “typical” stolen art cases because provenance research is always object-related and fact-intensive, and neither the victims (those few remaining alive) nor their heirs can become a plaintiff class.

International arbitration, however, offers some unique options, including the use of knowledgeable neutrals, art historians, and art collectors chosen for their expertise. The arbitrators can be well-versed in the histories and the complexities of legitimately competing interests of a museum or a purchaser with those of the survivors of the Holocaust and their heirs. Moreover, international alternative dispute resolution offers the following advantageous factors: First, the international community supports and encourages conciliation, mediation, and arbitration through governmental tribunals, commissions, and private associations for the restitution...
of looted art. Also, with alternative dispute resolution, the parties can craft a mutually advantageous remedy (for example, selling the artwork to a museum, splitting the proceeds, and having a placard placed identifying the history). Lastly, arbitration and alternative dispute resolution protect both parties through no-fault consensual returns, accompanying acknowledgement of seizure, and confidentiality.

Intermediary institutions and government advisory commissions and tribunals also offer nuanced assistance to victims. Six European nations have established commissions for the study of looted art claims. Additionally, several European governments have administrative bodies dedicated exclusively to art restitution cases. In the United States, the Association of Art Museum Directors and the New York Holocaust Claims Processing Office (HCPO) utilize interdisciplinary experts that focus on restitution outside of court. Conciliation, mediation, and arbitration are encouraged by these organizations, with a focus on seeking mechanisms for reaching fair results for victims in looted art cases.

One excellent example showcasing the benefits of alternative dispute resolution (in this case, mediation) is the matter between the Canton of Saint-Gall and the City of Zurich concerning a terrestrial globe and other cultural artifacts. In 1712, during the Battles of Villmergen between Catholics and Reformed Swiss Cantons, several cultural objects that previously belonged to the Abbey Library of Saint-Gall were transferred to Zurich. After the parties signed a peace accord in 1718, Zurich agreed to return all but 100 manuscripts, books, paintings, and other astronomical devices to the Abbey. Among the objects kept was Prince-Abbot Bernhard Muller’s cosmographical globe, believed to have been created shortly after 1570. A few attempts to recover the globe occurred from 1718 to 1735, but Zurich denied taking the objects and kept the globe.
Over 250 years later, in 1996, a letter to the editor of a journal from Saint-Gall claimed that the Canton actually owned the cultural goods that were in the Central Library and National Museum in Zurich. The letter raised a public debate, which the Cantonal Executive Council of Saint-Gall joined. This public debate led to formal negotiations by the Canton with Zurich for return of the cultural objects. The Canton argued that the objects had never been validly acquired by Zurich in view of the law of war, which already prohibited the theft of cultural goods. Zurich in turn insisted that it legitimately acquired the property under the relevant international law at the time of the war. Additionally, Zurich argued, under the signed peace treaty and the resultant restitution of objects, the Canton forfeited its claim, or at least the claims were time-barred.

For eight years, the parties struggled to reach an agreement. The Canton then requested mediation support from the Swiss government. A Swiss government-authorized mediation team assisted in reaching the ultimate settlement, crafting an agreement that recognized the Canton’s original ownership while loaning the objects to Zurich. The agreement can be terminated or modified in thirty-eight years. Among the issues that would have been difficult to recognize in litigation, the mediation team considered that the globe and other cultural objects were part of a collection that for historical reasons should remain together.

Like mediation, arbitration has also successfully yielded promising results in the area of art restitution. The seminal case in arbitration is Maria Altmann’s arbitration against the Republic of Austria. Altmann, the niece of Ferdinand Bloch-Bauer, sought to recover six paintings by Gustav Klimt taken by the Nazis from Ferdinand and Adele Bloch-Bauer and located in the Austrian National Gallery. Specifically, Altmann requested the restitution of *Adele Bloch-Bauer I, Adele Bloch-Bauer II*, *Apfelbaum I*, *Apfelbaum II*, *Portrait of Adele Bloch Bauer II*, *Klimt, Gustav, Adele Bloch-Bauer II, 1912, Austrian Gallery Belvedere, Vienna, Austria. Accessed 10 Oct. 2017 from: http://commons.wikimedia.org/*

*Portrait of Adele Bloch Bauer II*
before Austrian courts but was forced to withdraw her claim because of the costly legal fees required by Austrian law (1.2% of the litigated value, i.e., around US$1.6 million). Altmann next initiated suit against the Republic of Austria and the Austrian National Gallery in the Central District of California, alleging expropriation of property in violation of international law. After the Supreme Court lifted Austria’s jurisdictional immunity, the parties reached an agreement to end the litigation and submit the dispute to arbitration in Austria.

The parties agreed to establish a panel of three Austrian arbitrators and to accept the decision of the panel as final and without any right of appeal. Pursuant to the arbitration agreement, the panel had to rule on the ownership situation of the Klimt paintings and determine whether the 1998 Austrian Restitution Act was applicable. The parties further agreed that the arbitration tribunal was to apply Austrian substantive and procedural law. All costs were covered by the Republic of Austria. Ultimately, the panel ruled that Austria was obliged to return five of the Klimt masterpieces to Maria Altmann, and the paintings were returned to Altmann’s family.
Given the size of the art market, and the potential for ongoing relationships, parties tend to “tread carefully with lawsuits.” Thus, many may prefer the protections of arbitration because the parties can maintain confidentiality and better compensate an injured party. For example, consider the Old Master paintings belonging to Arthur Feldmann, which caused public controversy over the British Museum’s prized collection of Old Master paintings. Feldmann was an art collector from Czechoslovakia with a collection of 750 Old Master paintings. His collection was seized by the Nazis, and Feldmann died in a Nazi prison. His wife, Gisela Feldmann, died at Auschwitz. Feldmann’s Old Master paintings were widely disbursed. In May 2002, the British Museum was confronted with a restitution claim by the Feldmann heirs regarding four Old Master drawings. The Commission of Looted Art Europe, which represented the heirs, and the British Museum jointly sought guidance from the British Spoliation Advisory Panel. The British Museum was advised by the attorney-general regarding whether the British Museum Act allows or requires the restitution of an art object to meet a moral obligation. The attorney-general deferred the issue to the High Court, which held that restitution was not possible without an Act of the Parliament. Eventually, the British Museum’s authorities followed the recommendation of the Spoliation Advisory Panel and compensated the family with an ex-gratia payment.

Following the news of the restitution process for the Feldmann Old Master paintings, an American professor learned she had inherited *The Liberation of Saint Peter*, originally attributed to Rembrandt but now believed to have been painted by one of his students. The professor’s father purchased the artwork in Amsterdam in the 1970’s. This piece was part of Feldmann’s Old Master paintings collection sold at the same 1946 auction as the pieces purchased by the British Museum. The Feldmanns traced the work, and in 2002, the professor contacted the International Foundation for Art Research (IFAR) for assistance. IFAR then contacted the Commission for Looted Art in Europe. Because the professor legitimately acquired...
title over the artwork, and given time limitations under Dutch law, there were significant impediments to the Feldmanns’ claim to the artwork in court. The parties chose to avoid litigation, however, and negotiated a private, undisclosed settlement. The conditions of the settlement included the painting’s return to the Feldmann family and the complete anonymity of the professor and her family. The ability to facilitate a private and confidential settlement led to a favorable and confidential outcome for both parties—a result that could not have been achieved in court.

In conclusion, looted and stolen art cases are multilayered, multijurisdictional, and worth multimillions. Artwork differs from any other types of stolen tangible property because it cannot be hidden or commingled among other assets. Given the enormous complexity, cultural significance, and sensitivity that parties both require and deserve, litigation is one dimensional and often cannot provide the results the parties want. International alternative dispute resolution, however, offers flexibility and a multifaceted approach to address Europe’s unfinished business of art restitution.

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**Endnotes**

5. Orkin v. Taylor, 487 F.3d 734 (9th Cir. 2007).
6. Id. at 738.
7. Id. at 741-42.
11. Hildebrand Gurlitt was one of the most notorious Nazi collaborators and art dealers of the Nazi era. His collection was discovered at the house of his son, Cornelius Gurlitt, in Munich in 2012. See Alexander Forbes, *Nazi Loot Hoarder Cornelius Gurlitt Dead at 81*, Artnet (6 May 2014), available at https://news.artnet.com/artworld/nazi-loot-hoarder-cornelius-gurlitt-dead-at-81-14069.
12. See supra n. 10.
20. Burrus, supra n. 18, at 416.
21. See Von Saher v. Norton Simon Museum of Art at Pasadena,
Restituting Nazi-Looted Art, continued

22 Morsesian v. Victoria Versicherung AG, 670 F.3d 1067 (9th Cir. 2015).
24 Madeline Cimento, supra. N. 14, at 223.
26 The six commissions in Europe are the following: (1) the German Advisory (Limbach) Commission; (2) the Austrian “Beirat”; (3) the Dutch Elkhart or “Restitution” Committee; (4) the French Commission for Compensation for Victims of Spoliation; (5) the English Spoliation Advisory Board; and (6) the Czech Republic Commission (Rychetsky Commission).
30 Bandle and Theurich, supra. n. 28, at 35.
31 One of the attorneys responsible for the success achieved by Altmann, Don Burris, was the premier keynote speaker of The Florida Bar’s International Law Section’s iLaw 2017 conference. He gave an amazing presentation of the case, which inspired this article.
32 Gunnar Schnabel and Monika Tatzkow, Nazi Looted Art, Handbuch Kunstrestitution weltweit (Berlin: Proprietas-Verlag, 2007), 313.
35 Bandle and Theurich, supra. n. 28, at 36.

Update: Florida Supreme Court to Consider International Litigation and Arbitration Certification

A new International Litigation and Arbitration certification is pending before the Florida Supreme Court. The certification, which was proposed by The Florida Bar’s International Law Section, was unanimously approved by the Bar’s Board of Governors at its May 2016 meeting. Supreme Court approval is the last step in the approval process. If approved, the International Litigation and Arbitration certification will become the twenty-seventh certification in the Bar’s certification program. Although the program has yet to be approved, those who intend to seek certification should begin planning now. Particular attention should be paid this year to meeting the requirements for CLE credit. Specifically, the proposal before the Supreme Court would require applicants to have fifty CLE credits in international litigation and/or arbitration over the five years preceding application.
that is annulled (or in the parlance of the New York Convention, set aside) by a court of the seat of the arbitration ceases to be an award at all and cannot be enforced. Indeed, U.S. case law appears to support this view. In Termorio SA ESP v. Electranta SP, 487 F.3d 928 (D.C. Cir. 2007), the D.C. Circuit declined to enforce an award that had been set aside by the Colombian courts, the location where the arbitration had been held. The D.C. Circuit in Termorio was explicit:

for us to confirm the award would seriously undermine a principal precept of the New York Convention: an arbitration award does not exist to be enforced in another Contracting State if it has been lawfully ‘set aside’ by a competent authority in the State where the award was made. This principle controls the outcome of this case.

* * *

[that there is a] narrow public policy gloss on Article V(1)(e) of the Convention and that a foreign judgment is unenforceable as against public policy to the extent it is repugnant to fundamental notions of what is decent and just in the United States. (emphasis added)

Although Termorio provided a “narrow” public policy exception, it appeared to be so narrow so as to be practically nonexistent. For this very reason, the international arbitration community became highly concerned when the respected Second Circuit agreed to enforce an annulled award in the Pemex case.

We now turn our attention to the Pemex and Thai Lao Lignite decisions.

The Pemex and Thai Lao Lignite Decisions

In Pemex, the Southern District Court of New York enforced an arbitration award that had been set aside by the Mexican Eleventh Collegiate Court, finding that the Mexican court’s judgment violated U.S. public policy by applying a retroactive prohibition on arbitrability and denying the plaintiff any remedy. The arbitration was commenced in 2004 by COMMISA, a Mexican subsidiary of a U.S. entity, against Pemex, the Mexican state-owned oil company, over a dispute related to allegedly seized oil platforms. The arbitration was administered by and subject to the ICC rules. Both parties participated in the proceeding, but Pemex challenged the arbitral tribunal’s jurisdiction. In May 2009, well after the arbitration had commenced, Mexico passed Section 98 of the Law of Public Works and Related Services, prohibiting the resolution of disputes arising out of government contracts by arbitration. Not only did Section 98 prohibit resolution by arbitration, but a forty-five-day statute of limitations was imposed. The limitations period applicable to COMMISA’s claim had long passed by the time the law came into effect. Subsequent to Section 98 coming into force, the Pemex tribunal issued its award, granting about $300 million in damages to COMMISA. COMMISA petitioned the Southern District Court of New York to enforce the award pursuant to the Panama Convention. In a parallel proceeding, Pemex brought suit in Mexico to set aside the award. The New York federal court granted enforcement in August 2010, and Pemex appealed to the Second Circuit. Prior to the appellate decision, the Mexican Eleventh Collegiate Court set aside the award, relying in part on Section 98, and finding that the tribunal had decided a non-arbitrable issue and that its decision was against Mexican public policy. The Second Circuit remanded to the district court for further proceedings considering the Mexican ruling. The district court held that “the Eleventh Collegiate Court decision violated basic notions of justice in that it applied a law that was not in existence at the time the parties’ contract was formed and left COMMISA without an apparent ability to litigate its claims.” Corp. Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. Pemex-Exploracion y Prod., 962 F. Supp. 2d 642, 644 (S.D.N.Y. 2013).

On appeal, the Second Circuit affirmed the enforcement of the award on the basis that to do otherwise would contravene the public policy of the United States. Commentators Linda Silberman and Nathan Yaffe have noted that the four considerations cited by the Second Circuit to support its decision all “merit further inquiry” in the context of the enforcement of foreign arbitral awards, though no further inquiry was made by the court. The four factors considered were: (1) the Mexican judgment violated a contractual waiver of sovereign immunity; (2) the judgment equated to the
Enforcement of Annulled International Awards, continued

...retroactive application of law; (3) the judgment effectively deprived COMMISA of a viable forum to seek remedy; and (4) the judgment was effectively an expropriation without compensation.\(^{11}\) The *Pemex* court relied on the Panama Convention’s Article V\(^{12}\) in deciding to enforce the award, albeit after stating that, “discretion is constrained by the prudential concern of international comity, which remains vital notwithstanding that it is not expressly codified in the Panama Convention.” *Pemex*, 832 F.3d at 106 (emphasis added). Obviously, the concern for international comity was not prudent enough for the Second Circuit in deciding to enforce an award annulled by the courts of a sister state.

