INTERNATIONAL LAW QUARTERLY
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A LOOK BACK AT 2019-2020 AND THE YEAR THE WORLD CHANGED

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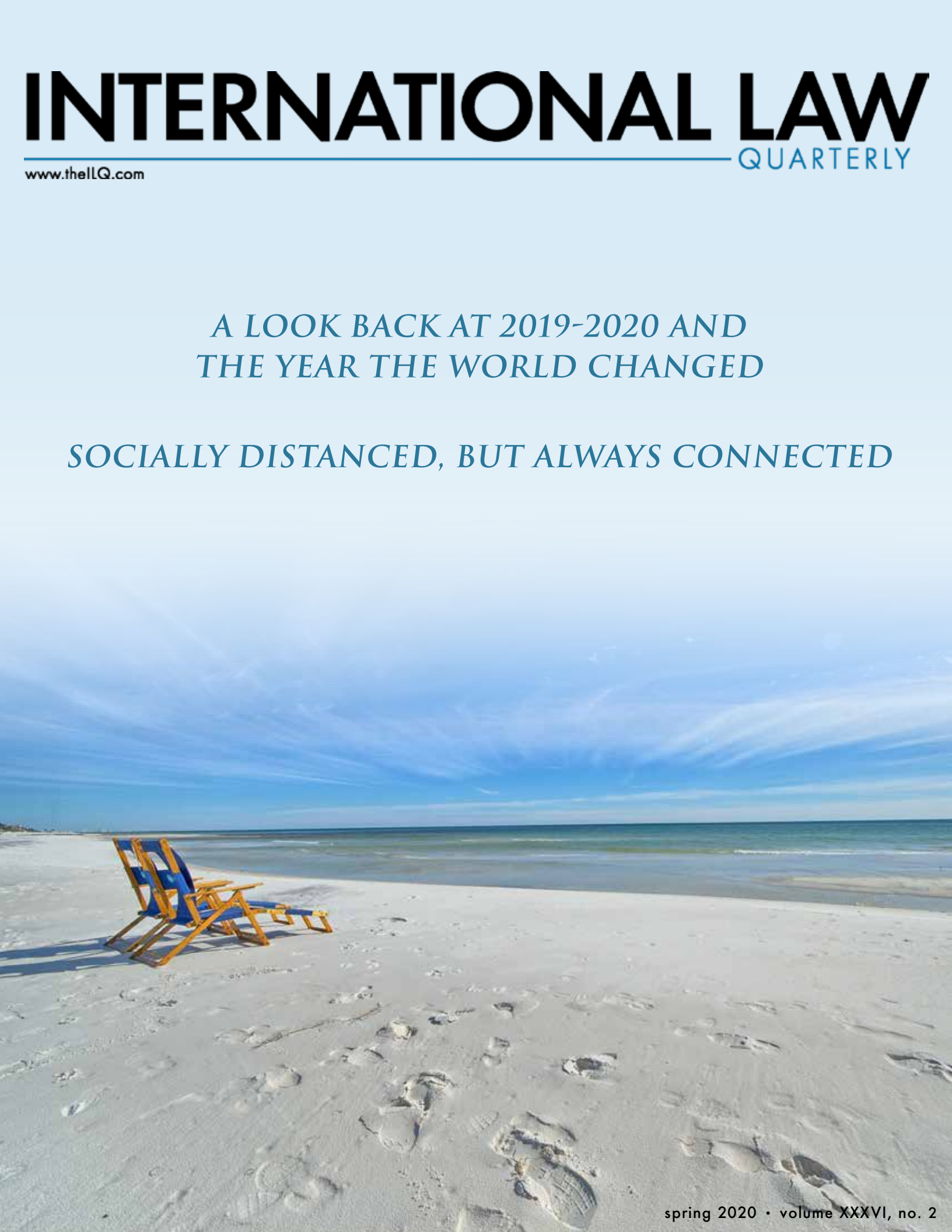

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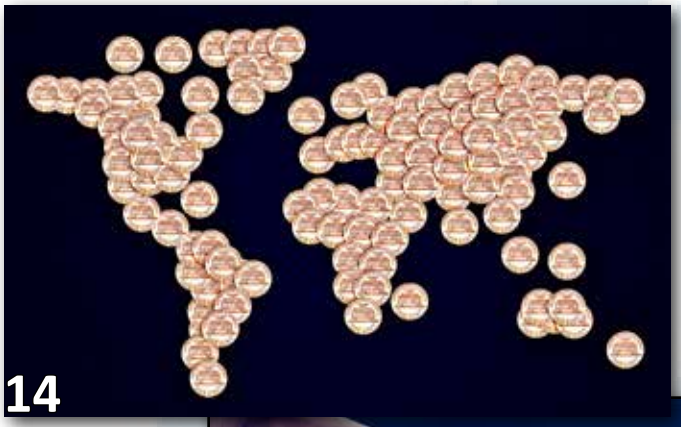

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Section 212(a)(4)(A) of the Immigration and Nationality Act allows for the denial of entry to the United States of any applicant who is considered likely to become a public charge at any time. This article examines the public charge ground of inadmissibility; changes between the former definition of *public charge* and the current definition in the regulations; its applicability to immigrant and nonimmigrants, as well as exemptions; and analyzes the "totality of the circumstances" test to be conducted.

14 • Taxation of Assets at Death—By Whom?

For our international clients who may reside overseas but maintain assets and interests in the United States, determining which country has the legal right to collect taxes upon the death of the decedent can be complicated and intimidating. The goals of this article are to identify unique scenarios that we as international legal practitioners may face in this context, to diagnose the pertinent legal issues in those scenarios, and to present the likely answers. This article also shows that the proper structuring of assets prior to death could significantly reduce U.S. estate tax upon death.

16 • The Effect of the General Data Protection Regulation on Discovery in the United States

The early cases in the United States suggest that the GDPR may have a profound impact on discovery in the United States. The GDPR may provide for targets subject to the jurisdiction of courts in the United States to object to discovery with the purpose (or possibly under the guise) of protecting EU citizens' privacy. This article summarizes the divergent approaches U.S. courts have taken since the regulation came into effect on 25 May 2018 and notes that most courts in the United States are not willing to allow GDPR objections to outweigh a party's right to obtain discovery that it is entitled to obtain in U.S. litigation.

18 • Arbitration in Infrastructure Public Contracts in Brazil: An Overview of Federal Decree No. 10,025/2019

Brazil is generally considered to be an arbitration-friendly jurisdiction. To expand the use of arbitration to matters between the federal government or the entities of the federal public administration and concessionaires, sub-concessionaires, lessees, permit holders, and port operators, the president of Brazil issued Federal Decree No. 10,025. This article explains how the Brazilian legal framework led to the enactment of this Decree. It also highlights the context and the rationale behind the Decree's rules and discusses the main provisions of the novel Decree. Lastly, it addresses the main criticism raised by scholars and practitioners since the new law came into force.

20 • The Human Papillomavirus: Vaccines for One of the World's Most Common STDs Are Not Available Worldwide

Expanding the reach of HPV vaccines to developing countries is not a simple matter—just having permission and perhaps the moral obligation to spread the vaccine has not been enough. This article questions how the definition of the right to health, health care, and medicine could be expanded to obligate action by state and other organizations at times of particular need. Can international patent law and human rights law be combined to ensure adequate care of a vulnerable population worldwide that is so devastated by a virus that can easily be contained? When is "enough" truly enough?

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Message From the Chair

A Look Back at 2019-2020 and the Year the World Changed

By Clarissa A. Rodriguez

CLARISSA A. RODRIGUEZ

Dear friends and colleagues, we did it! The ILS 2019-2020 was a tremendous year. The goal was for the section to focus on serving as a hub of international law activities and events, allowing other groups, organizations, and individuals to access the ILS. We wanted and continue to want the ILS to be the go-to place for international law here in Florida. We accomplished our goal and continue expanding the section's reach.

We kicked off the year with a spectacular ILS leadership retreat at the Ritz Carlton on Amelia Island, Florida. We promoted leadership and wellness as we heard from great motivational speakers, professional coaches, and experts in various fields. Inspired, the ILS was a proud of sponsor of last fall's International Association of Young Lawyers (AIJA) Half-Year Conference in Miami, Florida. ILS members participated in AIJA's famous Home Hospitality Program where the local legal community invites AIJA members to dine in their homes. The experience was tremendous, and the ILS was proud to host its international colleagues.

With outreach always in mind, the ILS continued the tradition of hosting an Orlando Luncheon Program at the Citrus Club in Orlando, Florida. Our northern ILS members hosted a fabulous lunch program with great lectures and networking. ILS Chair-Elect Bob Becerra lined up phenomenal speakers for the 2019-2020 Lunch & Learn series. This is also a great networking that invites ILS veterans to speak about their legal careers, most exciting cases, and life paths in a roundtable format. Hosted by Fiduciary Trust International in Coral Gables, the ILS Lunch & Learn series will continue now in virtual format allowing ILS members from anywhere to join and participate. We finished 2019 strong with a post Art Basel ILS Holiday Party at Avant Art Gallery in downtown Miami, Florida. More than ten past ILS chairs attended this great networking event, and we filled the gallery wall to wall.

The ILS hit the ground running in 2020 with its premier flagship conference, the iLaw2020: Global Forum on International Law. Known by ILS members as the trifecta of international law in Miami, the iLaw2020 is hosted each year right after the ILS executive council meeting and right before the Richard DeWitt Memorial Vis Pre-Moot Competition. On 28 February 2020 at the JW Marriott Marquis, the iLaw2020 reached another milestone in depth and size. This year's ilaw2020 theme was International Corruption, and the panels were bursting with world-renowned speakers and faculty. We were honored to have Florida Bar President John Stewart speak at the iLaw2020 closing reception.

The following day, at JAMS Arbitration Center, the ILS hosted its annual pre-moot competition, named after its founder, the late Richard DeWitt. The ILS continues to be one of the few bar sections across the country that offers law students a pre-moot competition before they travel to Vienna, Austria, to compete at the Willem C. Vis International Commercial Moot Arbitration. The section offers handsome stipends to the Florida law schools competing. The ILS thanks its host and sponsor, JAMS, for offering its facility for the pre-moot competition.

In the spirit of hosting, the ILS has continued to host delegates from various bar associations including

Message From the Chair, continued

India and Spain. Joining eighty-four bar sections from around the world, the ILS participated in the Hong Kong International Roundtable hosted virtually. The bar sections covered the immediate effect of the COVID-19 pandemic on the practice of law, the rule of law, and its foreseeable impacts on international law. The ILS has mutual cooperation agreements with several bar associations around the world and will continue participating in these exchanges in efforts to continue bringing ILS members the latest available information and resources for practicing.

Of course, 2020 is the year the world changed. During the early days of the COVID-19 pandemic, several ILS programs pivoted and the ILS became fully virtual. Almost immediately the ILS was able to create and offer CLE programming focused on the latest available legal information as it pertains to the impact of COVID-19 on immigration, force majeure clauses in international contracts, best business practices, and more. The ILS webinars have been very well received, and we have more programs in process.

This year the ILS was pleased to offer its members wellness and mental health programs in Costa Rica and during the ILS retreat. In the spirit of pivoting, the ILS will be offering webinars with a focus on mediation, yoga, and mental health support.

After four years and with the assistance of 27 authors and editors, the ILS is publishing an international desk reference book. This book was written entirely by ILS members, edited by ILS members, and fully funded by the section. We are extremely proud of this endeavor, which will serve as a practice resource for the two ILS Board Certifications: International Law and International Litigation & Arbitration.

In terms of publishing, the *ILQ* is a substantive legal publication comparable to the *Economist* for its elevated content, professional editing, and truly informative editions. The *ILQ* Winter edition on International Power & Tyranny was an exceptional publication authored by scholars and professors from all over the world. This edition, written and produced remotely during the spread of COVID-19, is amazing.

An ILS member taking advantage of the CLEs available at ILS-sponsored events, roundtables, webinars, luncheons, publishing, iLaw2020, and guest judging at the pre-moot court competition received more than 65 CLE credits, all toward Florida Bar Certifications in both International Law and International Litigation & Arbitration.

With a weekly *ILS Gazette* that reaches thousands of practitioners, the ILS is truly a hub for all things international. As your chair, I am tremendously proud of this section and all of these accomplishments during 2019-2020.

With gratitude,

Clarissa A. Rodriguez
Chair, International Law Section of The Florida Bar
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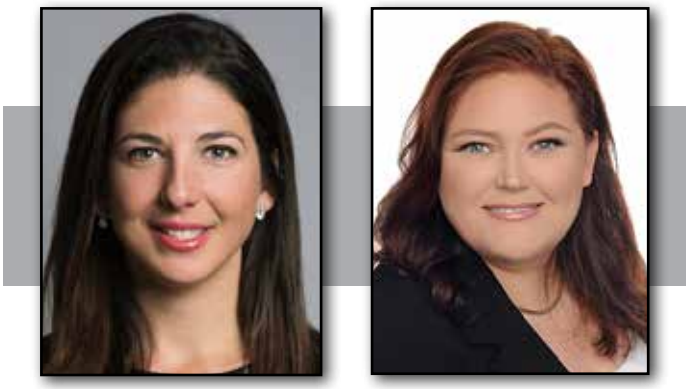
From the Editors . . .
Socially Distanced, But Always Connected



ANA M. BARTON LAURA M. REICH

Dear section members and friends, the editors and staff of the *International Law Quarterly* (*ILQ*) originally sat down to plan this Spring 2020 edition during the International Law Section (ILS) retreat in Amelia Island in October of last year. For anyone who might be curious, it takes approximately six to eight months to bring an edition of the *ILQ* from concept to fruition. At that October 2019 retreat, we blithely selected a topic of focus and promoted that topic to the membership. By December 2019, ILS members were already reaching out with proposed articles, and we began to think seriously about what this edition would look like.

Literally no one will be surprised to learn that those original plans for this edition have changed dramatically. Of course, we were all blissfully ignorant of what 2020 had in store for us. So many professions were dramatically impacted by the coronavirus, and attorneys were not immune. Fortunately, however, as international practitioners, we had some built-in advantages. While certainly our international travel plans were disrupted, we were already accustomed to long-distance relationships with our clients, colleagues, courts, and tribunals. Nevertheless, COVID-19, social distancing, business closures, and remote working changed life for everyone, and it is very likely that some things will never be the same.

Accordingly, we bring you this Spring 2020 edition of the *International Law Quarterly* from our remote working locations—from home offices and virtual offices, and from the living rooms of our condos, townhouses, and other residences. You will likely notice a few changes from prior editions. Some changes to the *ILQ* are temporary. For example, while a few hard copies of the *ILQ* will still be printed, this edition will be primarily distributed by electronic means as so many of our usual distribution channels (including the Annual Florida Bar Convention) have gone virtual. Other planned changes to the *ILQ* have been temporarily postponed, but look for exciting updates in the future.

Some changes to the *ILQ* are here to stay and have never been more important—for example, the *ILQ* now offers a wellness/practice management column entitled "Best Practices," which in this edition offers thoughts from **Paula Black**, a business development coach for attorneys, on **Seven Ways to Become More Efficient While Feeling More Satisfied**. The *ILQ* also now offers thoughts on novel or complex topics presented in longer articles in an "executive" format in our new "Quick Take" column. Our inaugural Quick Take features impressions and thoughts on **Income and Asset Disclosure for Public Charge Law** from **Christina Ackemjack**. This important immigration topic is further explored by **Larry S. Rifken** in **The Public Charge Maze: How to Navigate the New Frontier**.

As the coronavirus forces everyone to consider mortality, international clients who reside abroad but who have assets and interests in the United States may want to consider their estate planning. Key among their considerations may be the issue of what countries may collect taxes upon the death of an international decedent. **Jeffrey S. Hagen** considers this interesting question in **Taxation of Assets at Death—By Whom?**

In **The Effect of the General Data Protection Regulation on Discovery in the United States** by **Amanda E. Finley**, we explore the early U.S. cases suggesting that the GDPR may have a profound impact on discovery in the United States, although courts have, thus far, taken divergent

approaches to this regulation. We also turn our attention to Brazilian arbitration in **Arbitration in Infrastructure Public Contracts in Brazil** by **Thaís Amaral Dourado** and consider the expansion of use of arbitration in matters between the federal government and various third-parties pursuant to newly enacted Federal Decree No. 10,025. Finally, in keeping with the ILS tradition of publishing articles from talented law students, we are pleased to offer **The Human Papillomavirus: Vaccines for One of the World's Most Common STDs Are Not Available Worldwide** by **Natalie Del Cueto**, who has just graduated from Florida International University School of Law. As the world eagerly waits for the development of a vaccine for COVID-19, it is useful to consider lessons learned from the difficulty of providing access to the life-saving HPV vaccine in developing countries.

During these difficult times, the editors and staff of the *ILQ* send their warmest regards to all of our readers. While we must remain socially distanced at the current time, we have never been professionally separated from each other. Through the activities and virtual events of the International Law Section, including this publication, we have remained connected to each other and on the cutting edge of legal developments. We look forward to the next opportunity to network together in person, perhaps with a copy of the next edition of the *International Law Quarterly* in hand. Until then, be well and stay safe.

Best regards,

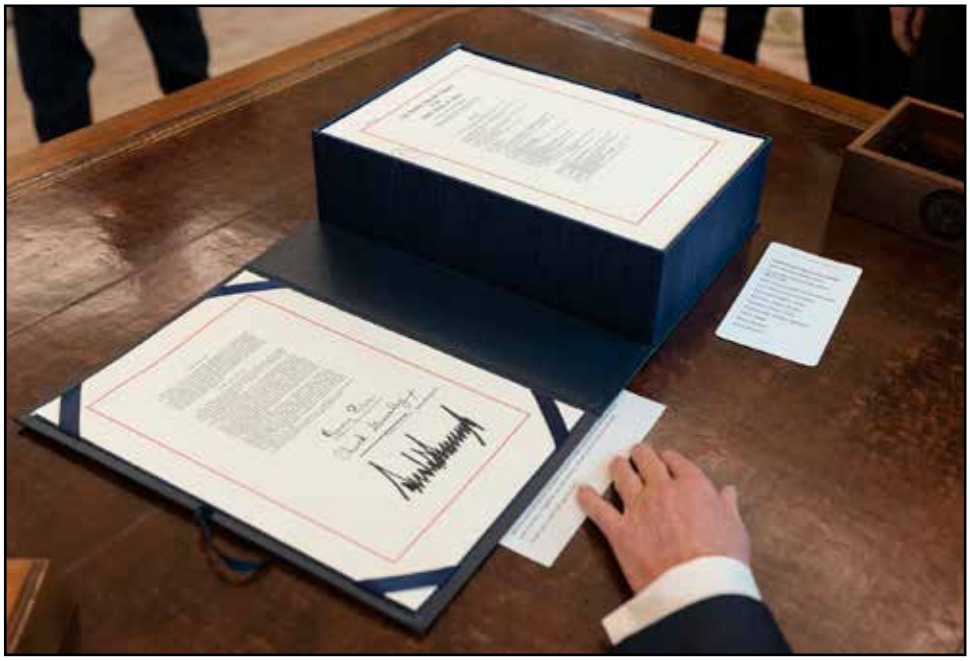
Ana M. Barton—co-Editor-in-Chief
Laura M. Reich—co-Editor-in-Chief

QUICK TAKE

Immigration Law Update: Income and Asset Disclosure for Public Charge Law

By Christina Ackemjack, Miami

The public charge ground of inadmissibility that allows for the denial of visa applications for foreign nationals that are "likely at any time to become a public charge" was introduced in the United States Congress in 1882. Visa applications subject to this ground of inadmissibility include applications for adjustment of status to that of lawful permanent resident (LPR). On 24 February 2020, the United States Department of Homeland Security (DHS) implemented the Inadmissibility on Public Charge Grounds Final Rule (the Final Rule).