Almost exactly a year later, the Second Circuit was again confronted with a case in which the award creditor sought to enforce in New York an award that had been annulled at the seat. Yet in the new case, the court ruled the opposite way and refused to enforce the annulled award. In *Thai Lao Lignite*, the Second Circuit affirmed a district court’s decision to vacate a previous order that enforced the arbitral award. The circumstances of the appeal are unique: after the arbitral award was recognized and enforced in the secondary jurisdiction, and all appeals exhausted, the primary jurisdiction’s court annulled the award, causing the secondary jurisdiction to overturn its previous judgment.

The petitioners, Thai Lao Lignite (TLL) and its subsidiary, Hongsa Lignite (HLL), initiated arbitration against the Government of the Lao People’s Democratic Republic (Laos). The case arose out of a series of mining contracts and a power generation project initiated in the 1990’s, but culminated in a request for arbitration in June 2007. The arbitration was seated in Malaysia, where an award for $57 million was rendered in November 2009, in favor of TLL and HLL. After the term for applications to set aside the award under Malaysian law had passed, the petitioners sought to enforce the award in the United States, the United Kingdom, and France (all secondary jurisdictions). Initially, the petitioners succeeded in all three actions; only the French Court of Appeal of Paris overturned the trial level decision because it found that the arbitrators ruled on matters outside the scope of the arbitration agreement. The U.S. district court proceeding was similarly appealed by Laos; however, the U.S. circuit court affirmed the decision to enforce the award (July 2012). In the U.K., the High Court of Justice of England and Wales entered judgment enforcing the award, relying heavily on the U.S. district court’s determination to do so (November 2012).

During these enforcement proceedings, in October 2010, Laos initiated set aside proceedings in Malaysia, the primary jurisdiction. Despite expiry of the Malaysian statute of limitations to challenge the award, Laos applied to the court for an extension due to its “lack...
Enforcement of Annulled International Awards, continued

of knowledge of the local law and inadequate advice from its legal advisors.” The trial court denied Laos’s request, but on appeal the request was granted. The Court of Appeal of Malaysia found that a sovereign should be given special treatment, noting that to “refuse the extension of time would be tantamount to shutting out the Government of Laos from challenging the award.” Then, in December 2012, the Malaysian High Court annulled the award and ordered the parties to re-arbitrate their claims. It reasoned that the arbitral tribunal had exceeded its jurisdiction by addressing claims under the mining contracts, to which HLL was not party.

With the Malaysian annulment in hand, Laos moved in the U.S. district court to vacate its August 2011 judgment pursuant to Federal Rule of Civil Procedure (FRCP) 60(b)(5). The district court granted Laos’s motion and vacated its earlier judgment (February 2014). FRCP 60 provides the procedures for challenging a final judgment. Rule 60(b)(5) states that relief from a final judgment may be “based on an earlier judgment that has been reversed or vacated.” The burden lies with the party seeking to overturn the final judgment, Laos, “to demonstrate that it is entitled to relief.” In order to determine whether Laos was entitled to relief, the circuit court referred to the grounds for refusal of recognition of an award under the New York Convention and specifically to Article V(1)(e).

The Second Circuit noted the apparent discretion to refuse enforcement granted by Article V’s use of the word may, but held that “the scope of that discretion is ‘constrained by the prudential concern of international comity.’” Citing Pemex, 832 F.3d at 106. The court then compared the extension of time to challenge the award that was granted to Laos by the Malaysian courts, with the Mexican court’s retroactive application of new legislation in order to vacate an award. It found the factual scenarios distinct, noting that “although we might not necessarily agree with the merits of the Malaysian courts’ judgments, we see no grounds” similar to those in Pemex. The Second Circuit thus affirmed the district court’s decision to vacate its August 2011 judgment.

Finally, TLL and HLL attempted to enforce the English judgment, which had enforced the award in England. Laos did not file an answer to the enforcement action in the district court, so the clerk of the court entered a notice of default against Laos. The district court, however, sua sponte raised issue with the enforcement of the English judgment because it “rested heavily on the English court’s deference to the now-vacated August 2011 judgment entered in the United States.” In so finding, the district court decided that “equity favors giving the Malaysian judgment priority over the English judgment.”
Conclusion

Taken together, the *Pemex* and *Thai Lao Lignite* decisions make an important contribution to understanding the ability of a party to enforce an award annulled or set aside by a court of primary jurisdiction. In *Pemex*, the court recognized that the “narrow public policy gloss on Article V(1)(e)” of the New York Convention is not without effect; the Mexican Legislature had passed retroactive legislation prohibiting the enforcement of the award, leaving the claimant no potential remedy. This was simply too much for the Second Circuit to accept and found it to be “repugnant to fundamental notions of what is decent and just in the United States.” In *Thai Lao Lignite*, however, the Second Circuit found that the “narrow public policy gloss” is indeed very narrow. The Malaysian court’s decision not to enforce its statute of limitations, although not necessarily in line with what the Second Circuit would deem correct, simply did not rise to the level of being repugnant to U.S. notions of decency. Thus, parties can feel confident that U.S. courts will enforce Article V(1)(e) of the New York Convention and not ignore the setting aside of an award by a court of competent jurisdiction absent extraordinary and very narrow circumstances that are found to be repugnant to U.S. public policy.

Endnotes

1 Corporación Mexicana De Mantenimiento Integral, S. De R.L. De C.V. v. Pemex-Exploración Y Producción, 832 F.3d 92 (2d Cir. 2016) (hereinafter *Pemex*).
2 The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958, 330 U.N.T.S. 4739, p. 3 (the New York Convention) establishes the international framework for enforcing international arbitration agreements and awards and has been adopted by more than 150 countries. The New York Convention is codified in Chapter II of the Federal Arbitration Act (the FAA), see 9 U.S.C. § 201.
3 *Thai-Lao Lignite* (Thail.) Co. v. Gov’t of the Lao People’s Democratic Republic, 864 F.3d 172 (2d Cir. 2017) (hereinafter *Thai Lao Lignite*).
4 Stefanie A. Lindquist and Frank C. Cross, Stability, Predictability And The Rule Of Law: Store Decis As Reciprocity Norm, University of Texas School of Law [2010] (“Legal stability and predictability are a fundamental part of what people mean by the Rule of Law. In the absence of stability and predictability in law, citizens have difficulty managing their affairs effectively. Legal stability also has a moral valence in so far as it assures that like cases will be treated equally. In common law systems, legal stability and predictability are furthered by judicial adherence to precedent and the informal norm of stare decisis.”)
5 Mastec Latin Am. v. Inepar S/A Industrias E Construccoes, 2004 U.S. Dist. LEXIS 13132, 11-12 (S.D.N.Y. 2004) (“A contractual provision specifying in advance the forum in which disputes shall be litigated is an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction.”)
6 See, e.g., the website of the New York City’s Inspector General, available at http://www1.nyc.gov/site/doi/offices/marshals-and-judgments-faqs.page#q1 (“If the judgment debtor . . . does not pay the money judgment, an enforcement officer—either the City Sheriff or a City Marshal—may be able to help you collect it . . . . A City Marshal, if given the proper court document, called an Execution, . . . has legal authority to collect part of the judgment debtor’s income, money, or other personal property to enforce your judgment. [. . .] Simply put, a successful collection requires teamwork—you tell the marshal where to find the judgment debtor’s income, money, or other property, and the marshal uses his or her legal authority to obtain it to satisfy your judgment.”)
7 “The 1958 New York Convention is the most successful, multilateral instrument in the field of international trade law. It is the centrepiece in the mosaic of treaties on arbitration laws that ensure acceptance of arbitral awards in arbitration agreements. Courts around the world have been applying and interpreting the Convention for over 50 years in an increasing unified and harmonized fashion.” – Professor Pieter Sanders, speaking in April 2011, when he was the last surviving participant of the 1958 New York Conference on International Commercial Arbitration, which drafted the New York Convention. See also, Albert Jan van den Berg, “Striving for uniform interpretation” presented at “New York Convention Day” describing the New York Convention as “the most successful international convention in international private law of this century” at https://www.uncitral.org/pdf/english/texts/ arbitration/NYconv/NYDay-e.pdf, p. 41.
8 These terms do not appear anywhere in the treaty, but instead arise from U.S. case law interpreting the New York Convention Article V(1)(e). See *Karaha Bodas Co. v. Perusahaan Petrambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274 (5th Cir. 2004).
10 Silberman and Yaffe, at 806.
12 The Inter-American Convention on International Commercial Arbitration, Panama, 16 June 1975, 1438 UNTS 245 (the Panama Convention) is codified in Chapter III of the FAA, 9 U.S.C. § 301. The Panama Convention is substantially similar to the New York Convention and takes precedence over the New York Convention when both states have adopted the Panama Convention.
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adjudicatory body, which would require significant resources and bureaucracy.

In the ensuing years, some states have repudiated their investment treaties and others have removed ITA as a dispute-resolution mechanism. In September 2015, the European Commission sought to end ITA involving EU member states, proposing a supranational investment court instead. The European Commission took a huge step toward this goal when Vietnam became the first state to accept a court of permanent judges instead of ITA in the EU-Vietnam Free Trade Agreement (EU-Vietnam FTA). Canada accepted a similar court instead of ITA in the Comprehensive Economic and Trade Agreement (CETA). Most recently, the EU and Japan announced their agreement in principle on a new Japan-EU Economic Partnership Agreement that does not include any provisions for resolving investor-state disputes, which the EU insists reflects Japan’s agreement to use a supranational global investment court. Others assert that the silence reflects an “agreement to disagree.”

The United States has previously resisted opposition to ITA, but President Trump’s ascent has led to calls for increased protectionism, including an exit from certain free trade agreements, creating heavy uncertainty as to the United States’ future involvement in ITA. Nonetheless, the United States is currently revisiting NAFTA but seems committed to keeping the ITA provisions, albeit in an updated form.

The NAFTA and EU-Japan negotiations present a unique lens through which to reassess the future of ITA.

Part II - The United States: A Tempest in the Making?

The United States has strongly rebuffed Europe’s efforts to move toward a supranational investment court. It resisted, under then-President Obama, Europe’s attempts to include such a court in negotiations on the Transatlantic Trade and Investment Partnership. The new administration under President Trump has brought a change in the tide of trade policy, emphasizing protectionism and “America First.” The NAFTA renegotiation provides a small look at how this young administration will approach ITA.

The Office of the United States Trade Representative (the USTR) revealed its Summary of Objectives for the NAFTA Renegotiation (the Objectives) on 17 July 2017. The Objectives regarding ITA are modest:

- Secure for U.S. investors in the NAFTA countries important rights consistent with U.S. legal principles and practice while ensuring that NAFTA country investors in the United States are not accorded greater substantive rights than domestic investors.
- Encourage the early identification and settlement of disputes through consultation and other mechanisms.
- Establish a dispute settlement mechanism that is effective, timely, and in which panel determinations are based on the provisions of NAFTA and the submissions of the parties and are provided in a reasoned manner.
- Establish a dispute settlement process that is transparent by:
  - Requiring that parties’ submissions be made publicly available;
  - Requiring that hearings be open to the public;
  - Requiring that final determinations by a panel be made publicly available; and
  - Ensuring that nongovernmental entities have the right to request making written submissions to a panel.
- Have provisions that encourage compliance with the obligations of NAFTA.

Although most of these are vague, the key concrete items are:

1. Ensuring that NAFTA country investors in the United States are not accorded greater substantive rights than domestic investors are;
2. Requiring that parties’ submissions and the tribunal’s final determinations be made publicly available, and that hearings be open to the public; and
3. Ensuring that nongovernmental entities may request making written submissions to a panel.
Of these, the first Objective is arguably the most striking. Ensuring that NAFTA country investors in the United States are not accorded greater substantive rights than domestic investors is contrary to the fair and equitable treatment (FET) standard provided under NAFTA. That standard is based on the customary international law rule that host states must provide foreign investors and their investments with a minimum standard of treatment, regardless of whether such substantive protections are offered to the domestic citizens of the host state.

As other commentators have noted, the same language found in the Objective was used in Section 2(b)(4) of the 2015 Trade Promotion Authority (TPA) for the Trans-Pacific Partnership (TPP) Act, the 10 May 2007 U.S. Bipartisan Agreement on Trade Policy, and the U.S. Trade Act of 2002. Despite the ubiquity of the language, FET protection is included in the text of the TPP (Article 9.6), the U.S.-Peru Trade Promotion Agreement (Article 10.5), the U.S.-Chile Free Trade Agreement (Article 10.4), and the U.S.-Colombia Trade Promotion Agreement (Article 10.5). All of these agreements follow the U.S. Trade Act of 2002.

Although FET has always been a rather controversial standard, and despite the use of the same language in previous FTA’s, the United States has continuously and strongly rejected the Calvo Doctrine, that is, the philosophy that only the host country has jurisdiction over investment disputes and that investors are not to be treated better than local investors. Historically, the United States has favored the FET standard and argued that there is a baseline of fairness to which host states are entitled.
must adhere, even if they do not provide that level of fairness to their own investors.\textsuperscript{32}

Nonetheless, there are reasons to believe this Objective indicates a broader change.

First, the Trump administration’s position may reflect the increasing use of FTA’s against developed countries,\textsuperscript{33} such as cases challenging California’s ban on environmentally hazardous gasoline additives,\textsuperscript{34} Germany’s phase-out of nuclear power generation,\textsuperscript{35} and Australia’s tobacco-control efforts.\textsuperscript{36} Even if such cases do not lead to awards in favor of investors, they can hamper public-interest regulation and generate large government settlements.\textsuperscript{37}

In that context, this Objective appears to be leveled directly at criticisms arising from use of ITA to challenge public policy measures taken by developed states in sensitive areas such as health and environmental protection.\textsuperscript{38} The Trump administration is wrestling head-on with the heavy question, previously settled, of what level of protection is appropriate for foreign investors. This small clue in the Objectives may be a harbinger of conflicts to come.