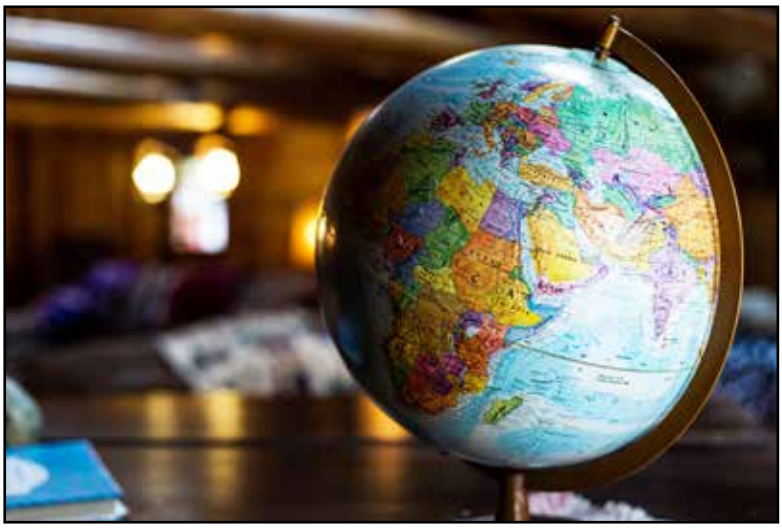
Signing of the CARES Act on 27 March 2020

The Final Rule dramatically changes the adjudication of applications for LPR status processed by the United States Citizenship and Immigration Services (USCIS). Before DHS implemented the Final Rule, legal immigrants could generally demonstrate that they were not inadmissible if they did not previously rely on government benefits, including cash assistance or long-term institutional care. Previously, if a citizen of the United States sponsored the foreign national's application, demonstrating that the value of the sponsor's household income or assets totaled over 125% of the United States federal poverty guidelines, that was also enough to pass the test. Under those circumstances, if the sponsor provided proof of income that exceeded 125% of the relevant threshold, then the sponsor was not required to disclose the sum of their assets.

The Final Rule now places greater scrutiny on the ability of applicants to support themselves under the newly expanded criteria for adjudication. Under the new law, immigration officers determine inadmissibility based on public charge grounds by looking at the factors outlined in 8 CFR 212.22.[1] This requires the immigration officer to review the totality of the applicant's circumstances when deciding whether the applicant is likely at any time to become a public charge. To do so, an immigration officer must weigh all "positive and negative factors" related to the immigrant's "age, health, family status, assets, resources and financial status, education and skills, prospective immigration status and period of stay."[2]

One key change is that USCIS now requires adjustment-of-status applicants to file Form I-944, Declaration of

Immigration Law Update, continued



Self-Sufficiency, in addition to the previously required application forms. Form I-944 is used to collect details about the applicant, including age, health, and financial status. It is precisely the disclosures that applicants make in response to this form that immigration officers use to determine whether an applicant is likely to become a public charge and is therefore inadmissible on public charge grounds.

Considerable public debate followed this dramatic change in the application process, specifically, whether these heightened requirements are a means to protect hardworking American taxpayers and safeguard welfare programs for truly needy Americans or if they are merely a wealth test implemented to chill U.S. immigration. Yet little attention has been paid to the invasiveness of the adjudication process itself with respect to the requested financial disclosures. Form I-944 notifies applicants that their ". . . assets, resources, and financial status are factors USCIS considers when deciding whether [the applicant is] inadmissible based on the public charge ground." Notably, Form I-944 requests the following financial disclosures and supporting documentation:

(1) Household Income. Applicants are asked to provide their annual gross income from their most recent federal income tax return, as well as the gross income of their household members' most recent federal income tax return. Applicants "must" also provide an IRS transcript of their federal income tax return for the most recent tax year and the IRS transcripts of household members if their income was also included.

(2) Additional Income. Applicants must declare additional income that is received on a continuing basis and was not included in their tax return or the tax return of their household members.

(3) Assets. All assets held in the United States or outside of the United States that can be converted into cash within twelve months must be listed. If applicants include the net value of their home, they must also include proof of ownership, evidence of any mortgages or liens on the property, and a recent appraisal by a licensed appraiser. If applicants list a checking and/or a savings account, they must provide the account statements for the most recent twelve months.

In recent days there has been some uncertainty in legal circles as to whether pandemic relief granted under the CARES Act to would-be adjustment-of-status applicants would require disclosure on Form I-944. As legal practitioners await guidance on both the Final Rule and the CARES Act, the impact of the ultimate interpretations of these laws in combination may affect this changing area of immigration law.

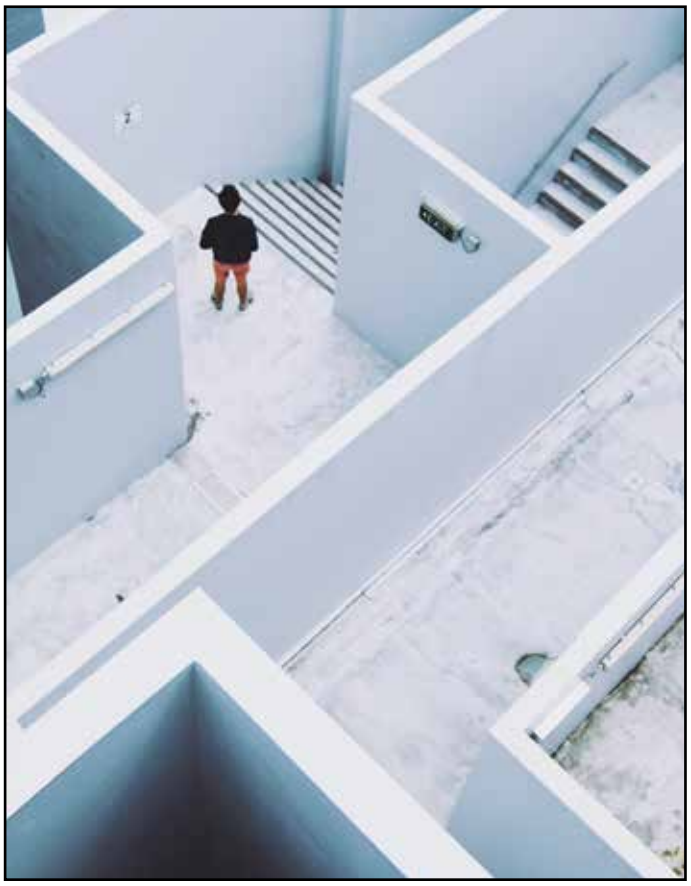
Christina Ackemjack *of Arce Immigration Law PA in Miami, Florida, advises employment-based visa applicants who hope to bring their professional success, as well as their families, to the United States. You may contact Ms. Ackemjack with regard to the new public charge law or with other immigration law questions at 305-330-6262 or christina@arceglobal.com.*

Endnotes

1 8 CFR 212.22.
2 *Id.*

The Public Charge Maze: How to Navigate the New Frontier

By Larry S. Rifkin, Miami



Section 212(a)(4)(A) of the Immigration and Nationality Act (INA) allows for the denial of entry to the United States of any applicant who is considered likely to become a public charge at any time. On 14 August 2019, U.S. Citizenship and Immigration Services (USCIS) (formerly INS), an agency of the Department of Homeland Security (DHS), published a final rule in the Federal Register amending the regulations related to the public charge ground of inadmissibility.[1] The new public charge regulations were originally scheduled to go into effect on 15 October 2019 but were delayed by preliminary injunctions issued by several federal courts that blocked the regulations from going into effect. On 27 January 2020, the U.S. Supreme Court issued an order that stayed the last nationwide preliminary injunctions remaining in effect, thus clearing the way for DHS to implement its new rule.[2] The U.S. Supreme Court subsequently stayed the statewide injunction in Illinois that remained in effect.[3] DHS's new public charge regulations went into effect on 24 February 2020.[4] This article will examine the public charge ground of inadmissibility; changes between the former definition of *public charge* and the current definition in the regulations; its applicability to immigrant and nonimmigrants, as well as exemptions; and it will analyze the "totality of the circumstances" test to be conducted.

DEFINITION OF PUBLIC CHARGE

Statute and Applicability

Section 212(a)(4) of the Immigration and Nationality Act reads as follows:

(4) Public charge

(A) In general

Any alien who, in the opinion of the consular officer at the time of application for a visa, or in the opinion of the Attorney General at the time of application for admission or adjustment of status, is likely at any time to become a public charge is inadmissible.

(B) Factors to be taken into account

(i) In determining whether an alien is inadmissible under this paragraph, the consular officer or the Attorney General shall at a minimum consider the alien's-

(I) age;

(II) health;

(III) family status;

(IV) assets, resources, and financial status; and

(V) education and skills.[5]

The Public Charge Maze, continued

An alien who is likely at any time to become a public charge is generally inadmissible to the United States and ineligible to become a lawful permanent resident (i.e., obtain a green card). The public charge ground of inadmissibility has always applied to the following classes of non-citizens:

- Applicants for adjustment of status in the United States (i.e., people seeking permanent residence in the United States);
- Applicants for an immigrant visa abroad at a U.S. Consulate in the alien's home country;
- Applicants for a nonimmigrant visa abroad at a U.S. Consulate in the alien's home country; and
- Applicants for admission at the U.S. border who have been granted an immigrant or nonimmigrant visa.[6]

Prior Interpretation of Public Charge

The Immigration and Nationality Act does not define the term *public charge*, nor does it provide any detail about how the factors of age; health; family status; assets, resources, and financial status; and education and skills mentioned in the statute should be considered in determining the likelihood of someone becoming a public charge at any time in the future. Legacy Immigration and Naturalization Service (INS) issued guidance that defined a public charge for purposes of admission/adjustment of status and deportation as someone who has become or who is *likely to become* "primarily dependent on the government for subsistence, as demonstrated by either the receipt of public cash assistance for income maintenance or institutionalization for long-term care at government expense."[7] Thus, INS's (and subsequently USCIS's) prior limited definition of public charge only applied in two circumstances: (1) if an alien received public cash assistance, such as Supplemental Security Income

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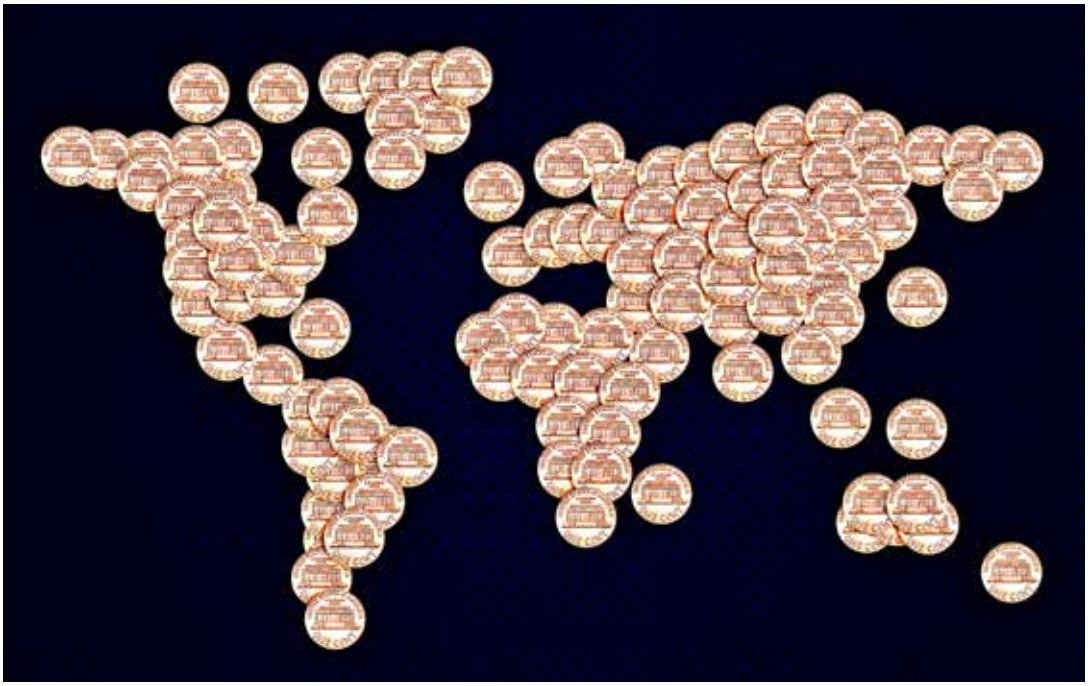
Taxation of Assets at Death—By Whom?

By Jeffrey S. Hagen, Miami

As a pandemic sweeps across the globe, human beings both home and abroad are becoming all too familiar with the unexpected deaths of loved ones. No matter the circumstances of the passing, a decedent's closest of kin or personal representative is often tasked with winding up the decedent's estate to ensure all taxes are rightfully paid and tax returns are properly filed in appropriate jurisdictions after these unfortunate events occur.

For our international clients who may reside overseas but maintain assets and interests in the United States, determining which country has the legal right to collect taxes upon the death of the decedent can be complicated and intimidating. The goals of this article are to identify unique scenarios that we as international legal practitioners may face in this context, to diagnose the pertinent legal issues in those scenarios, and then to present the likely answers. This article will also show that the proper structuring of assets prior to death could significantly reduce U.S. estate tax upon death.



Taxation of U.S.-Situs Assets at Death: U.S. Taxpayers vs. Nonresidents

The following is a brief overview that should illustrate the importance of sound estate tax planning for our international clients, as well as lay a strong foundation for the more granular topics discussed throughout the article's remainder.

U.S. citizens and others domiciled in the United States (U.S. taxpayers) are subject to U.S. estate tax on the value of their worldwide assets when they die, but there is a large exemption in place that excludes most U.S. taxpayers' estates from owing tax. For U.S. taxpayers, estate tax and gift tax are linked through an exemption known as the lifetime exemption amount.[1] For the year 2020, if the value of a U.S. taxpayer decedent's estate at death plus the total gifts made by the decedent during her or his life exceed a total of US$11.58 million, the excess in the decedent's estate will be subject to taxation at a 40% rate.[2] Annual exclusions for gifts up to US$15,000,[3] as well as special rules for spousal combined exemptions and the marital deduction, may also change or increase this number.

This differs sharply from how nonresidents are taxed on their U.S.-situs assets at death. For nonresidents, only a US$60,000 estate tax exemption exists.[4] Many of our clients may fall into the category of being nonresidents and having significant assets here, like tangible personal property located in the United

States, real estate located in the United States, or shares in U.S. corporations. It is worth noting that bank accounts maintained by nonresident decedents are not subject to estate tax;[5] however, it is commonplace for banks to freeze accounts of nonresident decedents until the federal government gives the bank tax clearance, a process that involves the filing of an estate tax return, which can lock up funds for several months.

A lack of proper tax planning can prove costly. For instance, the death of a nonresident owning a US$4 million parcel of real estate in Miami in his individual name could result in an estate tax of between US$1.5 million and US$1.6 million, while the estate of a U.S. taxpayer with a not otherwise depleted lifetime exemption amount would transfer the real estate at death without any estate tax at all.

Domicile and Tax Treaties

The determination of whether a person is a U.S. taxpayer or a nonresident for estate tax purposes is established by where the person is *domiciled*—according to the U.S. definition, the jurisdiction where the person lives and has no present intention of leaving. It is important to note that while obtaining a green card is conclusive of becoming a U.S. resident for income tax purposes, it is only one factor considered for whether a person is a domiciliary for estate tax purposes. Whether or not an individual is a U.S. domiciliary at death is significant, as a U.S. domiciliary is subject to estate tax on worldwide assets with a large exemption while a non-U.S. domiciliary is only taxed on the value of U.S.-situs assets with a very low exemption.

How the concept of domicile is interpreted varies across jurisdictions though,[6] creating discord as to which country has the right to tax assets at death, occasionally resulting in double taxation absent a treaty. The United States currently has fifteen estate tax treaties with other countries. The treaties focus on the shared concept of *fiscal domicile* to eliminate conflicts. Fiscal domicile of a decedent is decided through an ordered series of tiebreakers:

(1) Permanent Home: Continuous availability and control over the dwelling to the taxpayer is relevant, while taxpayer intent is not.[7] A vacation home owned and not rented should therefore qualify as a permanent home, and it is reasonable that a person could have a permanent home in two or more jurisdictions. In some European jurisdictions, the home in which a decedent's family resides may be weighed more heavily than the decedent's professional interests.[8] A person might also have no permanent home, such as a person who works abroad out of hotels and rents out his or her prior residence.

(2) Center of Vital Interests: If the decedent had permanent homes in two countries, facts and circumstances regarding the decedent's personal and economic relations are considered next. Some factors weighed are where children attend school, business locations, social club and religious memberships, where cars are licensed, and even where pets live.[9] While the U.S. Tax Court case *Podd v. Commissioner* does not consider time spent in each location as a material factor, several Canadian cases have concluded personal and economic relations were closer "where life was centered" and "emphasized the time spent in each country." Dutch courts have found that personal interests may prevail over economic.[10]

(3) Habitual Abode: If the center of vital interests test is nondeterminative, or if the decedent does not maintain a permanent home in any jurisdiction, frequency of time spent in a particular jurisdiction becomes the key factor.[11] This test may be inadequate when death cuts the stay in one country short despite the taxpayer's intent to remain or when the duration of stays in both countries have long gaps or intervals in between.

(4) Citizenship: If still no determination is made as to domicile, citizenship of the decedent will control where the decedent is ultimately domiciled, or failing that, the competent authorities of the conflicting jurisdictions will negotiate a mutual agreement.

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The Effect of the General Data Protection Regulation on Discovery in the United States

By Amanda E. Finley, Miami

Introduction

The European Union implemented the General Data Protection Regulation (GDPR), and it became effective on 25 May 2018.[1] The GDPR enforces privacy requirements to protect EU citizens.[2] "The GDPR applies to the processing of 'personal data,' which is defined as any information related to an 'identified or identifiable natural person,'" who can be directly or indirectly identified by the data produced.[3] The GDPR purports to have extraterritorial effect by applying "regardless whether the processing takes place in the EU or elsewhere."[4] The GDPR allows imposition of penalties and sanctions that "significantly increase[d] the maximum fine to €20 million, or 4% of annual worldwide turnover, whichever is greater."[5] Further, "[t]he GDPR provides an individual with access to the courts to seek a judicial remedy" in addition to any administrative remedy.[6] Essentially, any production of documents that contain information about EU citizens could cause serious consequences and large fines for a GDPR violation.

The early cases in the United States suggest that the GDPR may have a profound impact on discovery in the United States. The GDPR may provide for targets subject to the jurisdiction of courts in the United States to object to discovery with the purpose (or possibly under the guise) of protecting EU citizens' privacy. Defendants may object to production as a whole, request significant redaction of the discovery, request a strict confidentiality agreement, request to produce anonymized data that does not identify any EU citizen, or any combination thereof. There is limited case law on the implications of the GDPR on U.S. discovery because it is a relatively new regulation. So far, U.S. courts have taken divergent approaches on how to address and resolve objections to discovery based on the GDPR. Overall, it appears that most courts are allowing production of the discovery in some form, over a defendant's GDPR objection.

U.S. Courts' Historical Response to Discovery Objections Based on Foreign Privacy Statutes or Secrecy Laws

Historically, U.S. courts have been unwilling to allow a foreign privacy statute to preclude the production of responsive documents that were otherwise discoverable in U.S. litigation. As the Supreme Court stated, "[i]t is well settled that such statutes do not deprive an American court of the power to order a party subject to its jurisdiction to produce evidence even though the act of production may violate that statute."[7] The Court further noted that the French "blocking statute" was "originally 'inspired to impede enforcement of United States antitrust laws,' and that it did not appear to have been strictly enforced in France," which further undercut U.S. courts' interest in enforcing that foreign privacy statute over the American interest of full disclosure in discovery.[8] Prior and subsequent courts similarly ruled that foreign privacy statutes are not dispositive on production of discovery in U.S. cases, although the statutes may be relevant to the issue of whether sanctions should be imposed for failure to comply with U.S. discovery orders.[9] Likewise, U.S. courts deemed foreign bank secrecy laws insufficient to preclude discovery in U.S. litigation.[10] Therefore, generally, courts in the United States overwhelmingly have held that full disclosure in discovery outweighs any interest in enforcing foreign privacy or secrecy laws.

A Chronological Review of U.S. Courts' Approaches to GDPR Discovery Disputes and Other Foreign Privacy Statutes

On 5 October 2018, the first published ruling on GDPR in U.S. litigation involved a defendant, Microsoft, raising a GDPR objection to discovery based on the undue burden and cost of producing the discovery due to "the alleged tension with GDPR."[11] The court did not significantly analyze the GDPR issue, but stated that "the court [wa]s not persuaded by Microsoft's arguments concerning undue burden" and required the production of documents.[12]

On 17 December 2018, the first substantive ruling by a U.S. court to address an objection to discovery based on GDPR was in the context of a 28 U.S.C. § 1782 application to obtain discovery for use in a foreign proceeding.[13] The court "grant[ed] the application with respect to documents held by *foreign* custodians only to the extent that the Applicants (1) assume the costs of the document production, including the costs of compliance with the GDPR or other applicable European data privacy laws and (2) indemnify Respondents against any potential breaches of European data privacy laws."[14] Although the court granted production of the documents over the GDPR objection, this ruling has serious adverse consequences for parties seeking discovery in U.S. litigation if the GDPR is implicated because it required unknown and potentially multimillion-dollar indemnification liability on the party receiving the documents.

The approach in *Hansainvest* of requiring indemnification of the discovery target "against any potential breaches of European data privacy laws" is a serious deterrent to any party seeking discovery.[15] It would be unusual and highly unlikely that any party would knowingly accept such an open-ended and potentially large financial risk given the large fines for a GDPR violation. If courts routinely adopted this approach, it would have a significant chilling effect on U.S. discovery when the GDPR is implicated. *Hansainvest* is the only U.S. court, thus far, to rule that indemnification of any GDPR liability is a condition precedent to production of the documents. In later rulings, U.S. courts have taken less drastic approaches to GDPR objections to discovery.

On 14 February 2019, the court in *Finjan* entered a reasoned opinion "conclud[ing] that the GDPR d[id] not preclude the Court from ordering Defendant to produce the requested e-mails in an unredacted form, subject to the existing protective order" and did not amend the existing protective order to include cost splitting related to anonymization, as requested by the defendant.[16] First, the court referenced the Supreme Court ruling that a foreign country's statute precluding disclosure

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Arbitration in Infrastructure Public Contracts in Brazil: An Overview of Federal Decree No. 10,025/2019

By Thaís Amaral Dourado, Miami

Introduction

In 2017, the *Comitê Brasileiro de Arbitragem* (Brazilian Arbitration Committee) found that Brazilian courts enforced 76% of the sixty-one analyzed requests for ratification/enforcement of foreign arbitration awards in Brazil.[1] According to ICC's 2018 statistics,[2] Brazil is "the most represented nationality among parties [involved in ICC dispute resolution] from Latin America (35% of all Latin American parties)." And it has now "reached third place in the overall nationality ranking with 117 parties, following the USA (210 parties) and France (139 parties)."

The 2018 White & Case International Arbitration Survey[3] informed that Brazil occupied the eighth position in the overall ranking of the most in-demand places for arbitration in the world. These statistics demonstrate that Brazil has been one of the most arbitration-friendly jurisdictions in recent years.

Honoring its reputation, Brazil enacted Federal Decree No. 10,025/2019 (the Decree).[4] It regulates the use of arbitration to resolve conflicts involving the federal government or entities of the federal public administration and concessionaires, sub-concessionaires, permittees, lessees, permit holders, or operators in the port, road, rail, waterway, and airport sectors. This

article provides an overview of this Decree. Section II explains the Brazilian legal framework, which led to the enactment of the Decree. Section III highlights the context and the rationale behind the Decree's rules. Section IV discusses the main provisions of the novel Decree. Finally, Section V addresses the main criticism raised after the new law came into effect.

The Legal Framework of an Arbitration-Friendly Jurisdiction

The Brazilian Arbitration Act[5] (BAA), which applies to both international and domestic arbitration, came into force in 1996 and was based on the UNCITRAL Model Law and the 1988 Spanish Arbitration Act.[6] The BAA provides a broad scope of arbitrability, allowing any civil and commercial matters to be resolved via arbitration, even when a dispute involves "state entities."[7]

The BAA establishes no limitation on choosing arbitral institutions, whether international or domestic. Arbitrators must be "any individual with legal capacity," and when a case involves state entities, generally, the parties can appoint foreign arbitrators.[8] The parties can freely choose the language of the arbitration, except for cases involving state entities, which shall be in Portuguese. Nevertheless, under the BAA, it is possible to adopt bilingual arbitration.[9]

The Kompetenz-Kompetenz principle is fully recognized in Brazil, both by the BAA[10] and the Brazilian Code of Civil Procedure.[11] Arbitrators have the power to grant interim measures and may confirm, modify, or reverse interim measures granted by Brazilian courts.[12] An arbitral award rendered under the BAA has the same effect as Brazilian courts' decisions. No appellate proceedings are allowed in Brazilian arbitration, neither as to jurisdiction nor to the merits of an award, even though arbitral awards can be set aside before Brazilian courts under limited grounds.[13] Moreover, anti-arbitration injunctions preventing parties from initiating arbitral proceedings are rare.[14]

Arbitral awards rendered in Brazilian territory can be immediately enforced before the national courts under the same procedure as courts' decisions,[15] except for when the federal government, a state, a municipality, a government agency, or a government foundation is the losing party. In these cases, the BAA provides that a *precatório* (certificate of judgment debt) must be issued in favor of the opposing party. Finally, recognition of foreign arbitral awards in Brazil follows the 1958 New York Convention, ratified in 2002.

Therefore, Brazil has historically been an arbitration-friendly jurisdiction, and the successful statistics reflect its pro-arbitration legal framework. In 2019, the Latin American giant made many legislative advancements in arbitration. At a state level, São Paulo may now participate in arbitral proceedings under State Decree No. 64,356/2019.[16] Disputes in connection with public utility expropriations can be submitted to arbitration and mediation due to the novel Federal Law No. 13,867/2019.[17] Lastly, on 20 September 2019, Brazil passed Federal Decree No. 10,025/2019, regulating arbitration in public contracts in the port, road, rail, waterway, and airport sectors.

The enactment of Decree No. 10,025/2019 establishes one more development in favor of arbitration, for it allows arbitration in public infrastructure contracts. The government's goal is to attract private investors to expand infrastructure in Brazil. On the one hand, the Decree broadens the use of arbitration in the country; on the other hand, it establishes relevant limitations on the BAA's provisions.

Federal Decree No. 10,025/2019: Context and Rationale

In 2007, Justice José Antonio Dias Toffoli, working as Brazil's general counsel, highlighted the need for more effective instruments to achieve material justice. He suggested the use of alternative conflict resolution mechanisms to approximate the Office of the General Counsel for the federal government and the judiciary branch to the citizens and the Brazilian productive sector.[18]

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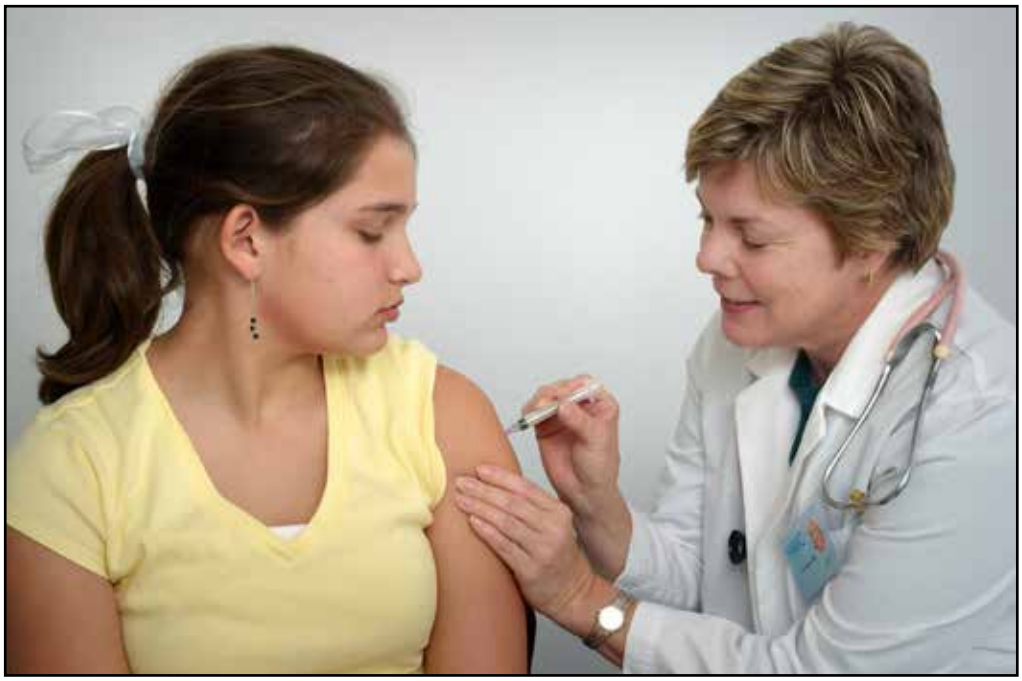
The Human Papillomavirus: Vaccines for One of the World's Most Common STDs Are Not Available Worldwide

By Natalie Del Cueto, Miami

Introduction



The human papillomavirus (HPV) is one of the most common sexually transmitted diseases (STDs) in the world, yet most people who contract HPV do not know they have been infected with one of its more than 100 different virus strains. HPV is particularly dangerous because it has been linked to abnormal cell changes in the cervix that can lead to cervical cancer. Studies show that cervical cancer is the "second most common cancer among women worldwide."[1] About 500,000 women are diagnosed with cervical cancer each year with more than 274,000 deaths annually.[2] Unfortunately, one can see the true inequality in global public health by looking at where most of these deaths occur: Over 80% of the annual deaths from cervical cancer occur in developing countries, and this number is expected to increase to 90% in 2020.[3]

Given the known link between HPV and cervical cancer, it is logical to ensure that the HPV vaccine is readily available in countries where there is a high cervical cancer mortality rate. The HPV vaccine combats the risk of women being diagnosed with an HPV infection at any point in their lives, and thus lowers the risk of cervical cancer; however, "barriers to the HPV vaccine introduction remain [the] greatest in those countries with the highest burden of cervical cancer and [with] the most . . . need for vaccination."[4] The market currently has two HPV vaccines, both of which are owned by pharmaceutical companies.[5] To expand the vaccines' availability, countries, non-governmental organizations, and pharmaceutical companies must work together to increase access in developing countries; however, such efforts are falling short.

Expanding the reach of HPV vaccines to developing countries is not a simple matter—just having permission and perhaps the moral obligation to spread the vaccine has not been enough. This article questions how the definition of the right to health, health care, and medicine could be expanded to obligate action by state and other organizations at times of particular need. We will consider when a government can step in to stop a growing worldwide epidemic from causing massive suffering to women in developing countries. We will also consider when pharmaceutical companies should put human rights at the forefront of their objectives, even

before profits. Can international patent law and human rights law be combined to ensure adequate care of a vulnerable population worldwide that is so devastated by a virus that can easily be contained? When is "enough" truly enough?

Vaccinations as Included in the Right to Health in International Legal Jurisprudence

Let's start at the beginning. In the 1940's, the United Nations created a special committee—the World Health Organization (WHO)—that devoted its time to ensuring that people all over the world could achieve the highest standard of health possible.[6] "Since the creation of the WHO, the international community has continually reiterated its commitment to world health by creating other organizations and programs to deal with health issues on a global scale."[7] In international law, health was mentioned as a fundamental right for the first time in the 1946 WHO Constitution, which imposed obligations on states and governments.[8] "Governments have a responsibility for the health of their peoples which can be fulfilled only by the provision of adequate health and social measures."[9] The WHO Constitution also emphasized the "common danger" of "unequal development in different countries in the promotion of health and control of [communicable] disease[s]."[10]

Shortly after the adoption of the WHO Constitution, the United Nations Declaration of Human Rights was signed in 1948, and forty-eight of the fifty-eight members of the United Nations voted in favor of its ratification.[11] In Article 25, the Declaration emphasized the following "standard" from the WHO Constitution:

> Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.[12]

Next, in 1966, the United Nations Human Rights Committee ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR), which states: "[t]he States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."[13] It further states: "[t]he steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include . . . the prevention, treatment and control of epidemic . . . and other diseases" and "[t]he creation of conditions which would assure to all medical service and medical attention in the event of sickness."[14] In 2000, the committee adopted the ICESCR General Comment No. 14 specifying that "highest attainable health" means "the right to health must be understood as a right to the enjoyment of a variety of facilities, goods, services and conditions necessary for the realization of the highest attainable standard of health."[15]

Since this article argues that states and corporations have an obligation and should step in when there are epidemics to expand access to vaccines in undeveloped countries, it is also important to look at patent and trade regulations, specifically the 1995 Trade-Related Aspects of Intellectual Property (TRIPS) and the 2001 DOHA Declaration on the TRIPS Agreement and Public Health (DOHA Declaration). The TRIPS agreement is a legal international agreement by the World Trade Organization (WTO) that set out the minimum standard for national governments to regulate intellectual property. The TRIPS agreement outlines the minimum requirements for patents worldwide: "Member countries [should] make patents available for any inventions, whether products or processes, in all fields of technology without discrimination."[16]

After the WTO concluded the TRIPS agreement, the WTO adopted the DOHA Declaration to clarify any confusion regarding patent rules and their connection with public health.[17] There were growing concerns that "patent rules might restrict access to affordable medicines for populations in developing countries in their efforts to control diseases of public health importance, including HIV, tuberculosis and malaria."[18] The DOHA Declaration emphasized that "the TRIPS Agreement does not and

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BEST PRACTICES

Seven Ways to Become More Efficient While Feeling More Satisfied

By Paula Black

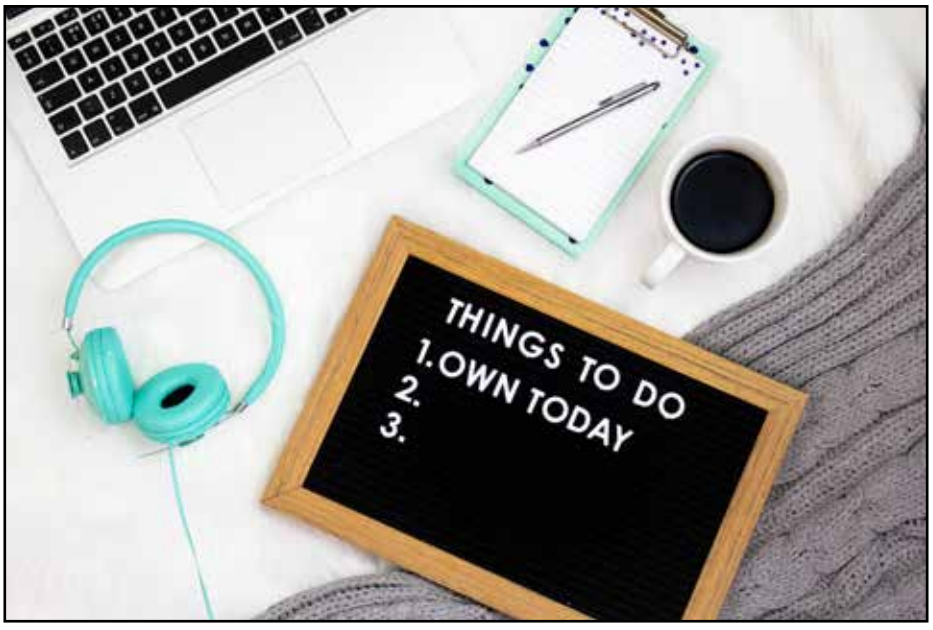
Most attorneys I know fill their schedules each day with more than two people could accomplish in a week. Is that you? It's a vicious cycle because we feel terrible about not being able to accomplish what's on the list—instead of feeling great about what we do accomplish. We literally sabotage our success and the feeling of accomplishment! How ridiculous is that? I think it's time we change that habit, don't you?

Here are things to consider:

1. Should everything on your to-do list really be there? Take an objective look at your list. Pull out your top priorities and the things you really need to MAKE time to do. This is your "daily" list. Then create a "later" list for all the rest. This not only will allow you to focus on your top priorities for the day, but you will be able to see what you have accomplished and feel good about it, instead of stressing over an endless list that never gets done. An unedited to-do list makes you feel like you are not accomplishing anything.