Second, since the release of the Objectives, rumors have begun to circulate about an even more dramatic restructuring, whereby NAFTA’s investor-state arbitration provisions would convert into an opt-in mechanism. Mexico, Canada, and the United States would each elect whether to permit investors from the other states to bring claims directly under NAFTA’s existing arbitration provisions.\textsuperscript{39} This could effectively kill NAFTA’s ITA provisions, as no one would opt in. Adding to the uncertainty, less than a week after the first round of negotiations, President Trump once more raised the possibility of terminating NAFTA.\textsuperscript{40}

Third, Canada has stated that it seeks to reform NAFTA’s ITA provisions to provide governments an “unassailable right to regulate in the public interest,” which is similar to the language used in the USTR’s Objectives.\textsuperscript{50} It has also hinted at possible environmental and labor carve-outs.\textsuperscript{51} Canada may be positioning itself to argue for an investor court similar to that promoted by the EU and included in CETA.\textsuperscript{52}

In all, although it is unlikely that we will see a significant change in the ITA provisions of NAFTA or any other U.S. international investment agreements, there certainly seems to be an evolution, however slow, in the thinking surrounding ITA and the best way to balance investor and state interests.

In the next issue of \textit{International Law Quarterly}, Alexis Foucard will discuss the future of ITA from the EU perspective in \textbf{Part III: The EU – Much Ado About Nothing?}

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Endnotes


3 Ibrahim F.I. Shihata, Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA, 1 ICSID Rev. – Foreign Inv. L. J. 1, 1–25 (1986); See also Christoph H. Schreuer, Do we need Investment Arbitration?, in Reshaping the Investor-State Dispute Settlement System, 879–889, 880 (Jean E. Kalicki & Anna Joubin-Bret eds., 2015).


8 Gabrielle Kaufmann-Kohler and Michele Potestà, Can the Mauritius Convention serve as a model for the reform of investor-State arbitration in connection with the introduction of a permanent investment tribunal or an appeal mechanism?, Geneva Center for International Dispute Settlement, para 25, 3 June 2016.

9 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 Mar. 1965, 575 UNTS 159 / [1991] ATS 23 / 4 ILM 532. The following states have denounced the ICSID Convention: Bolivia (2007); Ecuador (2009); and Venezuela (2012). The following states have terminated BIT’s since 2014: South Africa has terminated seventeen BIT’s since 2014; Indonesia has terminated one BIT in 2008; Venezuela terminated one BIT in 2008; Indonesia has terminated seventeen BIT’s since 2014; South Africa has terminated nine BIT’s since 2012.

10 See for instance U.S.-Australia FTA (2004), Article 11.16.


18 The Economist, The Trump administration starts to turn up the heat on trade, 27 Apr. 2017.


20 Id. at 17.


22 North American Free Trade Agreement, 32 I.L.M. 289 and 605 (1993), Article 1105: “Minimum Standard of Treatment . . . Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.”


24 U.S. Senate passed the Bipartisan Congressional Trade Priorities and Accountability Act (known as the Trade Promotion Authority (TPA)), 114 H. Rpt. 100 Part 1.


30 Public Law 112 – 42 (2012).


34 Methanex Corp. v. United States, UNCITRAL (NAFTA), Final
Death of Investment Treaty Arbitration, continued

Award of the Tribunal on Jurisdiction and Merits, 3 Aug. 2005.

35 Vattenfall AB and others v. Federal Republic of Germany, ICSID Case No. ARB/12/12.

36 Philip Morris Asia Limited (Hong Kong) v. The Commonwealth of Australia, PCA Case No. 2012-12.


51 Id.


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**NEED TO UPDATE YOUR ADDRESS?**

The Florida Bar’s website (www.FLORIDABAR.org) offers members the ability to update their address and/or other member information.

The online form can be found on the website under “Member Profile.”
General Requirements to Be an Expert Witness Concerning Translations

Before getting into the requirements for the expert witness, it is important to remind the reader that such an expert is not responsible for translating the documents. The expert witness will only oversee preparing the most accurate translation from the original text that has been translated by the parties or the arbitral tribunal.

In the world of international business transactions and in international arbitration, the most commonly used languages are English, French, and Spanish. English particularly is used as the international language of trade, marketing, tourism, legislation, and international policy making. Therefore, the first requirement for an expert witness who deals with conflicting translations, besides being independent from the parties, is that he or she knows at least two of the three major international languages such as English, Spanish, or French (other major international languages are Portuguese, Mandarin, and Arabic).

Additionally, the expert witness should understand the source of the text fully. The use of legalese instead of plain language in the drafting of legal documents makes it even harder for the translator to convey the text’s meaning in another language. In this sense, the expert witness should be able to comprehend not only the literal translation of words, but also be able to adapt the translations from the legal culture of one country to the legal context of the language used at the arbitral proceeding. The expert witness should be able to provide an opinion that avoids using the legalese of the original text, and convey in plain language the text’s meaning.

Returning to the example about the dispute between the American and Venezuelan companies, an expert witness involved in such a dispute must be aware of all the requirements of the Venezuelan legal system for the interpretation of its laws and legal documents. Accordingly, the expert witness dealing with the previous example must be knowledgeable of the internal legislation of the country from where the translated documents originated.

Additionally, the expert witness must focus on making the translation sound as natural as possible to the target-culture reader, making sure to understand the intention of the parties that drafted the original document and conveying that intention to the parties and the tribunal. It is presumed that most translators are not experts in the law of the country from where they are translating documents; however, it is desirable that they are least familiar with common law terms and the legal system of the other language that is at play in the arbitration. Consequently, the more familiar the expert witness is with the legislation and the culture of the place from where the translated documents originated, the better job he or she can do in assisting the parties and the tribunal to obtain the proper meaning of the documents.

In sum, these are the most relevant requirements an expert witness must possess when dealing with conflicting translations:

1. A proper understanding of the ideas, culture, and
legal system of the source of the translated text, and how these ideas have been achieved and expressed;\textsuperscript{19}

2. Ability to explain how the translated language follows with “naturalness” the language employed in the arbitral proceeding;\textsuperscript{20}

3. Understanding of the legal implications of the translated document in dispute, as well as be able to demonstrate that the same legal consequences were achieved by the translated text;\textsuperscript{21}

4. Ability to identify and avoid obscuring evidence; in other words, the expert witness must identify relevant points from the translation that were misinterpreted or missed, and that have significant consequences for the resolution of the dispute;\textsuperscript{22} and

5. Impartiality and independence from the parties and the arbitral tribunal; the role of the expert witness is to provide an independent opinion about the subject of the dispute to the parties and the arbitral tribunal.

Conclusion

The use of an expert witness to elucidate a conflicting translation may be ideal. Moreover, parties to an arbitration agreement should be careful in selecting the language of the proceedings. Such selection will impact the costs, selection of arbitrators, enforcement of awards, and potentially the outcome of a case. An expert witness with knowledge of the culture, legal system, and language from where the relevant translated documents originated will aid in the successful resolution of conflicting translations.

\textbf{Endnotes}\

1. Constitución de la República Bolivariana de Venezuela [Constitución de Venezuela] [Venezuelan Constitution] Art. 9; See also, Código Civil de Venezuela [C.C.] [Venezuelan Civil Code] Art. 13.


7. See id.

8. See \textit{3 Reasons to Ensure Your Arbitration Doesn’t Get Lost in Translation}, supra note 5.


10. See id.


12. See Alan Redfern & Martin Hunter, supra note 9. See also UNCITRAL Rules, Art. 27; ICC Rules, Art. 25(4); LCIA Rules, Art. 21; ICDR Rules, Art. 25; and IBA Rules on the Taking of Evidence in International Arbitration, Art. 5 and Art. 6.

13. See Dr. Gregory K. Bell et al., supra note 11 p. 7.


15. See id. at 3.

16. See Venezuelan Civil Code Art. 4. The Venezuelan Civil Code requires that the laws shall be attributed the sense that is evident from the proper meaning of the words, according to the connection between them and the intention of the Venezuelan legislator. Further, Venezuelan Civil Code requires that when there is no precise provision of the law for its interpretation, the provisions governing similar matters or cases shall be taken into account; and, if there are still doubts, the general principles of law shall apply.

17. See Enrique Alcaraz Varó & Brian Hughes, supra note 14 at p. 3.

18. See id. at 4.

19. See id. at 23.

20. See id.

21. See \textit{3 Reasons to Ensure Your Arbitration Doesn’t Get Lost in Translation}, supra note 5.

22. See id.
Enforcement of Arbitral Awards Under the FAA

As noted above, the New York Convention establishes a mechanism to enforce foreign arbitration awards among the state parties to the convention, and it is incorporated into U.S. law through Chapter Two of the FAA. Chapter Two expressly states the exclusive grounds available to refuse enforcement (or deny “confirmation”) of an arbitral award.

Enforcement or confirmation may only be denied if “one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention” is established. Therefore, the defenses a party can raise to oppose confirmation under Chapter Two are those enumerated in Article V of the New York Convention. These grounds, which are narrow and limited, include:

1. The arbitration agreement is not valid;
2. Gross due process violation due to lack of opportunity to present the case;
3. The arbitral tribunal decided beyond the scope of the arbitration agreement, or has exceeded its powers;
4. The arbitral tribunal was unduly constituted;
5. The award is not binding, or has been annulled;
6. The award violates international public policy or arbitrability issues.

Notably, under Article V(1)(e) of the New York Convention, a court may refuse enforcement if the award “has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.” This ground included in Article V(1)(e) acknowledges that a foreign award may be annulled by the courts of the seat of the arbitration, based on the arbitral law of the seat (lex arbitri). It also confirms that the courts and the rules applicable to the enforcement proceeding may differ from those applicable to the annulment request.

Chapter Two of the FAA is thus limited to the recognition and enforcement of foreign arbitral awards, and does not apply to a petition to vacate or annul an award. In fact, Chapter Two makes no explicit reference to the grounds that U.S courts should consider when deciding whether to annul or vacate an award. As will be explained, this gap has been filled through the FAA’s residual clause and Chapter One.

Annulment of Arbitral Awards Under the FAA

Most U.S. courts have recognized that the grounds for annulment of an arbitral award under Chapter One apply to international awards rendered in the United States. For example, the U.S. Court of Appeals for the Second Circuit has consistently held that “because the Convention allows the district court to refuse to enforce an award that has been vacated by a competent authority in the country where the award was rendered, the court may apply FAA standards to a motion to vacate a nondomestic award rendered in the United States.” Yusuf Ahmed Alghanim & Sons v. Toys “R” Us, Inc., 126 F.3d 15, 21 (2d Cir. 1997). Thus, because the New York Convention acknowledges the jurisdiction of the court of the seat of arbitration to decide annulment petitions, and based on the residual clause included in Chapter Two, the Second Circuit accepts Chapter One as part of U.S. lex arbitri and uses it to determine the rules and grounds applicable to the annulment of foreign awards.

Pursuant to Section 10 of Chapter One, a party can seek to vacate an award based on one or more of the following enumerated grounds:

1. Where the award was procured by corruption, fraud, or undue means;
2. Where there was evident partiality or corruption in the arbitrators, or either of them;
3. Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
4. Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.
Additionally, according to Section 12 of Chapter One, the petition to annul or vacate shall be filed within the next three months after the award was rendered. After such period, the party is barred from seeking annulment.

**Differences Between the Grounds to Refuse Enforcement and to Annul or Vacate a Foreign Award**

In the context of a foreign award rendered in the United States, it is especially relevant to understand the difference between the grounds to refuse enforcement or confirmation and the grounds to seek annulment. The former, governed by Chapter Two, are narrower and more difficult to establish whereas the latter have a broader scope of application.

The grounds to vacate an arbitral award in Chapter One, which apply to foreign awards based on the FAA’s residual clause, contain general references such as “evident partiality,” “refusing to hear evidence pertinent and material,” “any other misbehavior by which the rights of any party have been prejudiced,” or “imperfectly executed” powers by the arbitral tribunal. The broad nature of the grounds to vacate an arbitral award allows the requesting party to raise a number of issues that could not normally be raised as a ground to refuse enforcement of an award. In short, while some facts could serve as a basis to annul an award, the same facts may not be sufficient to refuse its enforcement or confirmation.\(^3\)

Given the above, it is crucial to clearly determine when each of these grounds should apply in a post-award proceeding. If an annulment petition is denied based on the grounds to deny enforcement of an award, a court would be requiring the requesting party to meet a different standard than the one determined by law.