2. Do you say YES to too many things? There are reasons you feel compelled to say yes to the requests from your clients or partners. But there is still a way to control the workload and stress. You can say, "Yes, will next Tuesday work for you?" When you do that, you are setting your own schedule and you are able to gauge the urgency of the request. Most people are *not* asking you to drop everything you're doing to address their matter, but we often react as if they are. When urgency is needed, you have to let the person know that you can't get to it until next Tuesday. And you have the opportunity to drop what you're doing to help, if it makes sense for you. Then they can choose to wait or they can ask someone else.

3. Are you addicted to your email inbox? A key strategy for managing email is NOT to look at it every time you hear an email come in—turn off the notification! Consider this: When you are with a client, you concentrate on that meeting and attend to your emails when you finish. Likewise, when you are in court, you don't answer emails. Why not adopt the same mindset throughout your day and only review email every 60 minutes or at set times such as 9 a.m., noon, 3 p.m., and 6 p.m.? Imagine how much better you could concentrate on your pressing priorities if your email were under control.



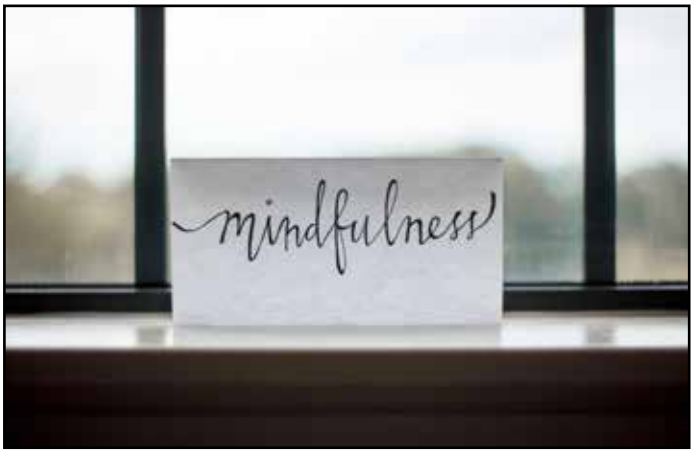
Seven Ways, continued

4. Are you stressed out trying to accomplish work-life balance? Work-life balance doesn't exist—it is an impossible goal. Striving for harmony in your life is a much more attainable goal. Integrate all parts of our life and do not measure your life against others. It's *your* life and you get to decide what's important and organize your time in a way that is appropriate for you and your family.

5. Are you delegating enough? Are you even delegating at all? Do you think it's faster just to do it yourself? This is a never-ending cycle for lawyers. Yes, it may be faster for you to do it yourself now—but if that happens time and time again, not so! Chances are it would be much more efficient if you spent the time it requires to teach someone how you like the task done; consequently it's permanently off your desk, saving a much bigger chunk of time in the future. If you don't have staff, you do have options—contract lawyers and support staff or temporary staff. Try this option when the situation isn't a rush. That way when it is a rush, you have a plan. This isn't just for work; it applies to all areas of your life—delegate.

6. Are you tracking ALL your time? Chances are the answer is no; "I don't bill by the hour" or "I only track my hourly work." To manage a successful practice and create a happy life, you need to know where you spend your time. Tracking everything you do will be eye-opening and will help you become more efficient. You will see how much time you are spending in correlation to the value each task generates, the satisfaction it gives you, and whether or not you prioritized the things that are important to you. I have a client who felt totally overwhelmed and stressed, never having enough time. So, we analyzed all her time. What an eye-opener! What we found is that she was spending 15% of her time on the cases that generated 85% of her revenue. What was the true cost of not knowing the value of where she spends her time? Her top priority—time spent with her family.

7. Are you kind to yourself? Give yourself a break. Don't be so hard on yourself; there is no such thing as perfect! Everything can be improved. Ask yourself: Is it good enough for now; will it do the job or will it communicate



what you intend to communicate? If the answer is yes—move on to the next priority. Listen to how you talk to yourself. Does it enliven you to move forward or does it undermine your success?

Becoming more efficient is about creating new habits, setting priorities, and not letting others hijack your time. And knowing those everyday unexpected things will come your way—that's life! If we have learned anything from COVID-19—mitigate! Having a sense of satisfaction for a day well done is possible. Remember these words from Prasad Mahes:

The mind is like water. When it's turbulent, it's difficult to see. When it's calm, everything becomes clear.

***Paula Black** is an author, keynote speaker, and one of the world's leading business development coaches for lawyers. She teaches them how to attract more clients and grow their practices while also creating a life more fulfilling than they ever thought possible. She is the award-winning and bestselling author of The Little Black Book series including A Lawyer's Guide to Creating a Life Not Just a Living: Ordinary Lawyers Doing Extraordinary Things. She recently released her sixth book, a collaboration with Jack Canfield, A Recipe for Success: The World's Leading Entrepreneurs and Professionals Reveal Their Secret Ingredients for Health, Wealth and Success Today. Ms. Black was voted one of the Top Legal Business Development Coaches and is a member of the Forbes Coaches Council.*

WORLD ROUNDUP

ASIA

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CHINA

CIETAC and HKIAC issue guidelines for arbitration during the COVID-19 pandemic.

On 1 May 2020, the China International Economic and Trade Arbitration Commission's "Guidelines on Proceeding with Arbitration Actively and Properly during the COVID-19 Pandemic (Trial)" came into effect. The Guidelines seek to manage the effects of the COVID-19 pandemic on arbitrations, recommending measures such as the electronic filing and service of documents and addressing the potential for the use of procedures such as documents-only arbitrations and virtual hearings. Notably, the Guidelines' annex on "Provisions on Virtual Hearings (Trial)" covers considerations and practicalities regarding the conduct of virtual hearings with a fair level of detail, covering matters such as security, attendance, suitability of locations, and appropriate conduct of participants when virtual hearings are conducted.

On 15 May 2020, the Hong Kong International Arbitration Centre similarly issued its "Guidelines for Virtual Hearings." As with the CIETAC Guidelines, the HKIAC Guidelines address practicalities and considerations for the conduct of virtual hearings.

For disputants affected by COVID-19 lockdowns who may be considering the use of virtual hearings, both the CIETAC and HKIAC Guidelines may be useful references for consultation.

Macau's new arbitration law enters into force.

On 4 May 2020, Macau's new arbitration law (Law No. 19/2019) entered into force. The new arbitration law unified the previous laws covering domestic and international commercial arbitrations seated in Macau and adopted several changes in line with the UNCITRAL Model Law. Amongst the notable changes are the introduction of an emergency arbitrator mechanism, stipulation as to court assistance in the taking of evidence from parties or non-parties to an arbitration, and the abolishment of the possibility of appealing arbitral awards to local courts. The introduction of scope for parties to agree, as an optional appellate mechanism before an award is rendered, that an award may be appealed to another arbitral tribunal is also a notable development. Other changes include the provision of a procedure for enforcement of interim measures, whether issued by tribunals seated in or outside Macau, and the provision for publication online of all arbitral awards relating to administrative disputes in Macau.

SINGAPORE

Court of Appeal clarifies interplay between winding-up proceedings and arbitration.

In April 2020, Singapore's apex court issued a judgment that clarified how winding-up petitions based on disputed debts arising out of contracts containing arbitration clauses should be treated: *AnAn Group v. VTB Bank* [2020] SGCA 33. Over the past several years, there has been a number of cases across the common law world involving parties seeking to bypass their arbitration agreements by filing statutory demands for debts and thereby invoking a national court's winding-up jurisdiction. In view of how insolvency is generally regarded as falling within the exclusive jurisdiction of national courts, and not of private arbitrators, there have been differing views as to how applications to stay or dismiss such winding-up attempts should be treated. According to one view, which was apparently endorsed by an earlier 2007 Singaporean decision of *Metalform Asia v. Holland Leedon*, a debtor company will need to establish triable issues to the court as to the alleged debt in order to obtain a stay or a dismissal of the winding-up petition. According to another view, endorsed by other decisions, where a dispute in relation to a debt is subject to an arbitration agreement and the debt is disputed, the court should, except in exceptional or abusive circumstances, stay or dismiss the winding-up petition as a matter of course, since there exists a prima facie dispute, which should be adjudicated via arbitration. The Singapore Court of Appeal's decision has clarified that the position under Singapore law is the latter.

JAPAN

Japan reforms Civil Code.

On 1 April 2020, Japan's first substantive amendments

in over 100 years to its 1896 Civil Code (the Amendment) came into effect. Some changes of note include:

(1) Extension of the statutory maximum period of land lease agreements from twenty years to fifty years

(2) Provision that contracting parties may terminate their agreements in the event of a default, regardless of whether the default is attributable to the defaulting party, unless otherwise provided in the agreement. Under the previous Civil Code, the termination of agreements could be applied only when a default was attributable to the defaulting party.

(3) Adoption of a new statutory limitation period for claims of five years from the time that a person knows that a claim may be made, which will apply concurrently with the previous statutory limitation period of ten years after a claim crystalizes. Under the amended Civil Code, a claim will be time-barred upon the earlier of these two periods occurring.

(4) Adjustment of the statutory interest from 5% to 3% per annum, with a floating interest rate component that will be applicable when the statutory interest rate varies 1% or more from the market interest rate based on the average market interest rate of short-term loans for the past five years.

The Amendment will govern contracts executed after the effective date of 1 April 2020. For contracts with automatic renewal provisions that were executed before this effective date, parties shall discuss whether the previous Civil Code or the Amendment shall govern their contractual relationship after the automatic renewal. If this does not occur, it is not entirely clear whether the previous or amended Civil Code should apply, but in the view of one of the Amendment's drafters, the amended Civil Code should apply to such situations by default.

Japan considers proposal to facilitate registered foreign lawyers' participation in international arbitration and mediation cases.

Japan's Cabinet is presently considering a bill to amend the country's laws regulating foreign lawyers' work in the country. The proposed amendments aim to facilitate participation in international arbitration and mediation cases by registered foreign lawyers in Japan, by making the following changes:

(1) Expansion of the definition of "international arbitration cases," to cover the following situations: Cases where (a) all or some of the parties to the case have head offices or other offices in a foreign jurisdiction; (b) the governing law that the parties have agreed to is not Japanese law; and (c) the seat of international arbitration is in a foreign jurisdiction, even if the physical hearing takes place in Japan. In such situations, foreign lawyers may represent parties in hearings held in Japan. Furthermore, under the proposed amendments, foreign lawyers may represent parties in international mediation cases under the situations of (a) and (b) above.

(2) Relaxing the foreign practice durational requirement for foreign lawyers to be registered in Japan from two years to one year. In the context of the minimum three years' practice requirement after foreign admissions in order to be registered, foreign lawyers may satisfy this by providing two years of legal services in Japan and practicing for one year in a foreign jurisdiction.

(3) A new system for "joint corporations" comprising Japanese lawyers and registered foreign lawyers is established. The provisions are that: (a) the scope of service shall only be in legal services; (b) Japanese lawyers are permitted to render full legal services, while registered foreign lawyers are only permitted to provide legal services regarding foreign law and other such services; (c) joint corporations may establish secondary law offices in Japan; and (d) joint corporations are subject to the same disciplinary requirements as Japanese legal professional corporations.

Japan considers amendments to renewable energy laws.

In February 2020, Japan's Cabinet submitted a bill to amend the country's renewable energy laws. The proposed amendments, which are expected to come into effect in early 2022, are designed to: (1) introduce a feed-in premium (FIP) program; (2) establish a new regime for grid enhancement; (3) establish reserve funds for decommissioning costs of solar power facilities; and (4) introduce termination measures for feed-in tariff (FIT) certificates of developers that fail to operate within a certain period. The amendments provide that:

(1) Aside from the present FIT program, the proposed new FIP program offers developers flexible measures on pricing renewable electricity by allowing developers to be granted a specific premium on top of the market price for renewable energy projects that they operate, calculated based on the market price of electricity. The FIP program accordingly enables the developers to stabilize their returns regardless of changes in market conditions and incentivizes them to increase electricity supply during times of peak demand. The FIP program will only be applicable to wind power and large-scale

solar power projects. Access to the FIP program will be by application to the Agency for Natural Resources and Energy Division of the Ministry of Economy Trade and Industry (METI).

(2) While the regional utilities bear grid enhancement costs under the current regime, the new regime requires developers for renewable energy projects to bear some portions of the costs arising from grid enhancement. In order to avoid cost-overrun on the interconnection development for grid enhancement, the new regime provides that an independent third-party agency, the Organization for Cross-Regional Coordination of Transmission Operators (OCCTO), will first assess the cost for grid enhancement and prepare an interregional grid development plan. The regional utilities will develop the transmission networks based on the interregional grid development plan upon its submission to the government.

(3) Solar power developers that generate over 10kW of output on their projects will have to establish an external reserve fund for decommission costs. The OCCTO withholds and reserves some of the profits arising from solar power electricity distribution by developers on a monthly basis for ten years before the expiration of the FIT period. In the event that the reserve funds are insufficient to decommission the solar power facilities, the developers shall secure the shortfall. All or part of the reserve fund may be reimbursed to the developers if they can prove financial capacity sufficient to cover decommission costs. Exceptionally, where approval is obtained from the minister of economic trade and industry, developers may be exempted from arranging for an external reserve fund and may establish an internal reserve fund instead.

(4) FIT certificates held by developers that fail to operate qualifying projects within a certain timeframe (which will be announced in due course by METI) will be automatically terminated.

Charles Tay *is a foreign legal consultant* with Zhong Lun Law Firm in Beijing. His work focuses on international arbitration and his general experience includes work on major cross-border disputes spanning construction, oil & gas, post M&A, investor-state, and general commercial interests. Prior to his work in Beijing, he practiced as a litigator in Singapore, served as associate and tribunal secretary to one of Asia's top international arbitrators, and in 2019 was a visiting foreign lawyer with WilmerHale's International Arbitration Group in London. He holds concurrent roles as Asia-Pacific regional representative of the LCIA's Young International Arbitration Group and research affiliate with the Singapore International Dispute Resolution Academy. (*Awaiting registration with the PRC Ministry of Justice)*

Takashi Yokoyama *is a lawyer presently awaiting admission in New York. He was previously engaged in corporate law practice and litigation management for over nine years as a legal advisor in the legal departments of Sojitz Corporation and a global pharmaceutical company in Tokyo. During and after his JD and LLM programs at the University of Miami School of Law, he also obtained work experience as an intern with the Energy Charter Secretariat in Brussels, Hogan Lovells' Energy, Infrastructure, Resources and Projects team in Tokyo, and WilmerHale's International Arbitration Group in London.*

INDIA

Neha S. Dagley
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COVID-19 in India results in the world's largest lockdown.

In the face of COVID-19, a third of the world population was under lockdown as of 23 April 2020. During this pandemic, India faced the critical question of how to control the spread of the virus and deal with the unending consequences of locking down 1.3 billion people. On 22 March 2020, Prime Minister Narendra Modi first made an appeal to the people of India and urged them to stay home.

Challenges and Actions

One major factor that sets India apart from the rest of the world is the sheer population density. For example, the largest city in India, Mumbai, has a population density of approximately 20,634 per square kilometer with a population of an estimated 24 million. This presents unprecedented complexities in major metropolitan areas of India. Social distancing is not an achievable reality for a substantial percentage of the population.

An immediate impact of the lockdown was the sudden exodus of migrant workers from the cities to their villages. A clear risk here was the possibility of migrant workers carrying the virus far and wide into the rural areas of India that lack basic medical resources and infrastructure to handle a crisis of this magnitude.

A notable action by the government of India included shutting down the Indian railway system. The Indian

rail network is 167 years old, runs more than 10,000 passenger trains daily, and transports 23 million passengers. Instead of allowing the trains to sit idle, Indian Railways took the initiative of converting train coaches into quarantine or isolation wards.

Silver Linings

Dramatic reduction in pollution: During the lockdown, India saw a dramatic reduction in air pollution. This was a notable silver lining in the crisis for a country that has seen dangerous levels of air quality for years.

Innovation: The launch of the *Aarogya Setu* mobile application was another effort by the government to address the pandemic. A government initiative, *Aarogya Setu*, was developed by the National Informatics Centre under the Ministry of Electronics and IT. The application's purpose is to connect essential health services with the people of India and is aimed at augmenting government initiatives in proactively reaching out to and informing users regarding risks, best practices, and relevant advisories pertaining to the containment of COVID-19. The app was first launched on 2 April 2020 and as of today's date has more than 50 million downloads.

The current conditions and outlook remain unclear for India. The US$2.9 trillion economy and India's people are suffering, but the risks are great in ending the lockdown. The population density threatens a quick resurgence and spread of the virus. In this vast uncertainty, one thing is for certain: the unbeatable spirit of the Indian people will lead the nation on a path to recovery.

Neha Dagley *is an attorney with the law firm of Rivero Mestre LLP in Miami, Florida. For the last fifteen years, she has represented a wide array of entrepreneurs and corporations in commercial litigation and arbitration matters. She represents foreign and domestic clients across multiple industries and national boundaries, delivering keen analysis and sound legal advice on a broad range of business disputes. She earned her Bachelor of Science in political science from Utah State University and then her JD at the University of Miami School of Law. A native of Mumbai, Ms. Dagley is multilingual—fully fluent in English, Hindi, and Gujarati—and she understands her clients' cultures and backgrounds. She has authored a number of legal publications and serves as chair of the India Subcommittee to The Florida Bar's International Law Section Asia Committee.*

LATIN AMERICA

Cintia D. Rosa and Paula E. Pagani, São Paulo, Brazil
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European Union–Mercosur free trade is facing debarments.

On 28 July 2019, European Union and Mercosur reached an "agreement in principle" on a free trade agreement as part of a broader association agreement. The negotiation was launched during the G20 Summit in Osaka. The agreement has already passed through the preparation and negotiation phases, but it still needs to be signed, approved by the European parliament, and, ultimately, ratified.

As foreseen, the main challenge to advancing the agreement is the weaknesses of the region's environmental policies, especially concerning the protection of the Amazon rainforest. As an illustration of European concern about environmental vulnerabilities, on 3 June 2020, the Dutch parliament passed a motion against ratifying the agreement, citing Latin American agricultural policies. The Austrian parliament has also refrained from confirming the agreement. The European Union's pro-sustainability coalition supported both countries' refusals to ratify the agreement.

On the Latin American side, the recurrent position of governments, such as Brazil, in insisting upon easing environmental controls and failing to control the COVID-19 spread, contributes to a continuing lack of support for ratifying the agreement.

New challenges arise in conducting internal investigations in Brazil.

With the increase of emergency contracts arising from the COVID-19 outbreak, the debate over the upsurge in compliance and internal control measures has become even more pressing. The flexibilization of due diligence measures, for example, has become an opportunity for corporate fraud and other misconduct. In this sense, the procedural changes brought by Law No. 13.964 (known as Package Anti-crime), sanctioned on 24 December 2019, play a fundamental role in this scenario.