**The Eleventh Circuit Improperly Conflated the Standards for Denying Confirmation and Annulling Arbitral Awards**

In *Industrial Risk*, the Eleventh Circuit incorrectly conflated the standards for denying confirmation and annulling arbitral awards. *Industrial Risk* involves a complex commercial litigation dispute in which a Florida nitric acid manufacturer, Nitram, Inc. (Nitram) contracted with a Texas corporation, Barnard and Burk Group, Inc. (Barnard Group) for the provision and installation of a tile pipe extender in Nitram’s manufacturing plant. *Industrial Risk*, 141 F.3d at 1438. The Texas corporation then contracted with a Louisiana corporation, Barnard and Burk Engineers and Constructors, Inc. (Barnard Engineers) to perform the construction work. Barnard Group and Barnard Engineers (collectively, Barnard Group and Engineers) subsequently contracted with a German turbine manufacturer, M.A.N. Maschinenfabrik Augsburg-Nürnberg AG (MAN) to purchase the tail gas expander. *Id.* M.A.N. Gutenhoffnungshütte GMBH
(MAN GHH), as the successor-in-interest to MAN, was responsible for the design, manufacturing, and delivery of the tail gas expander, and for providing technical guidance regarding its installation. Barnard Group and Engineers, on the other hand, was responsible for the piping for the tail gas expander. *Id.*

After the installation of the tail gas expander, problems arose that ultimately led to a “wreck” of the machine in January 1985. *Id.* A second wreck occurred a few months later. *Id.*

Nitram had purchased business risk insurance from Industrial Risk Insurers (IRI). IRI refused to compensate Nitram for the first wreck because IRI claimed that it was caused by Barnard Group and Engineers’ poor design and defective piping. *Id.* IRI partially covered the second wreck. *Id.* In October 1985, Nitram sued IRI and Barnard Group and Engineers in Florida state court seeking compensation for the damages suffered because of the two wrecks that had not been covered by IRI. *Id.* IRI counter-claimed to recover from Barnard Group and Engineers for the amount it had paid Nitram for the second wreck. *Id.* The case was then removed on diversity grounds to the U.S. District Court for the Middle District of Florida. *Id.* Barnard Group and Engineers counter-claimed against Nitram for breach of contract and filed a third-party claim against MAN GHH on the grounds that the expander it provided was faulty and that the expander was the cause of the two wrecks. *Id.* Nitram settled its claims against IRI, and the claims against IRI were subsequently dismissed. *Id.* IRI’s claims were subrogated to Nitram’s claims against Barnard Group and Engineers. *Id.*

In December 1987, pursuant to the arbitration clause in MAN GHH’s agreement with Barnard Group and Engineers, MAN GHH moved to compel arbitration against Barnard Group and Engineers for its third-party claim. *Id.* Pursuant to the agreement, the binding arbitration would be governed by the rules of the American Arbitration Association and Florida law. *Id.* at 1439. In July 1987, the district court ordered arbitration of the third-party claim. *Id.*

Nitram also amended its complaint in December 1987 to allege tort and breach of warranty claims directly against MAN GHH, claiming that the expander’s design and manufacturing were defective. *Id.* Additionally, Nitram demanded indemnification if Nitram was held liable to Barnard Group and Engineers. *Id.* IRI also added a cross-claim against MAN GHH. *Id.*

In August 1988, the district court, at the petition of MAN GHH, ordered arbitration of the claims. *Id.* Barnard Group and Engineers settled with Nitram and with IRI. Consequently, the arbitrator had to decide three issues: (1) Barnard Group and Engineers’ third-party claim against MAN GHH; (2) Nitram’s claim against MAN GHH; and (3) IRI’s cross-claim against MAN GHH (filed as Nitram’s subrogee). *Id.* At the heart of the three claims was whether the two wrecks were caused by Barnard Group and Engineers’ design and piping or by MAN GHH’s expander. *Id.*

The arbitral tribunal ruled in favor of MAN GHH, concluded that Barnard Group and Engineers’ design and piping caused the two wrecks, and awarded MAN GHH costs and conversion rate compensation. *Id.*

Barnard Group and Engineers moved to annul or vacate the arbitration award and the costs and compensation award in district court on the grounds that “the award was ‘arbitrary and capricious’ and that the arbitration panel improperly and prejudicially admitted certain testimony and evidence.” *Id.* The district court denied the motion for vacatur and confirmed the award. *Id.* Barnard Group and Engineers appealed the denial of the motion for vacatur. *Id.*

On appeal, the Eleventh Circuit held that the annulment proceeding was governed by Chapter Two (which relates to the enforcement of arbitral awards) because the chapter applied to “all arbitral awards ‘not entirely between citizens of the United States’” and this award was made “within the legal framework of another country.” *Id.* at 1441. The court considered that the international nature of the award implied that all proceedings relating to it shall be governed by Chapter Two, and ignored the residual clause included in Section 208 of that same chapter.
The court then addressed the grounds for vacatur that could be raised to annul a non-domestic award that was rendered in the United States. Specifically, the court analyzed whether a non-domestic arbitral award can be annulled on the ground that it is “arbitrary and capricious.” *Id.* at 1445.

As discussed above, pursuant to Article V of the New York Convention (which is incorporated into Chapter Two) and the residual clause included in Section 208 of Chapter Two, when deciding annulment petitions of foreign awards, the appropriate analysis is to determine whether the ground raised is available in Section 10(a)(1)-(4) of Chapter One.

Contrary to the FAA, the court incorrectly concluded that a party seeking to annul or vacate a foreign award can only rely on the grounds to challenge enforcement (i.e., confirmation) of a foreign award provided by Article V of the New York Convention. *Id.* at 1443, 1445. The Eleventh Circuit refused to entertain a challenge that did not fall “within one of the New York Convention’s seven grounds for refusal to enforce an award.” *Id.* at 1445. Consequently, the court determined that the award cannot be annulled on the ground that it is “arbitrary and capricious” because it is not one of the enumerated defenses provided by the New York Convention. *Id.* at 1143 (“We further hold that no defense against enforcement of an international arbitral award under Chapter 2 of the FAA is available on the ground that the award is ‘arbitrary and capricious,’ or on any other grounds not specified by the Convention.”).

In short, the Eleventh Circuit incorrectly held that a party seeking to set aside or vacate a foreign award cannot rely on the grounds to vacate provided by Chapter One of
the FAA (9 U.S.C. § 10(a)(1)-(4)) and instead can only rely on grounds to challenge confirmation of a non-domestic award provided by Article V of the New York Convention.

*Industrial Risk* not only disregards both Article V of the New York Convention and the residual clause of the FAA that allow parties to seek annulment of a foreign award under the grounds provided by Chapter One, but it is also in conflict with many federal courts in the United States, including the Second Circuit and its opinion in *Yusuf Ahmed Alghanim & Sons v. Toys “R” Us, Inc.*, 126 F.3d 15 (2d Cir. 1997).

In *Yusuf Ahmed Alghanim*, a foreign licensee (Yusuf Ahmed Alghani) initiated confirmation proceedings under the New York Convention to confirm an award against a licensor (Toys “R” Us, Inc.) that related to a dispute arising out of an international licensing agreement. *Id.* In response, the licensor cross-moved to vacate the award under the grounds included in Chapter One of the FAA. The U.S. District Court for the Southern District of New York held that “while the petition for confirmation was brought under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, respondents’ cross-motion to vacate or modify the award was properly brought under [Chapter One of] the Federal Arbitration Act, and thus those claims were governed by [Chapter One of] the Federal Arbitration Act’s implied grounds for vacatur.” *Id.* at 16. The district court granted the petition to confirm, and the Court of Appeals for the Second Circuit affirmed the district court’s ruling. *Id.* at 17, 18.

The court’s conclusion rested on its analysis of Article V(1)(e) of the New York Convention and the fact that the arbitral award at issue was rendered in the United States and vacatur was sought in the United States as well. The court determined that Article V(1)(e) “allow[s] a court in the country under whose law the arbitration was conducted to apply domestic arbitral law, in this case [Chapter one of] the FAA, to a motion to set aside or vacate that arbitral award.” *Id.* at 21. The court noted that Article V(1)(e) of the New York Convention does not specify grounds to vacate an award because “had the available grounds been defined in some way, such action would have constituted meddling with national procedure for handling domestic awards, a subject beyond the competence of the Conference.” *Id.* at 22 citing Leonard V. Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 Yale L.J. 1049, 1070 (1961).

The court further stated that “the language and history of the [New York] Convention” made clear that a petition to annul a foreign award in the state where the award was rendered “is to be governed by domestic law of the rendering state, despite the fact that the award is nondomestic within the meaning of the Convention . . . .” *Id.* at 23. The court appropriately distinguished the appropriate standards that govern grounds for annulment of a non-domestic award and defenses to confirmation of a non-domestic award. *Id.* The court held the following:

> [W]e conclude that the Convention mandates very different regimes for the review of arbitral awards (1) in the state in which, or under the law of which, the award was made, and (2) in other states where recognition and enforcement are sought. The Convention specifically contemplates that the state in which, or under the law of which, the award is made, will be free to set aside or modify an award in accordance with its domestic arbitral law and its full panoply of express and implied grounds for relief. *See* Convention art. V(1)(e). However, the Convention is equally clear that when an action for enforcement is brought in a foreign state, the state may refuse to enforce the award only on the grounds explicitly set forth in Article V of the Convention. *Id.*

This holding has been endorsed by the Third, Fifth, and Sixth Circuits. *See* Ario v. *Underwriting Members of Syndicate 53 at Lloyds for the 1998 Year of Account*, 618 F.3d 277, 290-91 (3d Cir. 2010) (“Here, because the arbitration took place in Philadelphia, and the enforcement action was also brought in Philadelphia, we may apply United States law, including the domestic FAA and its vacatur standards.”); *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357, 368 (5th Cir. 2003) (“By its silence on the matter, the Convention does not restrict the grounds on which primary-jurisdiction courts may annul an award, thereby leaving to a primary jurisdiction’s local law the decision whether to set aside an award.”); *Jacada (Europe), Ltd. v. International Marketing Strategies, Inc.*, 
401 F.3d 701 (6th Cir. 2), cert. denied, 126 S. Ct. 735 (2005), abrogated on other grounds by Hall Street Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576 (2008) (“[T]he award in this case was made in the United States, and therefore Article V(1)(e) authorizes this court to consider our domestic law, as it is the law where the award was made.”); Lander Co. v. MMP Investments, Inc., 107 F.3d 476, 478 (7th Cir. 1997) (Posner, J.) (“[T]he New York Convention contains no provision for seeking to vacate an award, although it contemplates the possibility of the award’s being set aside in a proceeding under local law, Art. V(1)(e), 21 U.S.T. at 2520, and recognizes defenses to the enforcement of an award.”).

Finally, even the U.S. Supreme Court has applied the grounds available in Chapter One (i.e., Section 10(a)(1)-(4)) to an annulment petition of a non-domestic arbitral award governed by Chapter Two. See BG Grp. Plc v. Republic of Argentina, 134 S.Ct. 1198, 1204, 1212-13 (2014). (“Chapter 1 applies to actions and proceedings brought under [the New York Convention] to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States.”). In BG Group, the Supreme Court analyzed whether an arbitral tribunal in a non-domestic arbitral proceeding exceeded its authority (pursuant to Section 10 of Chapter One) when it bypassed procedural preconditions to arbitration regarding venue. Id. at 1212-13. The Supreme Court ultimately held that the arbitral panel did not exceed its authority. Id.

Conclusion

By conflating the grounds for denying enforcement of arbitral awards with those for annulment of a foreign award rendered in the United States, Industrial Risk ignores the distinction between the denial of enforcement and annulment of arbitral awards and eliminates the right of the party to seek annulment of an award based on the grounds afforded by the arbitral law of the seat of arbitration. By doing so, Industrial Risk limits the grounds under which a party may seek the annulment of a foreign arbitral award.

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Endnotes

1 “1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were,
A Legal Framework, continued

under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.” New York Convention, Article V.

2 “(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(b) If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

(c) The United States district court for the district wherein an award was made that was issued pursuant to Section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in Section 572 of title 5.” 9 U.S.C. § 10.

“In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration—

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.” 9 U.S.C. § 11.

3 The difference between the grounds to enforce or annul an arbitral award was addressed though the UNCITRAL Model Law, which has been adopted by several countries as their own arbitralional law. Specifically, the grounds for annulment contemplated by the UNCITRAL Model Law emulate the grounds for refusing enforcement provided in Article V of the New York Convention. This clever unification eliminated the discussion regarding the different standards and grounds applicable in enforcement and annulment proceedings. The United States has not adopted the UNCITRAL Model Law as its arbitral law.
It can be a confusing inquiry whether a claim is properly brought as a direct or a derivative claim. After all, when a corporation is injured causing the company to lose value, the shareholders sustain a corresponding loss through the decline in the value of their shares. The distinction between direct and derivative claims can become further complicated in closely held corporations. Close corporations have few shareholders who often also are directors, officers, or employees of the corporation. The shareholders often have prior relationships and contracts between themselves, creating a nebulous set of interests interrelated with their rights as shareholders of the corporation. When one of these shareholders is a director that mismanages or misappropriates corporate assets, the other shareholders may attempt to assert direct claims based on the decline in the company’s value. Determining whether those claims are direct or derivative is a threshold issue.

Florida Corporation Controlling Foreign Assets

When the lawsuit involves a Florida corporation—meaning a corporation incorporated in Florida, regardless of its physical location(s)—the internal affairs doctrine results in Florida law applying to determine whether a claim is direct or derivative. See Chatlos Found., Inc. v. D’Arata, 882 So. 2d 1021, 1023 (Fla. 5th DCA 2004). If the claim is derivative, the requirements of § 607.07401, Florida Statutes, and related case law will apply to the case. Regardless of how the plaintiff pleads the claim, the factual allegations in the complaint control whether the claim is direct or derivative. See Braun v. Buyers Choice Mortg. Corp. ex rel. McAloon, 851 So. 2d 199, 203 (Fla. 4th DCA 2003).

Until recently, Florida case law was unclear about what tests were to be applied and what factors were to be considered when analyzing whether a shareholder’s claim is derivative. Then, in 2004, the Third District Court of Appeal issued its landmark decision in Dinuro Investments LLC v. Camacho, 141 So. 3d 731 (Fla. 3rd DCA 2014). In Dinuro Investments, the Third DCA synthesized over fifty years of unclear (and occasionally contradictory) case law to set forth Florida’s law on determining direct from derivative actions. Dinuro Investments was quickly adopted by the Fourth DCA, Strazzulla v. Riverside Banking Co., 175 So. 3d 879, 884 (Fla. 4th DCA 2015), and cited favorably by the Second DCA, Solinger v. Lee, No. 2015-1744, 2016 WL 1125502, at *1 (Fla. 2d DCA 2014). Therefore, it appears Dinuro Investments states the law that would be applied in any district in Florida.

Dinuro Investments analyzed Florida law, the law of other districts, and scholarly writing to conclude that Florida applies a two-pronged test to determine whether a claim is direct or derivative. 141 So. 3d at 735-40. The court ultimately concluded that a shareholder of a Florida corporation can bring a direct claim only if that shareholder satisfies both the “direct harm test” and the “special injury test.” Id. at 740. This two-pronged approach is unusual in that most jurisdictions apply only the “direct harm test.” Id. at 735. Delaware explicitly rejected the “special injury test” in 2003. See Tooley v. Donaldson Lufkin & Jenrette, Inc., 845 A.2d 1031 (Del. 2003) (adopting a modified “direct harm test” and finding the concept of “special injury” confusing to the proper analysis).