With Package Anti-crime, the crime of fraud, previously prosecuted through unconditional public criminal action, will be prosecuted through public action conditioned upon representation from the victim, except in cases where the victim is the public administration or a vulnerable individual (e.g., a minor or a person with a disability).

This change directly affects the time frame for conducting internal investigations. In practice, this means that the public prosecutor's office will only be able to indict for fraud when indicated by the victim's charges.

For internal investigations, the main effect of this change is that the victim's request for public investigation must be requested within six months, counted from the knowledge of the facts.

Consequently, even during the coronavirus outbreak period, it is essential that companies keep compliance controls up-to-date and that they maintain effective procedures, capable of conducting investigations that comply with the tight time frame put in place by the new legal requirements.

USMCA represents official commitment to prevent and combat corruption.

On 29 January 2020, the United States-Mexico-Canada Agreement (USMCA) was signed into law by President Trump and ratified by the Canadian Senate in March 2020, completing the ratification process by the three countries. For the first time, anticorruption measures have been addressed in a trade agreement between the United States, Mexico, and Canada, representing an official commitment by the three countries to combat bribery and corruption.

The anticorruption provisions outlined in Chapter 27 of the USMCA require the signatory countries to establish measures to combat and prevent corruption and bribery in international trade and investment and to recognize the need to build integrity within both the public and private sectors, aiming to promote integrity, honesty, and responsibility among public officials. Among many efforts, Chapter 27 requires the signatory countries to adopt or maintain legislative measures to criminalize bribery of public officials, including foreign public officials. It also requires the adoption of measures regarding the maintenance of books and records, financial statements disclosures, and accounting and auditing standards to prevent the establishment of off-the-books accounts or the recording of nonexistent expenditures.

USMCA will come into force on 1 July 2020 and may have a significant impact on Mexico's effort to combat corruption and to implement effective measures to comply with Chapter 27. Even though the Mexican government has increased its efforts to fight corruption in the past few years by creating the National Anticorruption System (SNA) and by enacting laws related to this matter, the number of corruption cases across the country is still high. The provisions of Chapter 27 may assist Mexico in making more effective efforts to combat corruption within the country and in establishing a stronger commercial relationship with the United States and Canada.

Cintia D. Rosa *focuses her practice on internal corporate investigations and compliance matters, leveraging her experience with criminal proceedings and white-collar crime from when she worked at the Brazilian Federal Police. She earned her law degree (LLB) from the Pontifical Catholic University of São Paulo (PUC-SP) and has specialization in compliance from the GV São Paulo Law School.*

Paula E. Pagani *focuses her practice on compliance and data privacy matters. She earned her law degree (LLB) from the Pontifical Catholic University of São Paulo (PUC-SP) and has specialization in white-collar crime and data privacy from the GV São Paulo Law School.*

MIDDLE EAST

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NMC Health Group bankruptcy doesn't foreclose criminal proceedings in the UAE.

NMC Health Group was founded in the United Kingdom by Indian billionaire B.R. Shetty in 1974. By 2018, it was listed on the London Stock Exchange and was one of three largest health care providers in the Middle East with 200 hospitals, clinics, and other sites in 19 countries. Most are based in the UAE.

In 2019, U.S.-based activist investor Muddy Waters alleged that NMC Health had inflated its cash balances, overpaid for assets, and understated its debt. Following that allegation, NMC Health made a series of disclosures including alleged theft and excess undisclosed borrowings by former directors. Trading in its shares was suspended in February 2020.

Abu Dhabi Commercial Bank (ADCB), NMC Health's biggest lender, successfully applied to a UK High Court to place NMC Health under administration (akin to U.S. bankruptcy proceeding). A week later, on 15 April 2020, ADCB announced it had launched criminal proceedings in Abu Dhabi against several individuals associated with NMC Health. There's no indication yet if British authorities will also launch criminal proceedings.

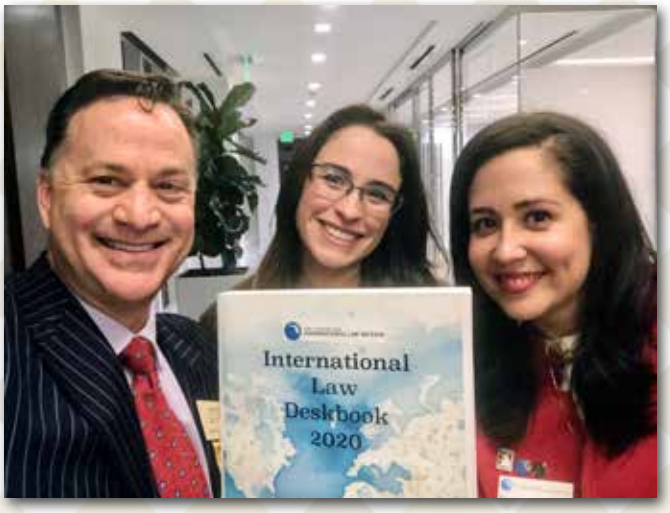
Arbitral institutes in the Middle East continue to operate.

While many domestic courts in the Middle East have

... continued on page 38

iLaw 2020 • The ILS Global Forum on International Law
28 February 2020 • JW Marriott Marquis • Miami, Florida

Known as the International Law Section's annual "crown jewel" event, iLaw offers three tracks in the specializations of international litigation, international business transactions, and international arbitration sponsored by the International Centre for Dispute Resolution.



Peter Quinter, Lauren Bengochea, and Clarissa Rodriguez

iLaw2020 Chair Cristina Vicens addresses the audience.

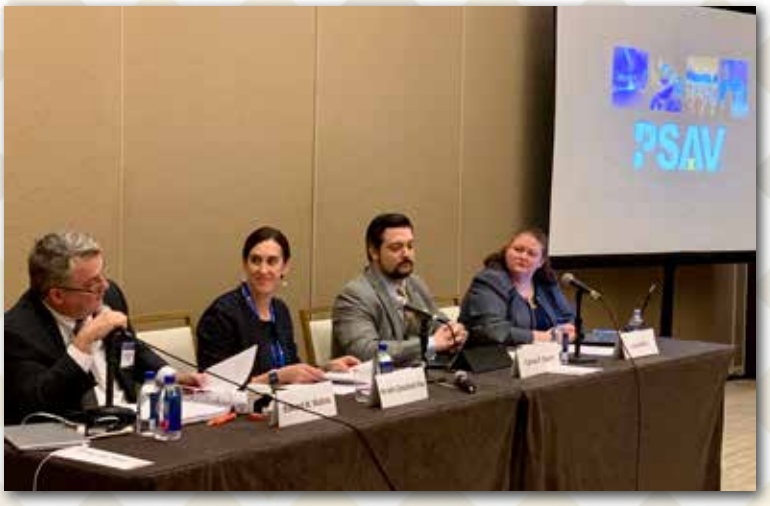
Opening reception hosted by Hogan Lovells

Harout Samra, Clarissa Rodriguez, Robert Becerra, and Sherman Humphrey

iLaw 2020 *continued*

Fernando Menendez, Stuart Cullen, Jeffrey Commission, and Boaz Morag

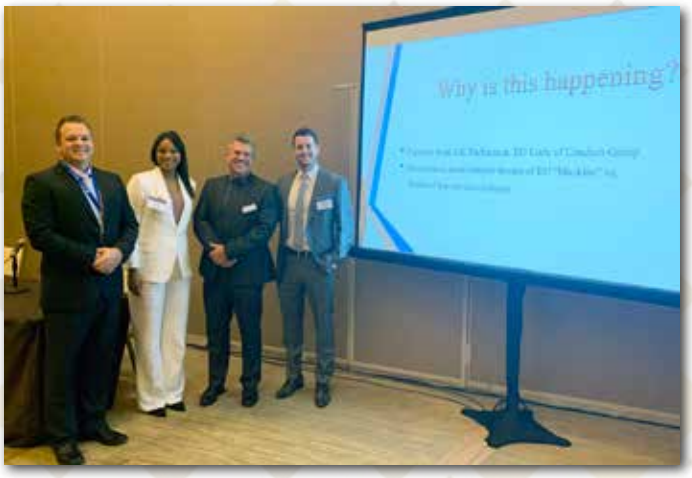
Luncheon guest speaker Elisabeth Eljuri, former chief negotiator and chief legal counsel, Sierra Oil and Gas



Edward Mullins, Kristin Drecktrah Paz, Carlos Osorio, and Laura Reich

Gary Birnberg, Mushegh Manukyan, Ximena Bustamante, and Salman Ravala

iLaw 2020 *continued*



Lynden John, Fanny Evans, James Meyer, and Jeffrey Hagen

Jacqueline Villalba, Elina Santana, Juliana Lamardo, and Larry Rifkin

Holli Credit, FIU student volunteer; Darya Massoudi, FIU student volunteer; Michal Slavik, Nova student volunteer; Cristina Vicens; Clarissa Rodriguez; Davy Karkason, Nova student volunteer; and Dilmurod Satvaldiev, UM student volunteer

Ana Barton, Clarissa Rodriguez, Omar Ibrahem, and Cristina Vicens

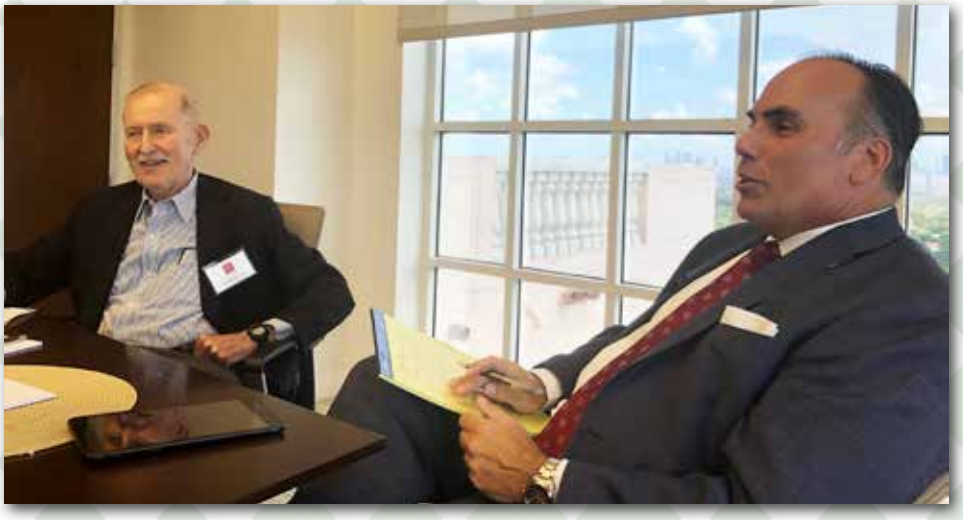
Penelope Perez-Kelly, Nouvelle Gonzalo, Ana Barton, Cristina Vicens, and Alvin Lindsay

ILS Lunch & Learn Series

The International Law Section holds periodic Lunch & Learn events at Fiduciary Trust International's offices in Coral Gables, Florida. During each Lunch & Learn, an invited guest shares his or her path to an international law practice, including the scope of his or her current practice. These enjoyable sessions help ILS members get to know one another better and provide important networking opportunities.

ILS Lunch & Learn • 11 September 2019

Guest Presenter: Burton A. Landy, Harper Meyer, Miami
ILS Past Chair



Burton A. Landy and Robert Becerra

ILS Lunch & Learn • 5 November 2019

Guest Presenter: Judge Jose Rodriguez
Circuit Judge, Eleventh Circuit
Admin. Judge, Int'l. Comm. Arbitration

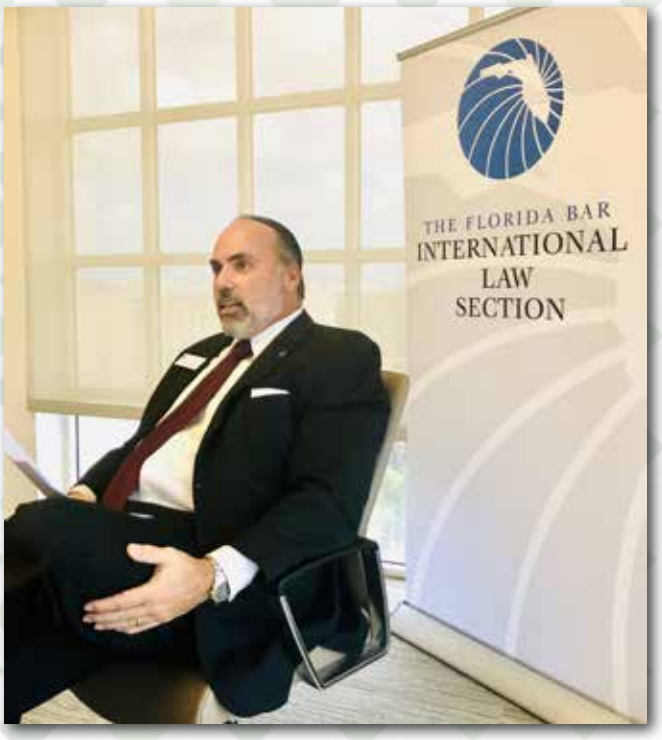
Judge Jose Rodriguez and Robert Becerra

ILS Lunch & Learn Series *continued*

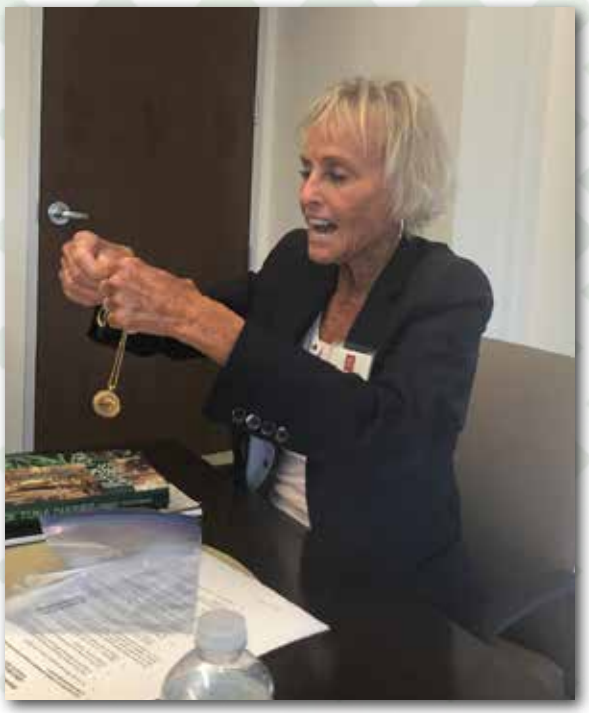
ILS Lunch & Learn • 9 January 2020

Guest Presenter: Rebekah J. Poston, Squire Patton Boggs (US) LLP, Miami

Rebekah J. Poston, Michael Cabanas of Fiduciary Trust International, and Robert Becerra



Robert Becerra

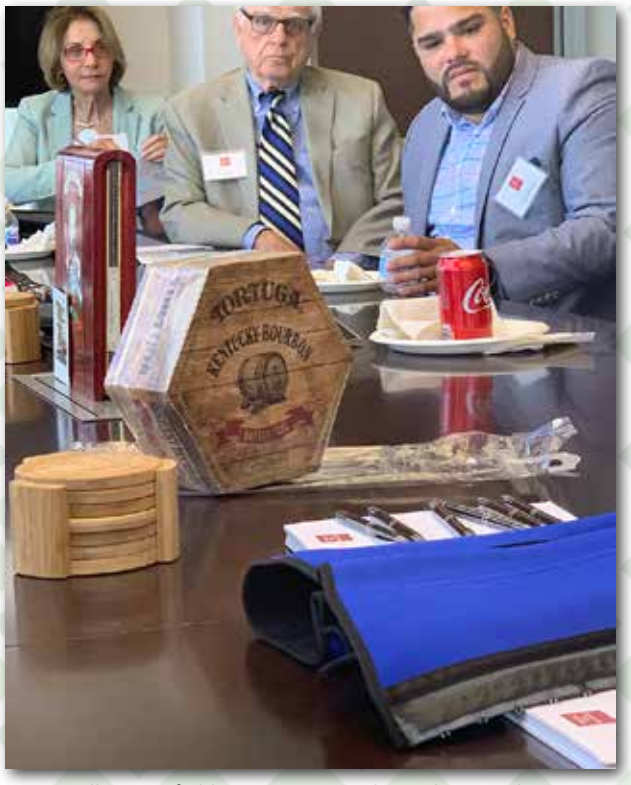


Rebekah Poston displays a gold necklace given to her by a client.

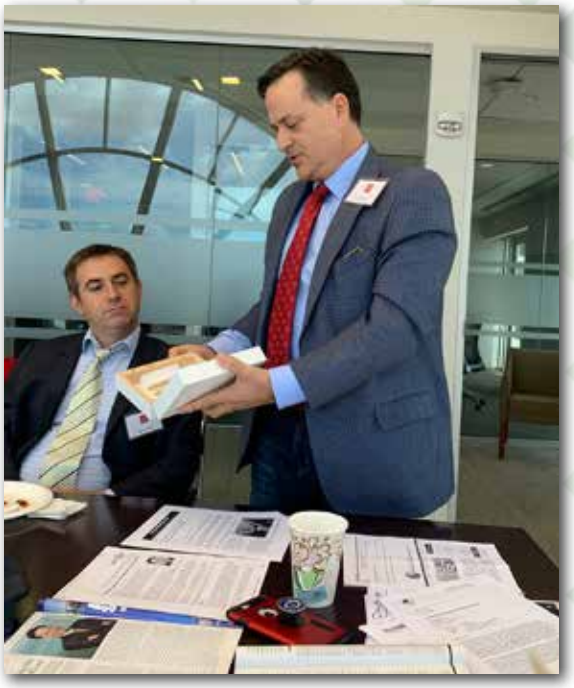
ILS Lunch & Learn Series *continued*

ILS Lunch & Learn • 11 March 2020
Guest Presenter: Peter A. Quinter, Gray Robinson PA, Miami
ILS Past Chair

Peter Quinter (left & top right) discusses his work as a customs and trade lawyer to allow shoes to be imported into the United States, and Robert Becerra (bottom right) poses with a box of Cuban cigars imported by Peter's clients.



Ellen Leesfield, Roy Gonas, and Angel Bermudez



Jose Martin and Peter Quinter

Ron Ravikoff, Rebekah Poston, James Meyer, Roy Gonas, Angel Bermudez, Ellen Leesfield, Carolina Obarrio, and Ed Vidal listen as Peter Quinter talks about the products displayed on conference table, all of which were legally imported into the United States as a result of Peter's representation of his clients before U.S. Customs and Border Protection.