Florida’s “direct harm test” allows a claim to proceed as a direct claim only if “there is a direct harm to the shareholder or member such that the alleged injury does not flow subsequently from an initial harm to the company . . ..” Dinuro Investments, 141 So. 3d at 739. Put another way, “[i]f the damages are only indirectly sustained by the stockholder as a result of injury to the corporation, the stockholder does not have a cause of action as an individual.” Alario v. Miller, 354 So. 2d 925, 926 (Fla. 2d DCA 1978). The result is that claims based upon injury to or theft of corporate assets cannot satisfy the direct harm test.

Florida’s “special injury test” allows a direct claim only if “there is a special injury to the shareholder or member that is separate and distinct from those sustained by the other shareholders or members.” Dinuro Investments, 141 So. 3d at 739-40. A claim that fails the direct harm test likely will also fail the special
Derivative Issues in International Litigation, continued

injury test; although, failing either test renders a claim derivative. A claim based on a decline in stock value that affects all shares—such as a claim that the directors mismanaged the company into bankruptcy—will fail both the direct harm test and the special injury test. See *Braun*, 851 So. 2d at 203.

The direct harm and special injury tests are strict but do not preclude all direct claims. For example, the shareholders in *Strazzula* asserted direct claims based on allegations that the directors made fraudulent representations to the plaintiffs (direct harm) causing injury when the shareholders relied on those statements in deciding not to sell their shares back to the corporation (special injury). 175 So. 3d at 886. Further, *Dinuro Investments* recognized an exception to the two-pronged test. “A shareholder or member need not satisfy this two pronged test when there is a separate duty owed by the defendant(s) to the individual plaintiff under contractual or statutory mandates.” *Dinuro Investments*, 141 So. 3d at 740.

The *Dinuro Investments* exception has particular relevance when dealing with LLC’s. An LLC operating agreement is a contract that might provide for rights separate and apart from the members’ rights under corporate law. *Id.* at 741. Also, the Florida Revised Limited Liability Company Act includes a provision stating that LLC managers owe fiduciary duties of loyalty and care directly to the LLC members themselves. See § 605.04091(1), Florida Statutes. It is unclear whether this statutory duty would satisfy the *Dinuro Investments* exception. If Section 605.04091(1) does allow a plaintiff to satisfy the *Dinuro Investments* exception, then the exception would swallow the two-part test when applied to Florida LLC’s.

**Foreign Corporation Controlling Florida Assets**

When dealing with a foreign-incorporated company controlling Florida assets, the plaintiff’s standing to sue is addressed under the relevant foreign law. See, e.g., *Gadd v. Pearson*, 351 F. Supp. 895, 902 (M.D. Fla. 1972) (applying Bahamian law to determine if claim relating to Bahamian corporation is direct or derivative); *Seybold v. Groenink*, 2007 WL 737502, at *5 (finding that the internal affairs doctrine required Dutch law to apply to determining whether suit related to Dutch corporation was derivative).

The question that must be asked is: does the plaintiff have the right under the law of the country of incorporation to bring the claims? U.S. courts have recognized that some countries may not permit shareholder derivative suits at all. E.g., *Levine v. Milton*, 42 Del. Ch. 597, 600, 219 A.2d 145, 147 (1966) (dismissing derivative claim related to Panamanian corporation because Panamanian law would not allow for derivative claims). Other countries permit derivative suits only after certain specific acts have been taken. E.g., *Sagarra Inversiones, S.L. v. Cementos Portland Valderrivas, S.A.*, 34 A.3d 1074, 1080 (Del. 2011) (addressing Spanish law on derivative suits; “To bring a derivative suit under Spanish law, [the plaintiff] would have first had to request that Uniland S.A.’s board of directors call a shareholder meeting to consider
whether to pursue the derivative claims.”); *Retirement Trust v. Blanchard*, 2005 WL 2063852 at *7 (S.D.N.Y. 2005) (dismissing derivative claims under Canadian law because “[s]ection 239 of the [Canadian Business Corporations Act] requires that a plaintiff seek leave of a specifically enumerated Canadian court before proceeding with a derivative action”). Summarizing the various shareholder standing laws of various foreign jurisdictions is well beyond the scope of this article. Suffice to say, foreign laws vary greatly and should be researched fully for each specific case.

Proving whether the plaintiff has standing under foreign law requires presenting the court with the law of the foreign jurisdiction. In federal court, Federal Rule of Civil Procedure 44.1 governs how the court will address foreign law. Rule 44.1 states that the court can consider “any relevant material source, including testimony,” without concern for the rules of evidence. Florida law allows a court to consider a qualified expert’s affidavit regarding issues of foreign law. *Accord O’Connor v. Ruden, McClowsky, Smith, Schuster & Russel, P.A.*, 792 So. 2d 527 (Mem) (Fla. 4th DCA 2001). So, in either forum, it is advisable to obtain an expert in the relevant country’s law to provide an expert opinion on the existence and applicability of the relevant law.

**Obtaining Jurisdiction Over the Corporation Itself**

The corporation itself is a necessary party to a shareholder derivative suit. After all, a derivative suit asserts the corporation’s rights and claims. “[A] corporation is ‘an essential, indispensable party in a derivative action, and the failure to make the corporation a party is not a mere defect of parties but leaves the stockholders without a cause of action and the court without jurisdiction.’” *Francini v. Int’l Marble Trades, Inc.*, 546 So. 2d 777, 779 (Fla. 3rd DCA 1989). Because the failure to join the corporation leaves the court without jurisdiction, the corporation must be made a party to the lawsuit.

Corporations are made party to a derivative suit by naming the corporation as a nominal defendant. Even though the claim at issue technically belongs to the corporation, one cannot unilaterally make another person or entity a plaintiff. This problem is solved by naming the corporation as a nominal defendant. The corporation, although a nominal defendant, must be properly served and subject to the court’s jurisdiction, or the case will be dismissed. *See, e.g., White v. Watts*, 716 So. 2d 293 (Fla. 2d DCA 1998). When the corporation at issue is incorporated in Florida, this does not present any problems beyond ensuring that service is properly completed. *Id.* When the corporation at issue is foreign-incorporated, more complicated personal jurisdiction and service issues may arise.

Personal jurisdiction over the foreign corporation is governed by Florida law and the constitutional principles set forth in *Venetian Salami Co. v. Parthenais*, 554 So. 2d 499, 500 (Fla. 1989) citing *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). In many cases, specific personal jurisdiction over the corporation will satisfy constitutional requirements because the case is filed in Florida due to the corporation conducting business in Florida or owning Florida assets that are the subject of the litigation. “When a corporate defendant who has purposefully directed its activities at a forum, seeks to defeat the forum’s jurisdiction, it ‘must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable.’” *Sternberg v. O’Neil*, 550 A.2d 1105, 1122 (Del. 1988) citing *Burger King Corp. v. Redzewicz*, 471 U.S. 462, 477 (1985).

Serving process on the corporation may present more difficult issues. International service of process often requires compliance with the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the Hague Convention). Both federal and state law require compliance with the Hague Convention if service will be made in a country that is a signatory to the Hague Convention. *See Federal Rules of Civil Procedure 4(h)(2) and 4(f)(1); § 48.194(1), Florida Statutes*. The formal service procedures under the Hague Convention can take an extended period of time. Fortunately, there is a shortcut built into the Hague Convention
for some jurisdictions. Article 10(a) of the Hague Convention states that the terms of the treaty “shall not interfere with . . . the freedom to send judicial documents, by postal channels, directly to the persons abroad.” Although there is a split of authority nationwide, the prevailing view and the view in Florida is that Article 10(a) allows for service by mail (including private carriers like Federal Express), unless the country at issue objected to Article 10(a). See *Portalp Intern. SAS v. Zuloaga*, 198 So. 3d 669, 672 (Fla. 2d DCA 2015) (collecting cases); *Ingenieria Y Exportacion De Tecnologia S.L. v. Freytech, Inc.*, 210 So. 3d 211 (Fla. 3rd DCA 2016). Under Section 10(a), service is proper if the complaint and summons are mailed to the corporation. It is best practice to use a private carrier that can capture an image of the recipient’s signature, for use if the sufficiency of service is contested.

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**Endnotes**

1. This article refers to “corporations” for ease of reading, but the law discussed herein applies equally to corporations and limited liability companies unless otherwise noted.

2. Often, a foreign corporation may wholly own a Florida subsidiary (or vice versa), and it is the subsidiary’s property that is the subject of litigation. In those circumstances, a shareholder derivative lawsuit would be “double-derivative.” Issues specifically relating to double-derivative lawsuits are beyond the scope of this article, but refer to *Crow v. Context Industries, Inc.*, 260 So.2d 865 (Fla. 3rd DCA 1972) and *Gadd v. Pearson*, 351 F. Supp. 895 (M.D. Fla. 1972) for guidance.

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for the position and the industry. Another issue of which attorneys should be aware is that the DOL examiner may classify the position submitted on the ETA Form 9141 with a different SOC code than the one the employer requested. The examiner, in his or her analysis of the proffered position, may determine that the job duties described on the application more accurately reflect the duties associated with a different occupation. As such, it is important to always review the classification issued on the prevailing wage determination when initiating the recruitment process in order to ensure that the proper classification and code are being used.

Finally, as previously stated, attorneys and employers must be keenly aware of the validity date period of the prevailing wage determination. Failure to initiate the recruitment step of the process by the expiration date invalidates the determination.

**Recruitment**

After receiving the prevailing wage determination, the next step in the permanent labor certification process is the recruitment period. This requires that the employers conduct “good faith” recruitment efforts by placing multiple advertisements for the foreign worker’s prospective job and certify to DOL that no willing and qualified U.S. workers applied and/or qualified for the position.

For most professional occupations (excluding college or university professors, Schedule A occupations, and sheepherders), the employer must conduct the recruitment steps within six months of filing the application for alien employment certification. Two of the recruitment steps—a job order and two print advertisements—are mandatory for all applications involving professional occupations, and these steps must be conducted at least 30 days, but no more than 180 days, before the filing of the application. The job order consists of the employer placing an advertisement with the State Workforce Agency (SWA) in the state of intended employment for a period of thirty days. The print advertisements must be placed in the newspaper of general circulation in the area of intended employment on two different Sundays. Along with the mandatory advertisements, the employer must also select three additional recruitment steps from the following alternatives:

- Job fairs
- Employer’s website
- Job search website other than the employer’s
- On-campus recruiting
- Trade or professional organizations
- Private employment firms
- Employee referral program with incentives
The PERM Dilemma, continued

- Campus placement offices
- Local and ethnic newspapers
- Radio and television advertisements.\(^{17}\)

Only one of the additional recruitment steps may consist solely of activity that took place within thirty days of the filing of the application.\(^{18}\) None of the steps may have taken place more than 180 days prior to filing the PERM application.\(^{19}\)

Finally, the employer must post an internal job notice to the employer’s employees at the facility or location of the employment.\(^{20}\) The notice must be posted for at least ten consecutive business days.\(^{21}\) The notice must be clearly visible and unobstructed while posted and must be posted in a conspicuous place where it can be readily read by the employer’s U.S. workers.\(^{22}\)

While the advertisements are running, the employer must review all of the resumes received in relation to the advertised position (if any).\(^{23}\) The attorney cannot be involved in the direct interviewing process at all.\(^{24}\) The employer must review each resume received and determine whether the candidate objectively qualifies for the position. If the employer finds a candidate who qualifies, the employer must contact the applicant for an interview.\(^{25}\) The employer must keep detailed records of all resumes received, interviews conducted, and reasons for rejecting all applicants, as well as all supporting recruitment documentation, for a period of five years.\(^{26}\)

At the conclusion of the recruitment period, if there were no U.S. workers able and qualified for the position, the employer must prepare a recruitment report signed by the employer describing the recruitment steps undertaken and the results achieved, the number of hires, and, if applicable, the number of U.S. workers rejected, categorized by the lawful job-related reasons for such rejections.\(^{27}\) The certifying officer, after reviewing the employer’s recruitment report, may request the U.S. workers’ resumes or applications, sorted by the reasons for which the workers were rejected.\(^{28}\)

A common issue that attorneys should keep in mind is the specific timeframe for each specific recruitment, such as the 30 days for the job order on the State Workforce Agency, the 10 business days for the internal job posting, and the 30/180-day timelines for when the employer can file the PERM application. Failure to properly calculate the relevant timelines will result in a denial of the application. Attorneys should also be aware of the required content for the advertisements, which should include the employer’s name and contact information, the physical address of the site of employment, the address where applicants should send resumes, which may be an email address or a P.O. box, and a description of the available position that is specific enough to apprise the U.S. workers of the job opportunity.\(^{29}\)

It is also very important for attorneys to counsel employers on keeping detailed records of all interviews and candidates’ responses in order to establish the lawful and job-related reasons for rejecting an applicant. The employer is required to show a good faith effort in contacting qualifying applicants interested in the position. Neglecting to contact potentially qualified applicants can result in a denial of the PERM application.
The PERM Dilemma, continued

Filing the PERM Application

The final step is for the employer, through counsel, to file the PERM application with DOL using ETA Form 9089 (provided no qualified and willing U.S. workers applied and/or qualified for and accepted an offer for the job position). In a similar fashion as the prevailing wage request, the employer files this form electronically at DOL’s website, http://www.plc.doleta.gov. The ETA Form 9089 provides DOL with information on the job opportunity (such as the worksite location, duties, requirements, and prevailing wage), information on the employer’s recruitment process (such as where the employer placed the ads and on which dates), and information on the foreign worker (such as the worker’s place of birth, education credentials, and work experience).