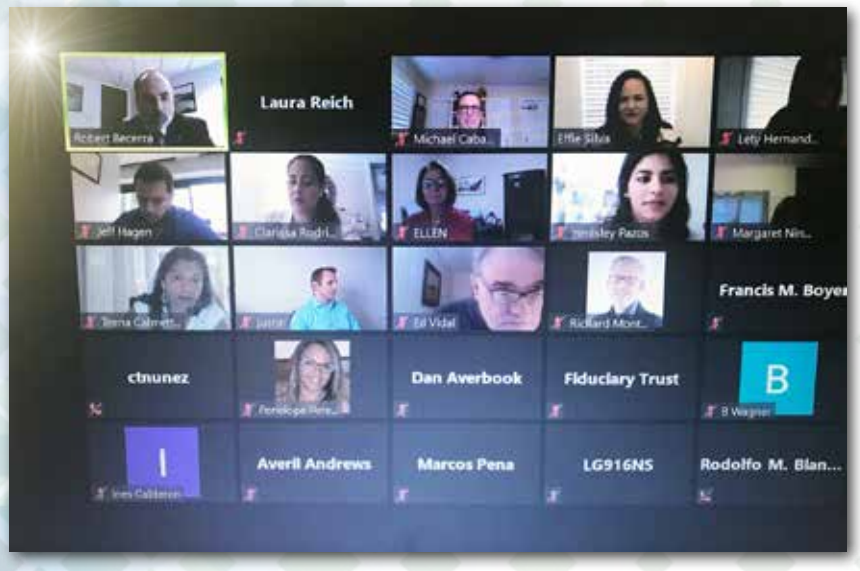
ILS Lunch & Learn Series *continued*

Virtual ILS Lunch & Learn • 13 May 2020 • via Zoom

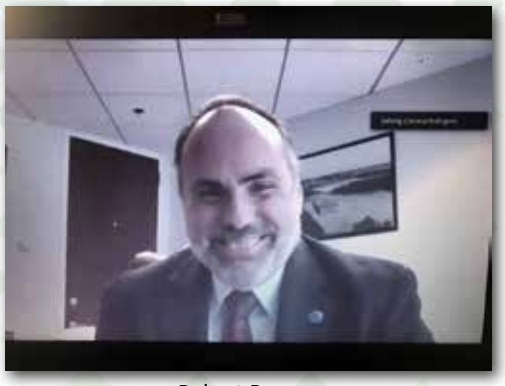
Guest Presenter: Effie D. Silva, Cargill, Inc., Wichita, Kansas

The International Law Section hasn't let the Coronavirus pandemic stop us! We continued our educational Lunch & Learn series with a virtual presentation by Effie D. Silva, Esq., FCIArb., corporate legal counsel and a fellow of the Chartered Institute of Arbitrators.

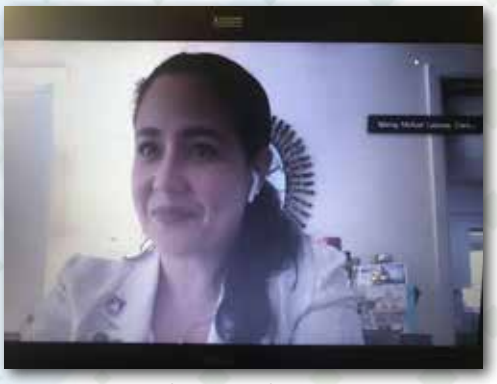
THE ILS LUNCH & LEARN GOES VIRTUAL.



Effie D. Silva welcomes everyone to the ILS Lunch & Learn via Zoom.



Robert Becerra



Clarissa Rodriguez

Effie D. Silva, Robert Becerra, and Lety Hernandez

THE FLORIDA BAR
INTERNATIONAL LAW SECTION

ILS AUDIO WEBCAST

June 24, 2020

12:00 noon – 1:00 p.m.

The Public Charge Maze – How to Navigate the New Frontier: The New Public-Charge Provisions and its Impact on Issuance of Non-Immigrant and Immigrant Visas

This audio webcast will discuss the new public-charge provisions and their impact on immigrant and non-immigrant visas.

Larry Rifkin, Rifkin & Fox-Isicoff, P.A., Miami
Elaine Weiss, Weiss and Kahn, P.A., Coral Gables
Juan Carlos Freire, Rifkin & Fox- Isicoff, P.A., Miami

CLE CREDITS

CLER PROGRAM
(Max. Credit: 1.0 hour)
General 1.0 hour

CERTIFICATION PROGRAM
(Max. Credit: 1.0 hour)
Immigration and Nationality Law 1.0 hour
International Law 1.0 hour
International Litigation and Arbitration 1.0 hour

To Register, Click Here

World Roundup, continued from page 29

temporarily suspended in-person court hearings, arbitral institutes across the Middle East continue to accept new matters and filings. The Dubai International Arbitration Centre, the DIFC London Court of International Arbitration, and the ICC International Centre for ADR all continue to operate, with staff working remotely. While in-person hearings at the respective hearing centers are postponed, many hearings are being conducted virtually.

Saudi Supreme Court judgments now available online.

In March 2020, the Saudi Ministry of Justice announced it has started publishing judgments of the Saudi Supreme Court relating to commercial cases. This follows the earlier announcement of the publication of final lower court rulings in commercial cases. These steps are being taken to raise awareness and promote transparency to investors and businesses of the Saudi judicial system. The judgments are published at www.moj.gov.sa and are available on the "Research Center" page.

Omar K. Ibrahem *is a practicing attorney in Miami, Florida. He can be reached at omar@okilaw.com.*

NORTH AMERICA

Laura Reich and Clarissa A. Rodriguez, Miami
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U.S. federal, state, and local governments declare public health states of emergency in response to novel coronavirus disease (COVID-19).

As cases of novel coronavirus disease 2019 (COVID-19) rose in the United States, Health and Human Services (HHS) Secretary Alex Azar declared a national public health emergency on 31 January 2020. The emergency HHS declaration authorized additional resources, enhanced federal powers, and increased interjurisdictional coordination to combat the spreading virus. Although primary responsibility for public health falls to the states, which may further delegate their powers to municipalities, federal powers have been exercised in response to prior national or global health crises such as H1N1 influenza, SARS, Avian (Bird) flu, and Ebola.

Following the federal declaration, numerous states and local governments also made emergency declarations in response to COVID-19.

Emergency declarations enhance national or regional response capabilities through, among other things, liability protections for first responders, increased reciprocity for licensed medical professionals, and accelerated approval of potential countermeasures such as vaccines in development and personal protective equipment (PPE). These declarations also authorized widespread business closures, stay-at-home orders, curfews, and travel restrictions. As the *ILQ* went to print, a number of legal challenges to the stay-at-home orders, travel bans, and other restrictions had been filed—often on First Amendment grounds—with limited success.

Canadians return to work with strict safety requirements and personal liability for employers who disregard those requirements.

As Canadian businesses begin to reopen following COVID-19 shutdowns, employers must strictly comply with stringent safety requirements to avoid personal liability. Each province has an "Occupational Health and Safety Act" requiring employers to take all reasonable precautions to protect their workers.

At this time, Ontario has what appear to be the strictest requirements, and individuals responsible for places of business need to be aware of their obligations. In Ontario, the Emergency Management and Civil Protection Act requires that the "person responsible for a place of business" ensure the business's legal compliance with safety requirements, which may include physical distancing, temperature checks, disinfecting, and other safety measures. Failure to do so may result in personal liability and fines.

In the wake of #BlackLivesMatter and other protests spurred by the death of George Floyd, lawyers are being trained to act as legal observers.

Spurred by protests organized by #BlackLivesMatter and others in response to the death of George Floyd at the hands of Minneapolis police officers, the National Lawyers Guild and other organizations are offering training to lawyers and legal professionals to act as "legal observers" (similar to poll watchers) at protests and other gatherings to support people in expressing their political views as fully as possible without unconstitutional disruption or interference. Legal observers are not participants in protests; rather, they are there to ensure accountability for official actions taken during protests.

Mexican federal court stays government orders restricting renewable energy projects.

Mexico's clean energy industry prevailed in several recent legal battles against new restrictions approved by the nation's Energy Ministry. In April and May 2020, a Mexican federal court stayed several orders from the Mexican government freezing certain renewable energy projects, such as the opening of a new renewable power plant. The Energy Ministry had argued that the intermittency of wind and solar power threatened the reliability of the national power supply.

The petitioner, Greenpeace México, S.C., fought and won an uphill battle to establish its standing in the context of an *amparo* petition. The court found that the petitioner, in its capacity as an environmentally focused NGO, had standing to seek a temporary stay as it has a "legitimate interest" in challenging the orders. Greenpeace argued that the orders were unconstitutional as they violated protected rights and interests under the Mexican constitution, including the right to a clean environment and to sustainable development.

Laura M. Reich *and* ***Clarissa A. Rodriguez*** *are the founding shareholders of Reich Rodriguez PA. The firm specializes in commercial litigation, international arbitration, and alternative dispute resolution. Reich Rodriguez's practice areas include art law disputes with an emphasis in recovery and restitution of stolen and looted art, with a focus on European art and art of the Americas.*

WESTERN EUROPE

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Germany's legal initiatives mitigate the consequences of the COVID-19 pandemic.

As the world manages through the coronavirus pandemic, the crisis' economic impact is leading to a global recession. Individuals and businesses are facing unprecedented, tough, and uncertain times. During the crisis, the world is observing Germany. The pandemic has hit Germany hard though the fatality rate is low and the government's response to the coronavirus outbreak was fast. Germany is among the first European nations to slowly ease lockdown restrictions and is moving gradually to open businesses. Like many other countries around the globe, Germany's government passed several aid packages and regulations for its citizens and businesses to provide financial relief. One of Germany's initiatives was passing legislation to mitigate the consequences of the COVID-19 pandemic.

The German Federal House of Representatives (Bundestag) passed a law on 27 March 2020 to mitigate the consequences of the coronavirus pandemic in the area of civil law, insolvency law, and criminal procedure law. Under Article 2 of the legislation, which includes regulations for corporate matters, shareholders of limited liability companies can take any action, which may be taken at a meeting of the shareholders, without a meeting through written cast of votes or consent in writing signed by the shareholders. The written consent does not need to be unanimous. This is a temporary exception to § 48 II GmbHG (Limited Liabilities Company Act) that any action by the shareholders not taken at a meeting but taken by written consent or written cast of votes must be unanimous. This exception applies only to shareholder meetings and resolutions in 2020.

In addition, the filing deadline for new bankruptcy cases is deferred until 20 September 2020, unless the bankruptcy is not caused by the COVID-19 pandemic or there is no chance that bankruptcy can be avoided. If the debtor was considered bankrupt on 31 December 2019, it is presumed the bankruptcy is caused by the COVID-19 pandemic, and recovery is possible. This means that a business can still apply for government loans and loan disbursements and its actions are not considered wrongful and delaying bankruptcy.

The legislation also implemented relief for certain consumer contracts. A consumer can deny payment until 30 June 2020 if a permanent debt obligation existed before 8 March 2020, the transaction is a consumer contract, and the consumer is unable to make payments without risking his or the livelihood of his dependents due to the impact of COVID-19. There is an exception if the nonpayment would be unreasonably burdensome to the creditor.

Further, a financial break is granted to certain tenants. A landlord cannot terminate a residential lease if the tenant does not pay rent from 1 April 2020 to 30 June 2020 due to the impact of COVID-19. The tenant must credibly establish that nonpayment is caused by the impact of the COVID-19 pandemic.

Susanne Leone *is one of the founders of Leone Zhgun, based in Miami, Florida. She concentrates her practice on national and international business start-ups, enterprises, and individuals engaged in cross-border international business transactions or investments in various sectors. Ms. Leone is licensed to practice law in Germany and in Florida.*

The Public Charge Maze, from page 13

(SSI), Temporary Assistance to Needy Families (TANF), and state general relief or assistance; or (2) long-term care at government expense. Under the prior guidance, if one of these two circumstances was present, then service officers would assess the financial responsibility of the alien by examining the "totality of the alien's circumstances" at the time of his or her application.[8] The determination of financial responsibility was a prospective evaluation based on the alien's age; health; family status; assets, resources, and financial status; and education and skills, among other factors.[9]

Current Definition of Public Charge and Changes From Prior Interpretation

Under the new public charge regulations published by the Trump administration and currently in effect, the term *public charge* has been redefined and expanded to apply to an alien who receives one or more designated public benefits for more than twelve months in the aggregate within any thirty-six-month period (such that, for instance, receipt of two benefits in one month counts as two months).[10]

The statutory language in INA § 212(a)(4), "Likely at any time to become a public charge" now means "*more likely than not* at any time in the future to become a public charge," as defined in [INA §] 212.21(a), based on the totality of the alien's circumstances.[11] Under the current regulations, the standard of proof has thus changed from *likely to become* to *more likely than not*, thereby imposing a heavier burden of proof on the alien to establish why he or she will not become a public charge.

The term *public benefit* has been defined to include cash benefits for income maintenance, Supplemental Nutrition Assistance Program (SNAP, formerly food stamps), nonemergency Medicaid, Section 8 Housing Assistance under the Housing Choice Voucher (HCV) program, Section 8 Project-Based Rental Assistance, and certain other forms of subsidized housing.[12] According to USCIS's Fact Sheet, the following common federal benefit programs are not included in the definition of public benefit: Special Supplemental Nutrition Program for Women, Infants, and Children (WIC); Medicare; disaster relief; national school lunch or school breakfast programs; foster care and adoption; Head Start; Children's Health Insurance Program (CHIP); Pell grants and student loans; AIDS Drug Assistance Program (ADAP); Premium Tax Credit under the ACA; and the Earned Income Tax Credit (EITC) or Child Tax Credit.[13] Benefits received by an applicant's family members will also not be considered in the public charge determination.[14] Additionally, Medicaid received by applicants while under age 21, while pregnant (and up to sixty days after a pregnancy), or during an emergency are similarly not considered.[15]

Different Standard for Changes of Status and Extensions of Stay

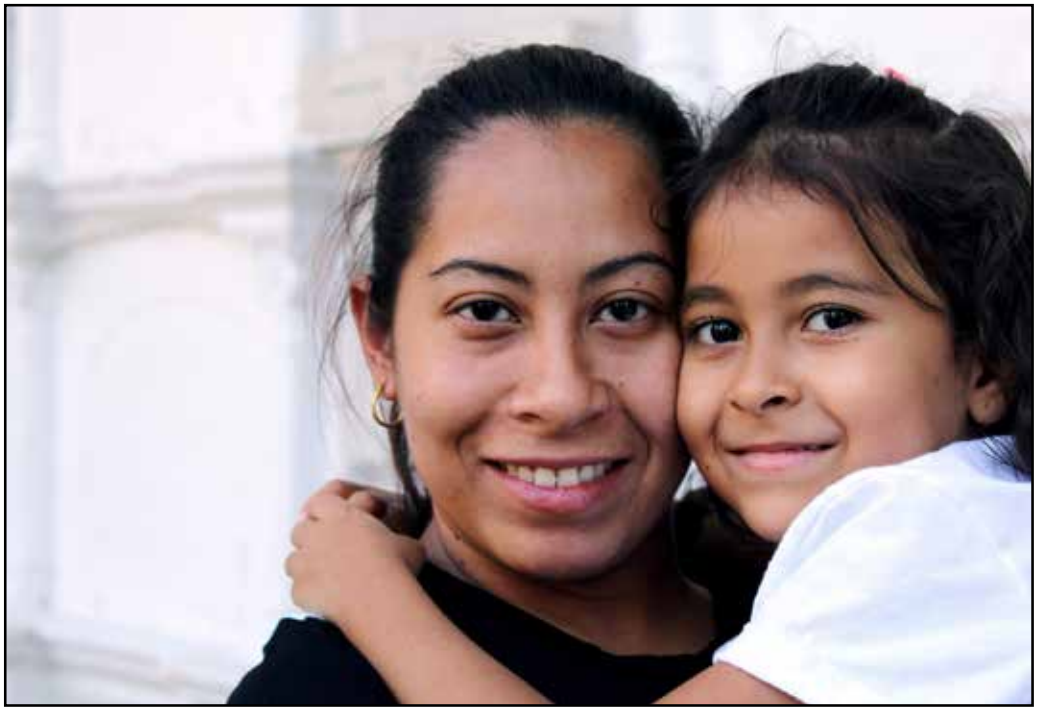
The new regulations also add an additional category of aliens to whom the public charge ground of inadmissibility now applies: nonimmigrants applying for an extension or a change of status within the United States.[16] These nonimmigrants must demonstrate that since obtaining the nonimmigrant status they now seek to extend or change, until the date USCIS adjudicates the Change of Status (COS) or Extension of Status (EOS) application, they have not received one or more of the listed public benefits for an aggregate of more than twelve months over the course of three years.[17]

Exemptions

The following classes of noncitizens are exempt from the new public charge guidelines:

- Refugee applicants and refugees who are applying for adjustment of status;
- Asylum applicants and asylees who are applying for adjustment of status;
- Applicants for withholding of removal or relief under the Convention Against Torture;
- Applicants for initial or re-registration of Temporary Protected Status (TPS);
- Applicants for initial or renewal of Deferred Action for Childhood Arrivals (DACA) status;
- Cubans who are applying for adjustment of status under the Cuban Adjustment Act;

- Amerasians who are applying for adjustment of status;
- Afghan and Iraqi interpreters and translators who are applying for special immigrant visas (SIV);
- Applicants for Special Immigrant Juvenile Status (SIJS);
- Victims of certain crimes who are applying for a U nonimmigrant visa or U visa holders applying for adjustment of status;
- Victims of trafficking who are applying for a T nonimmigrant visa; T visa recipients who are applying for adjustment of status no longer have to seek a waiver of public charge inadmissibility;
- Victims of domestic violence who are applying for relief under the Violence Against Women Act (VAWA), including approved self-petitioners who are applying for adjustment of status;
- Applicants for "registry" based on their having resided in the United States since before 1 January 1972;
- Applicants for benefits under the Nicaraguan Adjustment and Central American Relief Act (NACARA);
- Applicants for benefits under the Haitian Relief and Immigrant Fairness Act (HRIFA); and
- Lautenberg parolees who are applying for adjustment of status.[18]



Please note that if a person who falls under one of the categories listed above—not subject to the public charge ground of inadmissibility, such as TPS—were to apply for adjustment of status under a family-based category, that person would nevertheless be subject to the new public charge rule. Note, however, that benefits received by an individual who was not subject to the public charge ground of inadmissibility when the benefits were received are not considered.[19]

TOTALITY OF THE CIRCUMSTANCES TEST

Factors

The new regulations state that "the determination of an alien's likelihood of becoming a public charge at any time in the future must be based on the **totality of the alien's circumstances** by weighing all factors that are relevant to whether the alien is more likely than not at any time in the future to receive one or more public benefits."[20] The factors to be considered at a minimum are the ones listed in the statute: alien's health; family status; assets, resources, and financial status; and education and skills.[21]