By submitting the PERM application online, the employer certifies to the following conditions of employment under penalty of perjury:

1. The offered wage equals or exceeds the prevailing wage determined pursuant to § 656.40 and § 656.41, and the wage the employer will pay to the alien to begin work will equal or exceed the prevailing wage that is applicable at the time the alien begins work or from the time the alien is admitted to take up the certified employment;
2. The wage offered is not based on commissions, bonuses or other incentives, unless the employer guarantees a prevailing wage paid on a weekly, bi-weekly, or monthly basis that equals or exceeds the prevailing wage;
3. The employer has enough funds available to pay the wage or salary offered the alien;
4. The employer will be able to place the alien on the payroll on or before the date of the alien’s proposed entrance into the United States;
5. The job opportunity does not involve unlawful discrimination by race, creed, color, national origin, age, sex, religion, handicap, or citizenship;
6. The employer’s job opportunity is not:
   1. Vacant because the former occupant is on strike or locked out in the course of a labor dispute involving a work stoppage;
   2. At issue in a labor dispute involving a work stoppage.
7. The job opportunity’s terms, conditions and occupational environment are not contrary to federal, state or local law;
8. The job opportunity has been and is clearly open to any U.S. worker;
9. The U.S. workers who applied for the job opportunity were rejected for lawful job-related reasons;
10. The job opportunity is for full-time, permanent employment for an employer other than the alien.

PERM applications are filed online without supporting documentation that establishes the employer’s recruitment efforts, the result of those efforts, or any other such proof. The employer attests to the content of the filing, including the completion of required recruitment, but has no mechanism to provide proof with the filing. After filing the ETA Form 9089, the employer will wait several months for DOL to adjudicate the PERM. DOL can (1) approve the PERM; (2) deny the PERM; or (3) audit the PERM. Audits can be random or targeted. DOL has stated that audits are “necessary to maintain program integrity” as well as for quality control. The random audits (less common than targeted audits) are just that, random. They are used by DOL as a check in the system and to discourage employers from taking advantage of the process. A targeted audit, however, is triggered by apparent issues with the application. If the PERM is audited, the certifying officer will ask the employer to provide additional evidence for the application, such as proof of recruitment and copies of all resumes received. After the employer responds to the audit request, the certifying officer will review the new evidence and either approve or deny the PERM application. If the PERM is approved, the employer will receive a certification from DOL, which is required for the filing of an I-140 immigrant visa petition with USCIS.

Common mistakes to avoid with the PERM application are typos with regard to the employer’s name and foreign worker’s biographic information, failure to include all the requested information on the form, the employer’s failure to reply to the DOL questionnaire after submission of the application, and the employer’s failure to retain the required documentation for a period of five years.
The PERM Dilemma, continued

For the 2016 fiscal year, nearly 14% of the 97,000 PERM labor filings underwent an audit review. Attorneys should be aware of the following red flags, which are common causes for a targeted PERM audit:

- Jobs for which the minimum education requirements is less than a bachelor’s degree;
- Trade-related occupations;
- Certain public schools;
- 50% of cases that require a degree (either bachelor’s or master’s) and no experience; and
- 50% of cases where the employer indicates it recently has had a layoff.

If a PERM application is selected for audit, the employer will receive an audit letter that specifically states what additional documentation should be submitted, establishes a date (thirty days from the date of the audit letter) for submission of the required documentation, and advises that the application will be denied if the required information is not received by the deadline.

The documents normally requested by the certifying officer are:

- The prevailing wage determination;
- The completed and signed notice of filing;
- The completed and signed recruitment report;
- Copies of all resumes from applicants referenced in the recruitment report; and
- Clear copies of each advertisement referenced in the ETA Form 9089.

Conclusion

PERM labor certification is a complicated three-step process. From drafting a job description that matches the company’s needs to the monitoring of dates and relevant timelines during recruitment, as well as the filing of the PERM application, the PERM process can be overwhelming for most employers. An attorney with the proper awareness and understanding of its intricacies can play a vital role in achieving a successful outcome for both the employer and the foreign worker.

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Endnotes

2 Id.
3 INA § 212(a)(5)(A).
4 20 CFR §656.40.
5 Id.
9 Id.
11 20 CFR §656.40.
12 Id.
13 20 CFR §656.17(e)(1).
14 Id.
15 Id. at (e)(1)(i)(A).
16 Id. at (e)(1)(i)(B).
17 Id.
18 Id. at (e)(1)(ii).
19 Id.
20 20 CFR §656.10(d)(1)(ii).
21 Id.
22 Id.
23 20 CFR §656.10(b)(2)(ii).
24 Id. at (2)(i).
25 Id. at (2)(ii).
26 20 CFR §656.10(f).
27 20 CFR §656.17(g)(1).
28 Id.
29 Id. at (f)(1)-(7).
31 20 CFR §656.10(c)(1)-(10).
32 20 CFR §656.20(a).
37 Id. at (a)(1)-(3).
with individuals and 10 leniency accords (acordos de leniência) with companies in connection with Operation Car Wash.\textsuperscript{12} Collaboration agreements and leniency accords are similar, the difference being that the first is entered into by individuals while the second is entered into by companies.

Various criminal laws in Brazil allow individual defendants to collaborate with authorities in exchange for benefits.\textsuperscript{13} One of the most frequently utilized laws to criminally prosecute individuals throughout Operation Car Wash has been Law 12.850/2013, referred to as the Criminal Organizations Enforcement Act.\textsuperscript{14} Law 12.850 defines a criminal organization as “an association of four or more persons structurally organized and characterized by a division of labor, albeit informally, for the purpose of obtaining, directly or indirectly, an advantage of any kind through the practice of criminal offenses whose maximum penalties exceed four years or which are transnational in character.”\textsuperscript{15} Depending on, among other factors, the quality of the information provided by the defendant and his or her role in the scheme, Law 12.850 permits a reduced sentence, a judicial pardon, or absolute immunity whereby the MPF gives up its right to file a complaint against any of the confessed crimes.

In addition, Brazil’s anticorruption law, Law 12.846/2013 (frequently referred to as the Clean Companies Act), which creates civil and administrative liability for legal entities, allows authorities to enter into leniency accords with companies if the following criteria are met: (1) the collaboration results in the identification of those involved in the wrongdoing, when applicable; (2) the company promptly provides information regarding the misconduct; (3) the company is the first to approach authorities; (4) the company ceases its involvement in the wrongdoing; and (5) the company admits to the wrongdoing and cooperates fully throughout the investigation.\textsuperscript{16}

The Clean Companies Act grants explicit authority pursuant to the federal executive power to enter into leniency accords relating to offenses against the public administration and foreign public administrations to the comptroller general of the union (Controladoria-Geral da União or CGU),\textsuperscript{17} which has since been renamed the Ministry of Transparency, Supervision and Control (Ministério da Transparência, Fiscalização e Controle),\textsuperscript{18} and subsequent rules permit for oversight from Brazil’s audit court (Tribunal de Contas da União or TCU)\textsuperscript{19} and participation in negotiations by Brazil’s Solicitor General’s Office (Advocacia-Geral da União or AGU).\textsuperscript{20}

Despite the fact that the MPF lacks explicit authority to enter into leniency accords under the Clean Companies Act, the law permits “the highest authority of each public organ or entity” to enter into leniency accords.\textsuperscript{21} Perhaps the Clean Companies Act’s failure to clearly define the MPF’s role in reaching leniency accords explains why the MPF has largely failed to cooperate with the Ministry of Transparency, the AGU, and the TCU when entering into settlements with companies in the context of Operation Car Wash,\textsuperscript{22} or has done so informally.\textsuperscript{23} Instead, the MPF often uses other laws as the basis of its leniency agreements.
Practical Impacts

Increase in Internationally Coordinated Resolutions

One practical impact of a willingness by Brazilian authorities to enter into U.S.-style settlement agreements is that it helps to facilitate internationally coordinated agreements. In the last several years, Brazilian authorities have frequently partnered with U.S. enforcement agencies. In fact, Brazilian authorities have cooperated with the United States in three of the ten largest internationally coordinated resolutions involving the FCPA.24

A side-by-side comparison of Brazilian aircraft manufacturer Embraer’s settlements with the United States and Brazil highlights how similar the anticorruption settlements have become. In October 2016, Embraer settled allegations related to corruption schemes in the Dominican Republic, Mozambique, Saudi Arabia, and India through a coordinated effort between the United States and Brazil. While the agreements covered distinct crimes,25 the settlements included nearly identical fact patterns covering the same misconduct, the two countries announced the settlements on the same day, and the SEC settlement explicitly offset the amount due in the United States based on the amount owed in Brazil.26

Some Uncertainty Remains in Brazil

Because the use of U.S.-style settlement agreements in corruption-related cases is a relatively new phenomenon in Brazil, uncertainty surrounding the agreements remains. This poses concerns for companies and individuals looking for certainty in the Brazilian market. The uncertainties include the following.

First, all settlement agreements between the MPF and a defendant under Law 12.850/2013 must be approved by a judge, even though the law prohibits the judge from participating in the actual negotiation of such agreements.27 Therefore, in cases where an agreement is reached pursuant to Law 12.850, an individual may end up in a situation where he or she has confessed to crimes without knowing whether the agreement will be approved. In certain rare cases in the United States, U.S. federal district court judges have refused to approve deferred prosecution agreements, a tool frequently used during FCPA settlements, based on the inadequacy of the agreement conditions.28 However, the District of Columbia Circuit Court of Appeal’s 2016 decision in United States v. Fokker Services B.V. essentially precluded judicial review of the terms of deferred prosecution agreements, which reinforces the certainty surrounding these agreements.29 Furthermore, U.S. prosecutors have tools in the criminal context, including non-prosecution agreements, that allow them to avoid judicial scrutiny altogether.

Second, there is a lack of coordination among Brazil’s different entities charged with enforcing corruption-related laws. This may be due, in part, to the fact that the Clean Companies Act lacks clarity as to how the various government entities should go about collaborating to negotiate leniency accords. As mentioned above, the law explicitly grants power to the Ministry of Transparency, and subsequent regulations allow for the AGU’s and the TGU’s participation, but it is still unclear how the MPF and other interested entities
(e.g., state prosecutors) should cooperate with their counterparts when negotiating leniency accords under the Clean Companies Act.\textsuperscript{30} In practice, throughout Operation Car Wash, the MPF entered into agreements with companies relying on laws other than the Clean Companies Act and often failed to coordinate with other public entities, such as the Ministry of Transparency, during the course of its negotiations with these companies. This lack of coordination may threaten both the validity and the finality of such agreements,\textsuperscript{31} or at the very least, make companies less willing to voluntarily disclose potential misconduct to authorities in Brazil.

Third, the failed leniency accord with SBM Offshore (SBM) suggests that there may be a difference of opinion regarding the requisites for leniency accords among authorities within the same institution. In July 2016, SBM, a Netherlands-based oil services firm, entered into a leniency accord with the MPF, the Ministry of Transparency, the Attorney General’s Office, and Petrobras to settle allegations that the company paid bribes to officials at Petrobras.\textsuperscript{32} In exchange for a discharge of legal responsibility relating to allegations that SBM paid bribes to Petrobras executives from 1996 to 2012, the leniency accord required SBM to provide information to aid in the Brazilian government’s continued investigation and to adopt additional compliance protocols. Additionally, SBM agreed to pay $328.2 million to Petrobras (through fines and future reduced contract prices) and $13.6 million to the Brazilian government.\textsuperscript{33}

On 1 September 2016, the Fifth Chamber for Coordination and Review and Anti-Corruption (Fifth Chamber), a review board within the MPF, rejected the settlement, finding it too lenient.\textsuperscript{34} On appeal, the agreement was once again rejected.\textsuperscript{35} While the negotiations with SBM marked a step forward for collaboration among different governmental organs, the fact that there was a disagreement within the MPF regarding leniency requirements suggests that greater internal consensus regarding settlement arrangements may be required. In an apparent effort to standardize the settlement process, on 29 August 2017, the MPF issued guidelines for negotiating and entering into leniency agreements.\textsuperscript{36} The guidelines address a variety of issues including the number of prosecutors required to participate in the negotiation process, minimum obligations of cooperating companies, obligations of the MPF, evidence sharing, the coercion of collaborators, international cooperation, and penalties.\textsuperscript{37} Although uncertainties surrounding leniency accords remain, at the very least, the MPF’s guidelines help to shed some light on what was previously a rather opaque process.

**Conclusion**

Despite the fact that Brazilian authorities are often viewed as having less discretion than U.S. authorities, recent developments, largely fueled by Operation Car Wash, have allowed them more flexibility. While these “tools” now regularly used by Brazilian authorities may not be without their problems, the significant number of settlements reached throughout Operation Car Wash demonstrates the importance of such tools in anticorruption enforcement in Brazil and globally.

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Endnotes


2 Note: On 4 Sept. 2017, Brazil’s Attorney General Rodrigo Janot opened an investigation to evaluate the validity of the MPF’s agreement with Joseley Batista and two other collaborators based on newly discovered evidence. Therefore, the finality of Joesley Batista’s agreement with Joseley Batista and two other collaborators based on Janot opened an investigation to evaluate the validity of the MPF’s agreement with Joseley Batista and two other collaborators based on newly discovered evidence. Therefore, the finality of Joesley Batista’s agreement with the Ministério Público Federal, Instauração de Procedimento de Revisão de Acordo de Colaboração (4 Sept. 2017), http://www.mpf.mp.br/pgd/documentos/despacho1.pdf.

3 See Decreto-Lei No. 3.689, of 3 de Outubro de 1941, CÓDIGO DE PROCESSO PENAL [C.C.P.], arts. 24, 42, 576.


10 With regard to private criminal actions, the right to prosecute the crime in court is granted exclusively to the victim, his/her representative, or successor. In a private criminal action, the victim has broad freedom to choose whether to file a complaint as well as whether to withdrawal the complaint or refuse to file an appeal.

11 The 1988 Federal Constitution of Brazil expressly states that the Ministério Público has exclusive authority to prosecute a public criminal action, CONSTITUIÇÃO FEDERAL [C.F.] [Constitution] art. 129, i. As noted above, the Brazilian Code of Criminal Procedure states that, in the case of crimes treated as public criminal actions, the formal accusation should always be asserted by the Ministério Público (Article 24), which may not refuse to prosecute the proposed criminal action (Article 42) or an appeal (Article 576). See Decreto-Lei No. 3.689, of 3 de Outubro de 1941, CÓDIGO DE PROCESSO PENAL [C.C.P.], arts. 24, 42, and 576.