For the alien's age, DHS will consider the alien's age as it impacts his or her ability to work.[22] For the alien's health, DHS will consider whether the alien has been diagnosed with a medical condition that is likely to require extensive medical treatment or institutionalization, impacting his or her ability to care for him or herself or to work upon admission.[23] For the alien's family status, DHS will consider the alien's household size to determine the minimum income

needed under the federal poverty guidelines.[24] For the alien's assets, resources, and financial status, DHS will consider if the income exceeds 125% of the most recent poverty guidelines, as well as analyze the alien's financial liabilities and resources to determine if the alien has the funds necessary to cover any reasonably foreseeable medical costs and expenses.[25] For the alien's education and skills, DHS will consider whether the alien has adequate education and skills either to obtain or maintain lawful employment in the United States with an income sufficient to avoid being more likely than not to become a public charge.[26] DHS will consider the alien's employment history, degrees received, occupational skills, certifications or licenses, and proficiency in English.[27] DHS will also consider whether the alien is applying for adjustment of status or admission in a nonimmigrant or immigrant classification and if a nonimmigrant, the anticipated period of temporary stay.[28] Finally, in cases where a petitioner is submitting an affidavit of support on behalf of an alien, as required in family-petitioned immigrant visas or adjustment-of-status cases, DHS will consider the likelihood that the sponsor would actually provide the statutorily required amount of financial support to the alien.[29]

Heavily Weighted Negative Factors

The new regulations state that certain factors "will weigh heavily in favor of a finding that an alien is likely at any time in the future to become a public charge."[30] These negative factors are: if the alien is not a full-time student and is authorized to work, but is unable to demonstrate current employment, recent employment history, or a reasonable prospect of future employment; the alien has received or has been certified or approved to receive one or more public benefits; the alien has been diagnosed with a medical condition that is likely to require extensive medical treatment or institutionalization; the alien is uninsured and has neither the prospect of obtaining private health insurance, nor the financial resources to pay for reasonably foreseeable medical costs related to such medical condition; or the alien was previously found inadmissible or deportable on public charge grounds by an immigration judge or the Board of Immigration Appeals.[31]

Heavily Weighted Positive Factors

The regulations also state that the following factors will weigh heavily in favor of a finding that an alien is not likely to become a public charge: the alien's household has income, assets, or resources, and support of at least 250% of the Federal Poverty Guidelines for the alien's household size; the alien is authorized to work and is currently employed in a legal industry with an annual income of at least 250% of the Federal Poverty Guidelines for the alien's household size; or the alien has private health insurance for the expected period of admission (subsidies in the form of premium tax credits under the Patient Protection and Affordable Care Act do not count).[32]

MECHANICS OF NEW PUBLIC CHARGE REGULATIONS

Application

USCIS has amended its I-129 (nonimmigrant petitions) and I-539 (extension and change of status) forms to comply with the new public charge regulations, as these forms now include questions regarding receipt and/or certification for public benefits. USCIS also created a new form, Form I-944, Declaration of Self-Sufficiency, that many adjustment-of-status applicants will have to complete in order to provide information on receipt of public benefits to demonstrate they are not inadmissible based on the public charge ground. In addition to completing this new eighteen-page form, applicants for adjustment of status will also have to submit IRS transcripts, bank statements, evidence of assets and liabilities, credit reports, evidence of health insurance, academic degrees and transcripts, occupational licenses and certifications, documents regarding receipt of public benefits, and evidence of English proficiency. The government estimates it will take four to five hours for applicants to complete this new form.

Waiver

If an alien is determined to be inadmissible based on the public charge ground, there is no waiver available; however, if the person is otherwise admissible, he or she may be admitted at the discretion of the secretary of Homeland Security upon the giving of a suitable and proper bond.[33] USCIS will only exercise this authority in the context of adjustment-of-status applications in cases where adjustment would otherwise be granted but for the public charge inadmissibility.[34] If an alien has one or more heavily weighted negative factors, previously discussed, in his or her case, DHS generally will not favorably exercise discretion to allow submission of a public charge bond.[35]

If eligible, a public charge bond of at least US$8,100 (annually adjusted for inflation based on the Consumer Price Index for All Urban Consumers (CPI-U)), will be issued on the condition that the alien does not become a public charge after the bond is issued.[36] The bond amount, decided by DHS, may not be appealed by the alien or the bond obligor.[37] If the U.S. government permits the alien to post a public charge bond, and the bond posted is the amount specified by USCIS, and complies with all other requirements as provided in the form and its instructions, USCIS will accept the public charge bond and will adjust the applicant's status to that of a lawful permanent resident (LPR) despite the alien's inadmissibility.[38]

A public charge bond will remain in effect until USCIS grants a request to cancel the bond when the alien naturalizes or otherwise obtains U.S. citizenship, permanently departs the United States, dies, the alien has reached his or her five-year anniversary since becoming a lawful permanent resident, or the alien changes immigration status to one not subject to the public charge ground of inadmissibility.[39] If the lawful permanent resident receives public benefits while the bond is in effect, and therefore has become a public charge, he or she will have breached the conditions of the bond, and the U.S. government will require payment on the bond.[40]

DEPARTMENT OF STATE'S IMPLEMENTATION OF PUBLIC CHARGE REGULATIONS

The Department of State (DOS) is also applying this standard to applicants for immigrant and nonimmigrant visas;[41] however, the Foreign Affairs Manual (FAM) at 9 FAM §302.8 instructs consular officers that much greater evidence is generally required in an immigrant visa (IV) case than is required in a nonimmigrant visa (NIV) case.[42] "Your determination that an applicant qualifies for the NIV sought is generally sufficient to meet the requirements of INA 212(a)(4), absent evidence that gives you reason to believe that a public charge concern exists."[43] All immigrant visa applicants subject to INA § 212(a)(4) must complete and submit a Form DS-5540, Public Charge Questionnaire.[44] If a family unit applies together, only one form is required. Unless specified on Form DS-5540, applicants are not required to submit supporting documentation;[45] however, if the consular officer determines documentary evidence is necessary, he or she may request an applicant to establish the adequacy of financial resources by submitting, for example, evidence of bank deposits, ownership of property or real estate, ownership of stocks and bonds, insurance policies, or income from business investments, as well as those of any household members.[46]

In nonimmigrant cases, if the evidence of nonimmigrant status submitted does not indicate adequate provision for the applicant's support while in the United States, it is within the consular officer's discretion to request specific financial evidence and/or require the applicant to complete a Form DS-5540, Public Charge Questionnaire, in whole or in part, to respond orally to questions from that form, or require a surety bond.[47]

CONCLUSION

Practitioners must now navigate through the new public charge regulations and understand the totality of the circumstances test in order to competently and effectively represent their clients and present the evidence to USCIS in the most favorable light to overcome the public charge ground of inadmissibility.

The Public Charge Maze, continued

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Endnotes

1 Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41292 (14 Aug. 2019).

2 *Department of Homeland Security v. New York*, 589 U.S. __ (2020).

3 *Wolf v. Cook County*, 589 U.S. ___ (2020).

4 https://www.uscis.gov/news/news-releases/uscis-announces-public-charge-rule-implementation-following-supreme-court-stay-nationwide-injunctions

5 8 U.S.C. § 1182(a)(4)

6 https://www.uscis.gov/news/fact-sheets/public-charge-fact-sheet

7 "Field Guidance on Deportability and Inadmissibility on Public Charge Grounds," Immigration and Naturalization Service, Justice, 64 Fed. Reg. 28689-28693 (26 Mar. 1999), https://www.gpo.gov/fdsys/pkg/FR-1999-05-26/pdf/99-13202.pdf

8 *Id*.

9 *Id*.

10 8 C.F.R. § 212.21(a).

11 *Id*. at (c) (emphasis added).

12 *Id*. at (b)(1-6).

13 https://www.uscis.gov/news/fact-sheets/public-charge-fact-sheet

14 *Id*.

15 *Id*.

16 8 C.F.R. § 248.1(a) (change of status) and 8 CFR § 214.1(a)(3)(iv) (extension of status).

17 *Id*.

18 8 C.F.R. § 212.23(a)(1-27).

19 8 C.F.R. § 212.21(b)(8).

20 8 C.F.R. § 212.22(a) (emphasis added).

21 *Id*. at (b).

22 *Id*. at (b)(1)(i).

23 *Id*. at (b)(2)(i).

24 *Id*. at (b)(3).

25 *Id*. at (b)(4).

26 *Id*. at (b)(5)(i).

27 *Id*. at (b)(5)(ii).

28 *Id*. at (b)(6)(i).

29 *Id*. at (b)(7)(i).

30 *Id*. at (c)(1).

31 *Id*. at (i)-(iv).

32 *Id*. at (c)(2)(i)-(iii).

33 *See* INA § 213. *See* 8 C.F.R. § 103.6 and 8 C.F.R. § 213.1.

34 8 C.F.R. § 213.1(a).

35 1 *Id*. at (b).

36 *Id*. at (c)(2).

37 *Id*.

38 USCIS Policy Manual, Volume 8, Part G, Chapter 18.

39 8 C.F.R. § 213.1(d).

40 *Id*. at (h)(2)(i).

41 9 FAM § 302.8-2(A).

42 9 FAM § 302.8-2(B)(4).

43 Id.

44 9 FAM § 302.8-2(B)(2)(e)(3)(a).

45 *Id*.

46 *Id*.

47 9 FAM § 302.8-2(B)(4)(b).

Taxation of Assets at Death, from page 15

Intangible Assets

The above series of tiebreakers determining domicile should help legal practitioners to arrive at a result for their client as to whether a decedent's worldwide assets or merely U.S.-situs assets are subject to U.S. estate tax. But what about intangible assets? As you may know, intangible assets are nonphysical items of value such as copyrights, trademarks, patents, and goodwill; however, this section will focus on the intangible asset of *partnership interest*.[12]

U.S. corporate shares are considered tangible, U.S.-situs assets for U.S. estate tax purposes. A single-member limited liability company (SMLLC) is considered disregarded for U.S. tax purposes, and assets of the SMLLC are considered owned directly by the individual. U.S. partnership interests, on the other hand, are considered intangible assets. The most common interpretation of the situs for intangible property at death for purposes of U.S. estate tax is the domicile of the decedent, established under the doctrine of mobilia sequuntur personam, as ruled by the U.S. Supreme Court case *Blodgett v. Silberman* and affirmed in the U.S. Tax Court case *Estate of Vandenhoeck*. While U.S. corporate shares are subject to estate tax due to Internal Revenue Code Section 2104, no such statutory provision is applicable to U.S. partnership interests.[13]

The following example should aptly illustrate the above: *B*, a domiciliary of Brazil, owns 95% of the partnership interest in USA LLC, which owns a successful retail store in Miami. Upon *B's* death, the 95% partnership interest is distributed in accordance with his Brazilian will and is permitted under the USA LLC operating agreement's transfer provisions. Despite the value of property being well in excess of the US$60,000 nonresident exemption, *B's* estate should owe no U.S. estate tax as the 95% partnership interest in USA LLC is an intangible and is therefore deemed located in Brazil, where *B* resided.

The above approach to determining situs for estate tax purposes for foreign-owned U.S. partnership interests is not codified in law, and the directions for Form 706 (U.S. Estate Tax Return) do not explicitly cite authority for application in this manner. Despite this supposed ambiguity, most legal practitioners believe this interpretation is on sound legal footing—that intangibles such as partnership interests are sourced to the domicile of the decedent. This interpretation of U.S. law can provide many advantageous planning opportunities for international clients who wish to invest in the United States.

Covered Expatriates With U.S. Beneficiaries

A U.S. citizen *expatriates* when she or he chooses to relinquish U.S. citizenship and permanently leave the United States for a new country. Depending on the value of the property the expatriating individual owns at the time of the expatriation and how that value has increased over time, an "exit tax" may or may not apply. This section focuses on lingering U.S. taxes that could apply upon the eventual death of a "covered" expatriate post-expatriation.

As previously mentioned, it is typical that the estate of the decedent is responsible for paying tax on assets

that the decedent owns at death, and often it is the country where that decedent was domiciled that collects the tax. When the decedent qualifies as a *covered expatriate*, though, a different set of rules may apply. Covered expatriates usually own at least US$2 million in total assets upon their expatriation (with some other variables).[14] Internal Revenue Code Section 2801 (IRC § 2801) states that if a U.S. citizen or resident receives a bequest from a covered expatriate decedent, the U.S. citizen or resident transferee is responsible for paying an "inheritance tax" to the IRS of 40% of the value of the bequest. Residents for this purpose are those individuals considered domiciled in the Unites States. For 2020, the exemption for this inheritance tax is only US$15,000.[15]

Why would this inheritance tax exist? The public policy behind IRC § 2801 is that absent such a law, a U.S. citizen who expects a large income event could expatriate prior to gaining such income and could then subsequently pass significant assets to U.S. beneficiaries upon her or his death without U.S. taxation. For example, *A*, a U.S. citizen in 2020 with over US$2 million in total assets, anticipates receiving a US$50 million capital gain in 2021 if certain preconditions are met in the interim time period. *A* expatriates in 2020 and pays little or no tax to the United States upon the expatriation, depending on the nature of and original value of *A's* assets. In 2021, *A* receives the capital gain payment as anticipated. In 2024, *A* passes away and leaves US$52 million in assets to *A's* U.S. daughter as *A's* sole beneficiary. Without IRC § 2801, no U.S. tax would be collected and the decision by *A* to expatriate would have been handsomely rewarded. With the rule in place, *A's* daughter pays about US$20.8 million in inheritance tax upon the transfer at death from her covered expatriate parent (US$52 million x 40%). Had *A* never expatriated, *A* could have used the US$11.58 million exemption (which would likely be adjusted higher for inflation in 2024), and the total tax paid would have been approximately US$16.2 million (US$40.42 million x 40%), a US$4.6 million difference in tax in this case.

Armed with information about taxation for international clients (and for U.S. clients who live outside the United States), legal practitioners can provide valuable counsel. It is hoped this article has given some guidance to its readers as to minimizing U.S. estate taxes when an international entrepreneur with interests in the United States, one of our main sources of clientele, passes on. Of course, the tax planning needs to be done prior to death to be most effective.

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Endnotes

1 I.R.C. § 2010(c).

2 This article does not consider the application of estate tax or inheritance tax by the several states in the United States that impose such taxes. This is, however, a relevant consideration that should not be overlooked.

3 I.R.C. § 2503(b)(1). This number has been adjusted for inflation for 2020.

4 I.R.C. § 6018(a)(2).

5 I.R.C. § 2105(b).

6 *See* U.S.-Germany Estate Tax Treaty (1980).

7 *See* OECD's Model Estate and Gift Tax Treaty (1982).

8 *Larcher v. France*, Conseil d'Etat (1995).

9 *Podd v. Commissioner*, T.C. Memo 1998-418.

10 Baker, *Double Taxation Conventions and International Tax Law* (2010).

11 *See* OECD's Model Estate and Gift Tax Treaty (1982).

12 Hudson, *The Tax Effects of Choice of Entities for Foreign Investments in U.S. Real Estate and U.S. Business*, Business Entities (WG&L) (2002).

13 *Id.*

14 IRS Notice 2009-85, 2009-45 I.R.B. 598 (2009).

15 I.R.C. § 2503(b)(1). This number has been adjusted for inflation for 2020.

Data Protection, from page 17

of evidence "do[es] not deprive an American court of the power to order a party subject to its jurisdiction to produce evidence even though the act of production may violate that statute."[17] "In determining whether the foreign statute excuses noncompliance with the discovery order, courts consider: (1) the importance of the documents or other information requested to the litigation; (2) the degree of specificity of the request; (3) whether the information originated in the United States; (4) the availability of alternative means of securing the information; and (5) the extent to which noncompliance would undermine important interests of the United States."[18] Other considerations would be "the extent and the nature of the hardship that inconsistent enforcement would impose upon the person" and "the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by the state."[19]

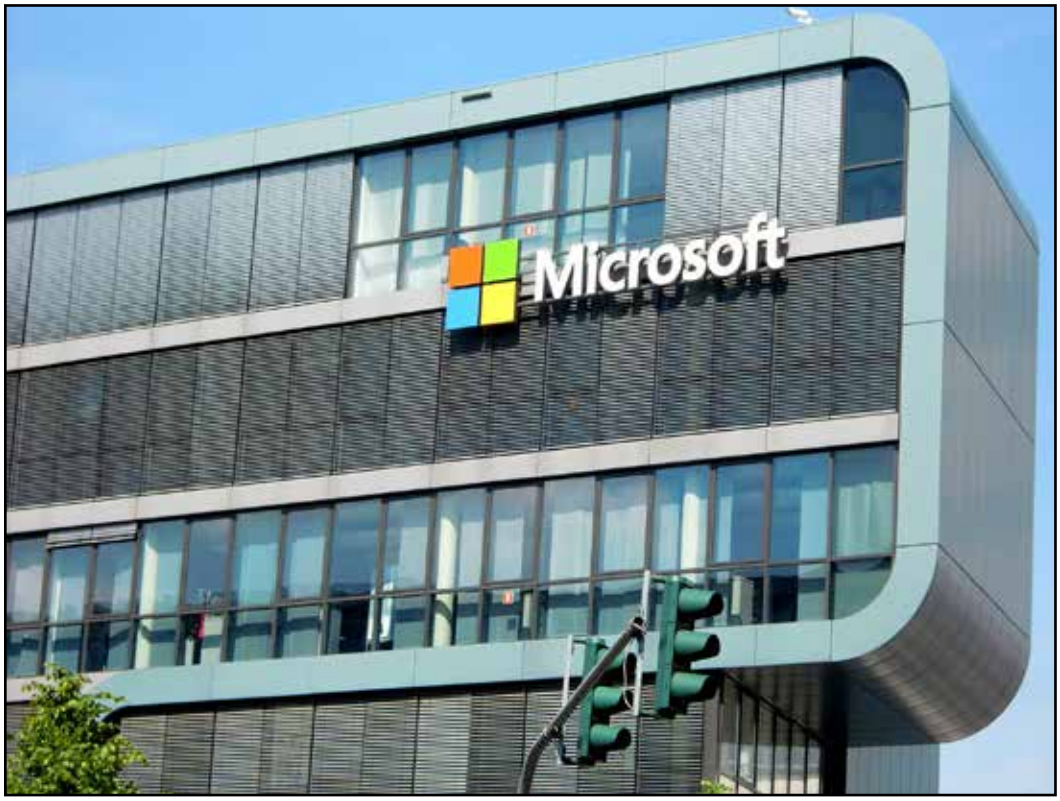
The court in *Finjan* stated, "the balance of national interests . . . 'is the most important factor' [and] protecting privacy 'is diminished where the court has entered a protective order preventing disclosure of secret information.'"[20] This is crucial to the analysis because facilitating the availability of discovery in U.S. litigation should be a national interest, among others. Further, it is logical not to prohibit or limit the disclosure of relevant documents in U.S. litigation based on a foreign privacy statute when there is already a court order in the case that accomplishes the goal of protecting all private data to be disclosed in discovery.