15 Id. art. 1, § 1.


17 Id. art. 16, § 10.


21 See Lei No. 12.846 supra note 16, art. 16.


27 See Lei No. 12.850/2013, supra note 14 (“The judge will not participate in the negotiations underlying the collaboration agreement . . . between the Ministério Público[,] the individual being investigated or accused[,] and his or her defense attorney.”).


30 Note: On 18 Dec. 2015, former President Dilma Rousseff issued Provisional Measure No. 703, which would have amended the Clean Companies Act to encourage involvement of the MPF, the CGU, and the AGU in the negotiation and validation of leniency agreements; however, it was never approved by Congress.


33 Id.


37 Id.
convenience stores and gas stations—are owned by the state. Further, there is no clear place in this framework for the ban on individual people-to-people travel. Although the White House has indicated that this category of travel was removed because it “was at the highest risk of potential abuse of the statutory ban on tourism,” removing this category of travel may negatively impact Cuban entrepreneurs, as U.S. travelers will be forced to travel in larger groups that Cuban-owned small businesses are unable to accommodate.

Diplomatic Strain and a National Security Conundrum

Despite the apparent stasis related to the promulgation of the new regulations and the Trump administration’s insistence that it wishes to continue economic rapprochement with the Cuban people, recent events between the two countries may indicate a reversal in the U.S.-Cuba rapprochement.

The U.S. Department of State recently notified the public that, beginning in 2016, “specific attacks” were made on diplomatic personnel in Havana and that twenty-two individuals were “medically confirmed to have experienced health effects” stemming from those attacks. Reports indicate that U.S. personnel have suffered significant injuries, including “hearing loss, dizziness, headache, fatigue, cognitive issues, and difficulty sleeping” as a result of these attacks. The U.S. government has not specifically identified the nature of the attacks. It has noted, however, that the attacks have been “an ongoing series of incidents that are affecting [U.S.] diplomatic personnel” that “have persisted over a long period of time,” and that the harm caused by the attacks is “from some unknown means and method.” The United States and Cuba are cooperating in the investigations of the attacks, but have yet to determine the source or nature of the attacks.

The Trump administration was initially adamant in its position that Cuba is not responsible for the attacks, that the United States’ response to the attacks “does not signal a change of policy or determination of responsibility for the attacks,” and that the United States will be “maintaining diplomatic relations with Havana.” At that time, the administration took certain diplomatic actions on the basis that Cuba had failed to meet its responsibility to take “all appropriate steps to prevent attacks on [U.S.] diplomatic personnel and U.S. citizens in Cuba.” U.S. actions in response to the “specific attacks” fall under three main categories: (1) actions prioritizing the safety of U.S. citizens; (2) actions responding to Cuba’s efforts to protect U.S. personnel located in Cuba; and (3) actions impacting travel between the two countries. It was only after the U.S. Department of State took these measures that President Trump announced that he believed “Cuba knew about [the] attacks” and that he “believe[d] Cuba [was] responsible.”

Actions falling under the first category took place on 29 September 2017 and directly relate to ensuring the health of U.S. citizens. In particular, the U.S. Department of State “ordered the departure of non-emergency personnel assigned to the U.S. Embassy in Havana, as well as all family members,” reduced the embassy to emergency personnel only, and issued a travel warning “advising U.S. citizens to avoid travel to Cuba” as the attacks “occurred in U.S. diplomatic residences and hotels frequented by U.S. citizens.” These actions were taken in response to the Cuban government’s inability to ensure the safety of U.S. diplomats, the unknown nature and source of the attacks, and the inability of the Department of State to “recommend a means to mitigate exposure” to any further attacks. The ordered departures will severely limit the embassy’s ability to advocate for U.S. citizens on the island and to process visas for Cubans seeking to travel to the United States. The effect of the travel ban is unclear, but may dissuade U.S. citizens from visiting Cuba and, as such, limit the flow of U.S. dollars to the burgeoning Cuban entrepreneur sector.

The May and October 2017 expulsions of Cuban officials from the Cuban Embassy in Washington, D.C., fall into the second category. On 9 August 2017, the U.S. Department of State announced it had expelled in May 2017 two Cuban officials from the Cuban Embassy; then, on 3 October 2017, the State Department announced
the additional expulsion of fifteen Cuban officials. The U.S. Department of State noted that “[t]he decision was made due to Cuba’s failure to take appropriate steps to protect [U.S.] diplomats in accordance with its obligations under the Vienna Convention” and, in light of the removal of U.S. personnel from the embassy in Havana, “to ensure equity in [the countries’] respective diplomatic operations.” As a result of the expulsions, the Cuban Embassy will be limited in its resources to process the visas of U.S. citizens seeking to visit Cuba, effectively limiting travel beyond the administration’s announced regulatory changes. Further, although the United States has stated that these actions “do[] consular and diplomatic activity. The U.S. Department of State has ordered the indefinite suspension of routine visa operations in the U.S. Embassy and has explicitly limited the functions of remaining U.S. personnel to “core diplomatic and consular functions, including providing emergency assistance to U.S. citizens in Cuba.” As such, Cuban nationals can no longer obtain a visa to visit the United States for any reason. Further, the Department has ordered significant restrictions to short-term travel by U.S. officials to Cuba. U.S. officials may no longer travel to Cuba on official delegations or to engage in bilateral meetings; short-term travel by U.S. officials is permissible only insofar as it relates to national security, crucial embassy operations, or the ongoing investigations into the attacks.

The U.S. Department of State’s directives are significant. One could argue that the danger posed by the attacks themselves would have organically limited travel by U.S. officials to Cuba. One could also argue that the downsizing of personnel in Havana alone would effectively limit the embassy’s visa operations. It is possible that the limit on official travel and the restriction on routine visa operations could demonstrate an emerging policy significantly reducing engagement with the island. Ultimately, however, the reason and purpose behind these directives are unclear, although it is notable that Cuba has not imposed similar restrictions on diplomatic travel to the United States or on the issuance of visas.
Reconciling the Trump Administration’s Approach to Trade Regulations and National Security

The Trump administration’s ultimate Cuba policy is unclear. Its approach to trade policy seems contradictory to its response to attacks against embassy personnel. On the one hand, the proposed trade regulations purportedly focus on promoting human rights in Cuba while maintaining the Obama administration’s policy of economic interaction and purposeful travel. On the other hand, the measures taken in response to attacks on U.S. personnel in Cuba seem to drastically limit diplomatic relations and people-to-people exchanges between the countries. Although the reason for the contradiction is unknown, it is possible that the divergence in policy may be due either to a long-term strategy to reverse the Obama administration’s changes in U.S.-Cuba policy or a short-term strategy to pressure Cuba into implementing diplomatic reforms in early 2018. Nevertheless, the U.S. Department of State’s announcements will likely impact travel, business, humanitarian, and educational opportunities between the two nations.

Although President Trump’s initially announced changes to U.S.-Cuba policy seemed to focus only on transactions benefitting the Cuban military and individual people-to-people travel, it is possible that the response to the embassy attacks is part of a long-term strategy to return U.S.-Cuba relations to a pre-Obama status. Indeed, in his June address to the nation, President Trump stated that he would be “canceling the last administration’s completely one-sided deal with Cuba” on the basis that “[t]he previous administration’s easing of restrictions on travel and trade [did] not help the Cuban people,” but instead led to “more repression” and served “to crush the peaceful, democratic movement [in Cuba].”41

One could argue that the U.S. Department of State’s announcements constitute an effective reversal of existing U.S.-Cuba regulations, as the measures taken by the U.S. State Department focus on core aspects of the Obama administration’s Cuba policy: diplomatic exchange and travel. Indeed, the removal of U.S. and Cuban personnel from their respective embassies limits the activities in which either embassy can engage and could function as an effective “closing” of those embassies. Further, the travel warning, removal of most Cuban embassy personnel, and suspension of the U.S. Embassy’s routine visa operations may create significant barriers to all U.S.-Cuba travel, “ending” the hallmark of Obama’s Cuba policy. Finally, the directive limiting short-term U.S. official visits to Cuba could have a negative effect on the countries’ twenty-two bilateral agreements and memoranda of understanding, ranging from topics related to postal services to health, oil spill mitigation, and commercial air service.42

In the alternative, it is possible that the U.S. Department of State’s actions are meant to pressure the Cuban government into implementing democratic reforms. For almost sixty years, the Castro brothers have governed Cuba. It is no secret that in early 2018, President Raúl Castro will step down and a changing of the guard will take place.43 As such, it is possible that the measures adopted by the U.S. Department of State were meant to set back U.S.-Cuba relations in order to provide the United States with more bargaining power once the new president of Cuba takes office. Indeed, President Trump’s speech stressed that, although the Obama administration “didn’t fight hard enough” in its negotiations with Cuba, the Trump administration “now hold[s] the cards.”44

While the Trump administration’s strategy related to Cuba and the long-term impact of that strategy is unclear, the U.S. Department of State’s recent restrictions may have significant short-term effects. By reducing the number of U.S. Embassy personnel, the U.S. Department of State has limited the number of activities that the current personnel can undertake. As such, fewer businesses will be able to receive support from the U.S. Embassy when entering into negotiations with the Cuban government. Additionally, by suspending the U.S. Embassy’s routine visa operations, the Trump administration has left Cuban citizens with no means of obtaining a visa to travel to the United States, and by severely limiting Cuban Embassy personnel, the Trump administration has made it difficult for U.S. citizens to receive timely visas for travel to Cuba. The impacts of
U.S.-Cuba Relations, continued

this effective travel ban are far-reaching. U.S. businesses may find that fewer U.S. citizens will be able to use their services to travel to Cuba. Cuban entrepreneurs, already burdened by the effects of Hurricane Irma, changing policies in Cuba, and the forthcoming ban on individual people-to-person travel, may face even more difficulties because of reduced U.S. travel and, consequently, reduced U.S. spending on the island. Cuban-Americans may find it difficult to visit family in Cuba, and Cuban citizens will be largely unable to visit family in the United States. Educational exchanges may become fewer and far between, impacting Cuban business owners and independent journalists. Cuban dissidents may also feel the negative effects of the restrictions, as they may find themselves unable to attend educational programs and tell their stories in the United States. Thus, in spite of President Trump’s proclamation in support of the Cuban people, the administration’s actions may have a significant negative impact on Cuban families and civil society.

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Endnotes


2 Id.


9 Id.


16 Id.

17 Id.

18 Id.
U.S.-Cuba Relations, continued

19 Id.
20 Id.
21 Id.
22 Id.
29 Id.
30 Id.
38 Id.
40 Id.
the formation deed or articles of association, and any subsequent change must be memorialized in a notary deed and be filed with the Mercantile Registry.\textsuperscript{12}

6. Registration

6.1. Registration of Cuban companies

State companies are formed by resolution of a Cuban ministry or resolution of a local government.\textsuperscript{13} The resolution must be filed with the State Register of Companies and Budgeted Units ("REEUP" using the initials under its Spanish name, Registro Estatal de Empresas y Unidades Presupuestadas).\textsuperscript{14}

Agricultural cooperatives are formed by resolution of either the Ministry of Agriculture or the Ministry of Sugar.\textsuperscript{15} The resolution must be filed with the State Register of Non-State Agricultural Entities ("REEANE" using the initials under its Spanish name, Registro Estatal de Entidades Agropecuarias No Estatales).\textsuperscript{16}

Non-agricultural cooperatives, joint ventures, wholly foreign-owned companies and wholly state-owned companies are formed by filing a formation deed (i.e., articles of association) before a public notary with the Mercantile Registry.\textsuperscript{17}

6.2. Registration of foreign companies

Foreign companies can register a branch or incorporate an affiliate in Cuba.\textsuperscript{18}

Foreign companies can open branches in Cuba under two different applicable laws: (1) Law 118/2014; and (2) Decree 206/1996. Branches opened under Law 118 are considered a form of foreign investment and must fulfill the requirements under the applicable foreign investment statutes and regulations while branches opened under Decree 206 are exclusively for the purpose of trading goods.

Decree 206 branches are the most common. The application is filed with the Chamber of Commerce of Cuba. The license is issued at the discretion of the Ministry of Foreign Trade and must fulfill the following requirements:\textsuperscript{19}

\begin{itemize}
\item[a)] Government’s interest in the business. The government will consider the class of goods the company intends to trade, the transfer of technology involved, financing, solvency, and prestige of the company.
\item[b)] The company’s capital must be subscribed and paid in an amount greater than US$50,000.00 or its equivalent.
\item[c)] The company must have had business operations with Cuban entities for an annual value greater than US$500,000.00 for at least the prior three years.
\end{itemize}

6.3. Redomiciliation/transfer

Foreign companies may be redomiciled as a Cuban company, and Cuban companies may be redomiciled in foreign countries.\textsuperscript{20}

6.4. Time requirement

Usually there is no time limit for the formation of companies in Cuba. Nonetheless, companies formed in the Mariel Special Development Zone\textsuperscript{21} should be formed within sixty-five days,\textsuperscript{22} and wholly foreign-owned companies and joint ventures should be formed in approximately eighty-two days.\textsuperscript{23}

6.5. Confidentiality

All information filed with the Mercantile Registry becomes part of the public record. Companies must file matters such as their corporate name, domicile, articles of association, capital of the company, shareholders and type of issued shares, directors, officers, liquidators and auditors, powers of attorney granting agency powers, opening and closing of branches, bankruptcy, transformation, merger, division, dissolution and liquidation, judicial or administrative decisions related to the company, and financial statements.\textsuperscript{24}

7. Reporting and Recordkeeping

Joint ventures, wholly state-owned companies, wholly foreign-owned companies, some state companies,\textsuperscript{25} and non-agricultural cooperatives must file an annual
Formation of Companies in Cuba, continued

financial statement with the Mercantile Registry.\textsuperscript{26} Dual filing is required for certain companies. Wholly state-owned companies, wholly foreign-owned companies, and joint ventures must file financial statements with both the Mercantile Registry and the Ministry of Foreign Trade.\textsuperscript{27} Agricultural cooperatives are required to present their financial statements to the Ministry of Agriculture or the Ministry of Sugar.\textsuperscript{28}

A company may, but is not required to, have a corporate seal.

8. Formation Documents

\textit{Articles of Association:} Wholly state-owned companies, wholly foreign-owned companies, and non-agricultural cooperatives must have articles of association. The articles must be memorialized in the form of a deed made before a notary public, and filed with the Mercantile Registry. The articles are the formation document per se, but formation of the document occurs upon the filing with the Mercantile Registry. The name in Spanish is \textit{Escritura Constitutiva o Escritura de Constitución}.

\textit{Bylaws:} Most companies usually have, but are not required to have, bylaws. Only non-agricultural cooperatives, joint ventures, and wholly foreign-owned companies are required to have bylaws.\textsuperscript{29} Because of the lack of a business association law in Cuba, and the gaps that exist in Cuban law as a result thereof, it is recommended that all companies have bylaws, however. The bylaws are memorialized in the form of a deed made before a notary public and filed with the Mercantile Registry. The name in Spanish is \textit{Estatutos}.

A state company must create an internal guideline, but does not have articles of association or bylaws. These must be approved by the ministry to which the company is subordinated.\textsuperscript{30}

\textit{Certificate of Government Approval:} Every company requires high-level government approval for the formation process. The authorization is discretionary. There is no right to form a company in Cuba.
9. Powers

The ultra vires doctrine applies in Cuba. Every entity, its shareholders, directors, and officers have all of the powers granted by law and may carry on any lawful powers necessary to conduct the entity’s business. Ultra vires acts are void.

10. Shareholders/Members

Agricultural cooperatives, wholly foreign-owned companies, and joint ventures must have at least two shareholders; wholly state-owned companies can have a single shareholder, and state companies do not have shareholders, partners, or members, as they are non-societal companies subordinated to a ministry.

Grade-one non-agricultural cooperatives (where only natural persons can be members) require at least three members, and grade-two cooperatives (where only cooperatives can be members) require two members.

10.1. Residency and nationality

Foreigner investors can hold interests only in a wholly foreign-owned company or in a joint venture.

Cuban residents can participate only in cooperatives. Note that the residency requirement is permanent residency, not just Cuban citizenship. For example, an Italian citizen who is a permanent resident in Cuba can be a member of a cooperative, but the holder of a Cuban passport who is not a permanent resident of Cuba cannot.

10.2. Registration and reporting

Companies must disclose and file with the correspondent register the names of their shareholders/members.

State companies must disclose the government entity to which they are subordinated.

11. Single Member Companies

Generally, single member companies are not permitted; however, wholly state-owned companies may have a single shareholder.

12. Capital

12.1. Share capital

Only wholly state-owned companies, wholly foreign-owned companies, and joint ventures have share capital. These companies have a corporate structure with capital divided into registered shares. Bearer shares are not permitted.

There is no minimum authorized capital requirement, except for financial institutions and insurance companies.

<table>
<thead>
<tr>
<th>Company Structure</th>
<th>Minimum Capital</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Banks</td>
<td>CUP$5 million</td>
</tr>
<tr>
<td>2. Non-Bank Financial Institutions</td>
<td>CUP$2 million</td>
</tr>
<tr>
<td>3. Insurance Company</td>
<td>The minimum subscribed capital must be as follows (depending on the insurance purpose), and at least 50% must be paid-in:</td>
</tr>
<tr>
<td>a) Group I: Life insurance</td>
<td>CUP$2 million</td>
</tr>
<tr>
<td>b) Group II: Property insurance</td>
<td>CUP$1.2 million</td>
</tr>
<tr>
<td>c) Group III: Credit and civil liability insurance</td>
<td>CUP$1 million</td>
</tr>
<tr>
<td>d) Group IV: Service insurance</td>
<td>CUP$500,000.00</td>
</tr>
<tr>
<td>e) Group V: Reinsurance</td>
<td>CUP$3.2 million</td>
</tr>
</tbody>
</table>

12.2. Transfer of shares

The transfer of shares in a joint venture requires the approval of the government entity that originally approved the formation of the company. There is no legal prohibition on the transfer of shares in wholly foreign-owned companies or wholly state-owned companies.
Formation of Companies in Cuba, continued

Entities in Cuba can buy back or redeem their own stock, but only to cancel stock and only if using surplus capital.  

12.3. Capital modification  
A company may reduce or increase its registered capital by resolution of shareholders. The quorum requirements shall be agreed to in the articles of association or bylaws. A supermajority vote of at least two-thirds is required for a quorum. The shareholders must receive notice of the purpose of the meeting where share capital is being reduced, even if an ordinary meeting is in session. The resolution must be certified and notarized before a public notary and then filed with the Mercantile Registry.  

12.4. Dividends/distributions  
Dividends may be paid in cash, corporate property, or stock, as provided in the articles of association or bylaws.  

13. Directors and Officers  
13.1. Appointment of directors  
Companies may have any number of directors, except state companies, which have only one director appointed by the sponsoring ministry. Directors are appointed by vote of a majority of shareholders following provisions in the articles of association or bylaws.  

13.2. Duties and powers of directors  
Directors of a company must act in good faith and will hold duties and powers granted in the articles of incorporation, bylaws, shareholders agreements, or statute. Duties of the directors of state companies are listed in statute. Additionally, agricultural cooperatives and state companies must act in the best interests of the public good.  

13.3. Officers  
Officers can be appointed as required or permitted by a company’s articles of association or bylaws. No specific officers are required to be appointed.  

13.4. Committees  
Unless restricted in the articles of association or bylaws, the directors of a company can delegate any of their powers to a committee of directors. Directors of state companies can delegate a statutorily listed number of functions.  

13.5. Liability and indemnification of directors and officers  
There is no prohibition or regulation for a company to indemnify or purchase insurance for its directors or other employees.  

14. Meetings  
Companies are not required to hold either annual or special shareholders’ or board of directors’ meetings, unless otherwise agreed to in the articles of association or bylaws.  

15. Resolutions  
Directors and shareholders can issue resolutions to approve matters that have been reserved to them in the articles of association or bylaws. The right to adopt a resolution by unanimous consent in writing must be permitted by the articles of association or bylaws. Note that the director of a state company has the power to issue resolutions by himself or herself.  

16. General Accounting Practices  
While a company must maintain proper books of account under the Cuban Rules of Accounting, the accounts need not be filed with the Mercantile Registry. Cuban companies must audit their financial statements every year. Wholly foreign-owned companies, wholly state-owned companies, joint ventures, non-agricultural cooperatives, and state companies must use an external auditor to audit and certify their financial statements. These companies are required to file with the Mercantile Registry their annual financial statements certified by external auditors.
Agricultural cooperatives are required to be audited and to have their financial statements certified by the Ministry of Agriculture or the Ministry of Sugar.  

Wholly state-owned companies, wholly foreign-owned companies, and joint ventures must file their financial statements with both the Mercantile Registry and the Ministry of Foreign Trade.  

17. Mergers & Acquisitions

State companies can be merged. The merger needs the approval of the ministries to which the companies are subordinated and from the Ministry of Economy and Planning.  

There is no prohibition on the merger of wholly foreign-owned companies, joint ventures, or wholly state-owned companies, but there is no merger regulation in Cuba for these companies.

Agricultural cooperatives can be merged, subject to the approval of the Ministry of Agriculture or the Ministry of Sugar.

Appraisal Rights: There are no provisions for appraisal rights (i.e., the right to require the company to purchase the shares of dissenting shareholders) in Cuban law. Since there are no such provisions, shareholders may agree on appraisal rights in the applicable articles of association or in shareholders’ agreements.

Conversion: There are no conversion provisions in Cuban law.

18. Liquidation/Dissolution

A company may be dissolved voluntarily or involuntarily. The procedures thereof must be provided in the bylaws or by statute.

The dissolution of a state company requires the approval of the government entity to which it is subordinated.

Osvaldo Miranda works as a foreign associate at Greenberg Traurig’s Miami office, with the firm’s Latin American and Iberian Practice. He assists clients doing business in Latin America and the Caribbean, including Cuba, Brazil, Mexico, Colombia, and Panama. Miranda practiced law in Cuba as an attorney representing private clients and as a judge in one of Cuba’s commercial courts. His practice in Cuba focused exclusively on representing foreign investors doing business in the island. During this time, he was engaged in several high-profile transactions and court cases, such as Tokmakjian, Coral Capital, Marambio, and Habaguanex. Miranda is a licensed attorney in New York and Cuba. He is also a licensed foreign legal consultant in the State of Florida. He graduated from the University of Havana and Duke Law School.

Endnotes

4. Decree-Law 305 § 5.
5. Despite that wholly state-owned companies and wholly foreign companies are both corporations, they are regulated by different laws.
7. Resolution 205/2003 Ministry of Justice § 2(1)(a), (b).
8. There are two official currencies in Cuba, the Cuban Convertible Peso (CUC) and the Cuban Unit Peso (CUP). The current conversion is 1CUCx25CUP. See http://www.bc.gob.cu/Espanol/default.asp.
12. Decree-Law 226 § 20(2)(b), 21(2)(a); Decree 42 § 16(a); Decree 309 § 21(d).
15. Law 95 § 14.
18. Law 118 16(2)(b)(c).
21. The Mariel Special Development Zone is an area of 465.4 square kilometers (180 sq. mi.), 45 km. (28 mi.) west of Havana, under specific statutory and regulatory rules in which the Cuban government grants a substantial group of benefits and guaranties, mostly tax related, to investors that decide to establish their operations in the zone.
23. Decree 325 § 32-36. In the forming a Cuban company, the application for governmental approval is the most time-consuming stage since it involves high-level governmental agencies such as
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There is a chain of governmental entities involved in the process, e.g., in the formation process of a wholly state-owned company, the applicant Ministry (i.e., Ministry with intention of forming a new company with a business purpose related to the field or sector sponsored or regulated by the Ministry) must file the application with the Ministry of Foreign Trade, which will present the application to the Ministry of Economy, which will then present the application to the Council of Ministers, which is the entity with the ultimate power to approve the formation of the new company. Resolution 260 Ministry of Foreign Trade § II(6). Every company has a different process of formation.

32 The formation must be authorized by the Ministry related to the business purpose of the prospective company (e.g., a formation of a construction company must be approved by the Ministry of Construction).

33 Decree 42 § 15.

34 Resolution 260 Ministry of Foreign Trade § II(6).

35 The Council of State grants authorization when the business purpose is related to public services or natural resources except when made through contracts of international economic associations at risk for the exploitation of non-renewable natural resources. The Council of Ministers grants the authorization when the business purpose is related to (i) real estate development; (ii) fully foreign capital companies; (iii) the transfer of state property or other realty over state property; (iv) contracts of international economic association at risk for the exploitation of non-renewable natural resources; (v) when a public foreign company participates in the formation; (vi) the use of renewable energy sources; (vii) health care, education, and armed-force-related; (viii) others that do not require the approval of the Council of State. The Council of Ministry can delegate its authorization power to a particular Ministry. Law 118 § 21(2), (3), (4).

36 Id.

37 Law 95 § 14.

38 Decree 305 § 12.

39 Law 59 § 41.

40 Law 59 § 42.

41 Law 59 § 67(g).

42 Law 118 § 2(g), (h); Law 95 § 4, 5; Resolution 260 Ministry of Foreign Trade.

43 Decree 42.

44 Id.

45 Law 118 § 2(g), (h).

46 Law 95 § 4, 5; Decree Law 305 § 10(1)(b); Decree-Law 305 5(1); Decree 42.

47 There is no express obligation in Cuban law to disclose the shareholders’ names to the Mercantile Registry. Notwithstanding, the obligation to file with the Mercantile Registry the articles of association and any further modification thereof will cause the effect of disclosing the shareholders’ names. Decree-Law 226 Law 118 § 22(2)(c), 23 (1)(a).


49 Law 118 § 2(g); Resolution 260 Ministry of Foreign Trade.

50 Law 498/1959 § 70.

51 Agreement 115/1998 Cuban Central Bank Section II (2).

52 Id. (3).

53 Decree-Law 177 § 10(1).

54 Law 118 § 14(1)(a).

55 Law 498/1959 § 87.

56 Law 498/1959 § 168.

57 Commerce Code § 168.


59 Decree 42 § 76.

60 Note that Cuban law suffers from a significant gap of corporate provisions such as shareholders’ agreements or voting rights. Articles of association and bylaws play an important role in the corporate life in Cuba.

61 Note that Cuban law suffers from a significant gap of corporate provisions such as directors’ fiduciary duties. Articles of association and bylaws play an important role in the corporate life in Cuba. The duty to act in good faith and agency powers rules apply to directors through contract provisions in the Civil Code. Law 59 § 6, 42.

62 Decree 42 § 79; Decree 2258/1988 Executive Committee of Council of Ministers, “Cuban State companies” § 23.

63 Law 95 § 3(1); Decree 2258/1988 Executive Committee of Council of Ministers, “Cuban State companies” § 22.

64 Decree 42 § 80.

65 Note that Cuban law suffers from a significant gap of corporate provisions such as board of directors’ resolutions and meetings, shareholders’ agreements, or voting rights. Articles of association and bylaws play an important role in the corporate life in Cuba.

66 Id.

67 Decree 42 § 76, 79; Decree 2258/1988 Executive Committee of Council of Ministers § 23.

68 Resolution 235/2005 Ministry of Finances and Prices.

69 Decree-Law 281 § 64(87)(94); Decree-Law 226 § 19(2)(i), 20(2)(l), 21(2)(k), 23(2)(k); Resolution 230/2005 Ministry of Justice § 21.


71 Law 95 § 45.

72 Law 188 § 53(1); Resolution 260/1999 Ministry of Foreign Trade, IV, Special Disposition (2); Resolution 230/2005 Ministry of Justice § 21.


74 There is no legal provision regulating merger by joint venture or wholly foreign-owned companies in Law 118 or by wholly owned Cuban companies in Resolution 260/1999 of Ministry of Foreign Trade. Notwithstanding, the transfer of shares is regulated in Law 118, which requires authorization of the government entity that originally authorized the formation of the company.

75 Law 95 § 77, 78.

76 Law 59 § 40(1).

77 Decree 42 § 17.
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