Finally, the court in *Finjan* found that "[t]he party relying on foreign law has the burden of showing that such law bars production."[21] In that case, the defendant failed to put forth evidence that there was a "likelihood of enforcement."[22] This is important because it relates to prior case law regarding the French blocking statutes and other privacy statutes implemented to prevent U.S. discovery or enforcement of other U.S. laws, such as antitrust laws, but were not even enforced in the country of origin.[23] As a practice point, an objector should always offer evidence of GDPR's enforcement as it is necessary to carry its burden. Likewise, the party seeking the discovery should always raise the objector's failure to offer evidence of GDPR enforcement, particularly in the context of fines imposed for discovery required to be produced in litigation abroad.

On 31 May 2019, the court in *Strauch* entered a ruling on a GDPR objection.[24] This ruling recounted that the appointed special master initially required a "filtered" approach to attempt to resolve the GDPR objection.[25] "Plaintiffs wanted a more comprehensive approach and objected to this 'filtering' because it left unanswered questions and potentially could lead to the omission of class members who worked in non-U.S. locations."[26] The plaintiffs would not agree to the defendant self-filtering responsive discovery, which could be problematic by potentially reducing the amount of responsive information to which the plaintiffs were otherwise entitled.[27] Later, after considering numerous proposals, the parties consensually resolved the issue by requiring the production of de-identified data that was subject to the GDPR.[28]

On 7 November 2019, the special master in the *Mercedez-Benz Emissions Litigation* entered a relevant ruling related to a GDPR discovery objection.[29] The court denied a motion to stay pending appeal regarding document production that the defendants alleged would violate the GDPR.[30] The special master ruled that the documents should be produced under a confidentiality order, which already protected the GDPR-protected information.[31] The special master did not require redaction, and there was no mention of cost splitting in the ruling.[32] The special master stated, "[w]hile the GDPR defines 'personal data' broadly to include even seemingly innocuous information like business contact and other related data about a business's employees, business partners, and customers—the sort of information in business records that parties routinely exchange as part of discovery in U.S. litigation, Defendants have not pointed to any prior enforcement actions by the EU focused on violations in the litigation context."[33] Again, the defendants failed to meet their burden by not introducing evidence of enforcement actions relating to disclosure of GDPR information required to be disclosed in discovery.

Data Protection, continued



objections. As the case law develops, time will tell whether there will be any further rulings requiring indemnification or otherwise limiting discovery that parties are otherwise entitled to obtain in U.S. litigation. Additionally, over time, there will be more information on GDPR enforcement actions, and particularly whether there are enforcement actions based on information that was required to be produced in discovery, which could affect future litigation on GDPR objections.

On 30 January 2020, the court in *Mercedez-Benz Emissions Litigation* overruled the objection to the defendants' appeal of the special master's opinion and affirmed the special master's GDPR ruling.[34] The court stated, "[b]ased on the Court's own international comity analysis, as well as an analysis of the Special Master's GDPR Ruling, the Court finds that the Special Master conducted a well-reasoned international comity analysis and did not abuse his discretion by prohibiting parties from redacting the names, positions, titles, or professional contact information of relevant current or former employees of any Defendant or third parties identified in relevant, responsive documents, data, or information produced in discovery in the above-captioned matter."[35] The court found that "[s]uch information can be designated and protected as 'Highly Confidential' pursuant to the Discovery Confidentiality Order provision," which balanced the plaintiffs' right to obtain the discovery and the EU citizens' privacy rights.[36]

Overall, with some outliers, courts seem to take a balanced and practical view in resolving GDPR

Approaches for Consensually Resolving a GDPR Discovery Objection

While there is limited case law on this issue, given that the GDPR became effective in May 2018, it appears that most courts in the United States are not willing to allow GDPR objections to outweigh a party's right to obtain discovery that it is entitled to obtain in U.S. litigation. This is consistent with the manner in which U.S. courts have historically addressed discovery objections based on foreign privacy or secrecy statutes.

This seems to be a sensible approach given that there are other less rigid ways of handling such objections rather than preventing or limiting the disclosure of the information. One option is redaction. This approach is not ideal, particularly for the parties seeking the information because they should be able to review the data themselves rather than relying on their opponent to filter the information. The next option is anonymization of EU citizens' information. This is a fair approach to allow the discovery, while also preventing it from disclosure in a manner that could compromise the privacy rights

Data Protection, continued

that the GDPR seeks to protect. One downside is that anonymization may be expensive; however, that should not be enough of a deterrent to outweigh a party's right to discovery in U.S. litigation. Finally, requiring the discovery to be subject to a confidentiality order seems to be the most straightforward approach and one that is already widely used. The information is protected from disclosure, so it protects the privacy of EU citizens, while still allowing the necessary, responsive discovery and not requiring the time and expense of redaction and anonymization.

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Endnotes

1 *Id*.

2 *Finjan, Inc. v. Zscaler, Inc.*, No. 17CV06946JSTKAW, 2019 WL 618554, at *1 (N.D. Cal. 14 Feb. 2019).

3 § 11:3.GDPR—Scope and main provisions, 2 Data Sec. & Privacy Law § 11:3 (2019) (citing Article 4(1) of the GDPR).

4 § 11:2.General Data Protection Regulation 2016/679, 2 Data Sec. & Privacy Law § 11:2 (2019) (citing Article 3(1) of the GDPR).

5 § 11:2.General Data Protection Regulation 2016/679, 2 Data Sec. & Privacy Law § 11:2 (2019) (citing Article 83 of the GDPR).

6 § 11:4.GDPR—Remedies, liability and sanctions, 2 Data Sec. & Privacy Law § 11:4 (2019) (citing Chapter 8 of the GDPR).

7 *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for S. Dist. of Iowa*, 482 U.S. 522, 544 n.29, 107 S. Ct. 2542, 2556, 96 L. Ed. 2d 461 (1987) (citing *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers,* 357 U.S. 197, 204-206, 78 S.Ct. 1087, 1091-1092, 2 L.Ed.2d 1255 (1958)).

8 Societe Nationale Industrielle Aerospatiale, 482 U.S. at 527; *see also Laydon v. Mizuho Bank, Ltd.*, 183 F. Supp.3d 409 (S.D.N.Y. 2016) (refusing to enforce predecessor United Kingdom privacy law, in which there was no evidence of enforcement of the law in the United Kingdom).

9 *See e.g., Arthur Andersen & Co. v. Finesilver*, 546 F.2d 338 (10th Cir. 1976)("district court did not usurp its power in entering discovery orders which required accounting firm to produce certain documents, even though production of such documents would allegedly violate nondisclosure laws of Switzerland."); *Graco v. Kremlin, Incorporated*, 101 F.R.D. 503, 514 (N.D. Ill. 1984); *First American Corp. v. Price Waterhouse LLP*, 154 F.3d 16, 21-22 (2d Cir. 1998); *Bodner v. Banque Paribas*, 202 F.R.D. 370, 375 (E.D.N.Y. 2000); *Stauss v. Credit Lyonnais, S.A.*, 249 F.R.D. 429 (E.D.N.Y. 2008); *In re Air Crash at Taipei, Taiwan on Oct. 31, 2000*, 211 F.R.D. 374 (C.D. Cal. 2002); *Pershing Pacific West, LLC v. Marinemax, Inc.*, 2013 WL 941617, at *8-9 (S.D. Cal. 11 Mar. 2013); *St. Jude Med. S.C. v. Janssen-Counotte*, 104 F. Supp.3d 1150, 1162 (D. Or. 2015); *Laydon*, 183 F. Supp.3d 409 (S.D.N.Y. 2016); *Las Vegas Sands v. Eighth Jud. Dist. Ct.*, 130 Nev. 578, 585, 331 P.3d 876, 880 (2014); *Wynn Resorts, Ltd. v. Eighth Judicial Dist. Court of State in & for Cty. of Clark*, 386 P.3d 996 (Nev. 2016); *Knight Capital Partners Corp. v. Henkel AG & Co.*, 290 F. Supp.3d 681, 690-91 (E.D. Mich. 2017); *Republic Tech. LLC v. BBK Tobacco & Foods, LLP*, 2017 WL 4287205, at *4-5 (N.D. Ill. 27 Sept. 2017); *Royal Park Investments SA/NV v. HSBC Bank USA, N.A.*, 2018 WL 745994, at *2 (S.D.N.Y. 6 Feb 2018).

10 *See e.g., Strauss*, 249 F.R.D. at 456; *Wultz v. Bank of China Ltd.*, 910 F. Supp. 2d 548, 559 (S.D.N.Y. 2012).

11 *Corel Software, LLC v. Microsoft Corp.*, No. 215CV00528JNPPMW, 2018 WL 4855268, at *1-2 (D. Utah 5 Oct. 2018).

12 *Id*.

13 *See In re Hansainvest Hanseatische Inv.-GmbH*, 364 F. Supp. 3d 243 (S.D.N.Y. 2018).

14 *Id*. at 252.

15 *Id*.

16 *Finjan*, 2019 WL 618554, at *3.

17 *Id*. (citing *Societe Nationale Industrielle Aerospatiale*, 482 U.S. at 544 n.29).

18 *Id*. (citing *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1475 (9th Cir. 1992)).

19 Id.

20 *Id*. (citing *Richmark*, 959 F.2d 1468, 1475 (9th Cir. 1992); *Masimo Corp. v. Mindray DS USA, Inc.*, Case No.: SACV 12-02206-CJC(JPRx), 2014 WL 12589321, at *3 (C.D. Cal. 28 May 2014); *United States v. Vetco Inc.*, 691 F.2d 1281, 1287, 1289 (9th Cir. 1981)).

21 *Id*. (citing *Vetco*, 691 F.2d at 1289).

22 *Id*.

23 *See Societe Nationale Industrielle Aerospatiale*, 482 U.S. at 527.

24 *Strauch v. Computer Scis. Corp.*, No. 3:14-CV-956 (JBA), 2019 WL 3337889, at *6 (D. Conn. 31 May 2019).

25 *Id*.

26 *Id*.

27 *Id*.

28 *Id*.

29 *In re Mercedes-Benz Emissions Litig.*, No. 216CV881SDWJAD, 2019 WL 5800270, at *2 (D.N.J. 7 Nov. 2019).

30 *Id*.

31 *Id*.

32 *Id*.

33 *Id*.

34 *In re Mercedes-Benz Emissions Litig.*, No. 16-CV-881 (KM) (ESK), 2020 WL 487288, at *1 (D.N.J. 30 Jan. 2020).

35 *Id*.

36 *Id*.

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Before that, in 2004, the Federal Law on Public-Private Partnerships (Federal Law No. 11,079/2004) had already established arbitration to resolve disputes regarding concession agreements;[19] however, under the *princípio da indisponibilidade do interesse público* (principle of unavailability of the public interest) adopted in Brazil, matters concerning the public administration were generally not arbitrable. Thus, the possibility and limits of using arbitration to solve conflicts involving state entities have been subjects of discussion since then.

In 2015, the BAA was amended to allow the public administration to use arbitration to resolve disputes related to *direitos patrimoniais disponíveis* (available property rights), meaning those rights a party may renounce.[20] In 2017, Federal Law No. 13,448/2017[21] regulated the use of arbitration in contracts involving the road, rail, and airport sectors of the federal administration.

Initially, the government used the mentioned legislation to include arbitration agreements in contracts involving state entities solely because the international banks financing major projects compelled the other contracting party to do so. Arbitration usually inspires more confidence among foreign investors than litigation in domestic courts, especially because of the notorious corruption issues in which Brazil has been traditionally involved.

As arbitration became more popular worldwide, Brazil was pushed to regulate and expand its use. In 2018, the Office of the General Counsel for the federal government enacted Ordinance No. 226/2018,[22] which created a specialized arbitration center to act in disputes related to capital, concessions, and electricity industries involving the federal government.

Decree No. 10,025/2019 revoked Federal Decree No. 8,465/2015. The latter provided for arbitration criteria to settle disputes within the port sector, and the former expanded its scope, making arbitration available also to the road, rail, waterway, and airport transport sectors. Decree No. 10,025/2019, in accordance with Justice Toffoli's concerns, also provides for the use of other alternative dispute resolution mechanisms, such as mediation and negotiation.

The primary purpose of the Decree is to intensify the regulation of arbitration cases involving state entities, considering some specificities that are not applicable in disputes only between individuals. By regulating the use of arbitration within the scope of "public contractual relations," the Decree provides an important tool to facilitate and promote the use of arbitration by federal public bodies.

Main Provisions of Federal Decree No. 10,025/2019

Consistent with Federal Law No. 13,129/2015, which permits the public administration to make use of arbitration to resolve disputes over "available property rights," Decree No. 10,025/2019 establishes as its scope, disputes involving such rights. Article 2 provides a list of what can be considered available property rights to guide the interpreters. This index, however, is not exhaustive. The examples presented in the Decree are:

(1) matters in connection with the economic-financial balance of contracts;

(2) the computation of indemnities arising from the termination or transfer of the partnership agreement; and

(3) the breach of contractual obligations by any of the parties, including penalties, which makes the application of contractual administrative penalties arbitrable.

Because the Decree establishes proceedings specifically designed for arbitration in public contracts concluded in infrastructure sectors, it narrowed the BAA's provisions. The arbitral tribunal shall exclusively apply Brazilian law, and arbitration in equity is not allowed. Also, the language of the arbitration must be Portuguese.

The Decree provides a simplified solution to what information is made public—and often oversimplifies it. Under the novel rules, information concerning the arbitral proceedings must be public, except for the protection of trade secrets and other data considered confidential under Brazilian laws. The Decree does not

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advise who or which entity will decide on what type of information is submitted to this confidentiality regime.

The rules establish a preference for institutional arbitration, to be conducted in front of an arbitration chamber previously accredited by the Office of the General Counsel for the federal government. The office will approve institutions that have been in operation for at least three years, are known for their experience and expertise in conducting arbitrations, and have arbitral rules translated into Portuguese, according to Article 10 of Decree No. 10,025/2019.

The arbitration clause or agreement may specify that the parties will select an arbitral institution from the list of approved arbitration chambers. The Decree provides that the state can object to the other contracting party's decision regarding the institution's choice within fifteen days. Nevertheless, it does not inform how many times such objection might be raised. Ad hoc arbitration is not prohibited; however, it will only be allowed when duly justified.

In contracts containing an arbitration clause, it shall comply with the general rules for arbitration and scope of arbitration/arbitrability, and must be highlighted on the document. The clause must establish if the arbitration will be ad hoc or institutional. When the parties do not specify the arbitral institution, the clause shall provide information on how they will choose one among the list of accredited chambers. The place of arbitration must be indicated in the agreement as well.

Generally, Decree No. 10,025/2019 does not apply to contracts or arbitration agreements before its enactment; however, the parties can agree to the application of the novel rules, and if no arbitration clause was stipulated, the contract might be amended to include this stipulation. This provision of the Decree is relevant because it expressly promotes the use of arbitration in contracts under its scope.

Nevertheless, the federal public administration holds the prerogative of accessing the benefits and disadvantages of entering into arbitration agreements when no arbitration clause was provided in a contract. The administration will prefer to arbitrate a dispute when it is predominantly based on technical aspects and when the delay of litigation may cause damages to the proper performance of the public services or the infrastructure's operation, or if it could prevent priority investments.[23]

The parties shall appoint arbitrators who have legal capacity and knowledge on the subject matter of the case. Also, an arbitrator must be free from conflicts of interests established in laws, rules, or international standards. These provisions were already set forth by the BAA and the Brazilian Code of Civil Procedure. Nonetheless, the Decree innovates by referring to the international guidelines in arbitration, such as the International Bar Association (IBA) Rules or the CIArb

(Chartered Institute of Arbitrators) Rules, as well as the rules of the arbitration institution selected by the parties.

Concerning verdicts and enforcement mechanisms, the public administration, in general, pays the damages established in arbitral awards through court orders; however, the public administration can resolve contractual disputes using other solutions based on administrative practices. The Decree incorporated these solutions and establishes that, where the parties so agree, payment may be made through compensation with contractual fees and nontax obligations, mechanisms for the economic-financial rebalancing of the contract, and attribution of the payment to a third party, in the cases admitted by law.

The Decree establishes time limits to the proceedings. The respondent shall have at least sixty days to answer the request for arbitration. The arbitrators have twenty-four months to render the final award, starting from the terms of reference date. Therefore, the terms of reference shall be mandatory. This time limit can be extended only once, depending on the agreement of the parties, and shall not exceed forty-eight months.

The contractors shall advance the costs of the arbitral institution and the arbitrators' fees in benefit of the investors. When applicable, these costs shall be reimbursed according to the final resolution of the arbitration, in order to discourage any frivolous claims. The parties will bear the costs of arbitration proportionally, in case each of them loses. The winning party may recover the *honorários sucumbenciais* (special attorney's contingent fees), to be calculated under the rules of the Brazilian Code of Civil Procedure. Generally, the parties shall pay the expenses of hiring technical experts, which must not be reimbursed. Nonetheless, the parties can agree with the contractor on advancing the costs associated with the production of expert evidence, including the expert's fees.

Criticism

Federal Decree No. 10,025/2019 has been in force since 20 September 2019 and has received significant criticism.[24] It looks like the novel rules assumed the state entities would always be the respondent when, for example, only a minimum of days for filing the answer is provided, and no time limit is set forth to the claimant.

Also, the maximum of twenty-four months for the arbitrators to render the final award, even if extended to forty-eight months, is impracticable. Construction arbitration rarely is concluded within two years, or even four. The subject matter of such cases is usually complex and technical, and they can take several years to be resolved. Therefore, this provision may be detrimental to the party's rights, and one cannot ensure that this provision will be fully effective.

Finally, the state must prepare to engage in arbitration on an equal footing with the big law firms that usually represent contracting companies. If the state does not provide adequate specialization on alternative dispute resolution, in particular to the Brazilian general counsel, then Decree No. 10,025/2019 might "shoot" the public administration in its "foot."

Conclusion

Brazil is a Latin American country globally recognized as an arbitration-friendly jurisdiction. To extend the use of arbitration to matters between the federal government or the entities of the federal public administration and concessionaires, sub-concessionaires, lessees, permit holders, and port operators, the president of Brazil issued Federal Decree No. 10,025. The primary purpose of the novel rules is to attract foreign investment. The Decree's provisions follow previous laws favorable to arbitration and establish specific proceedings for arbitration in public contracts concluded in infrastructure sectors. Even though Decree No. 10,025 has been in force for less than one year, it can be considered an efficient tool to manage political risk and risk allocation in state contracts.

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7 *See* Article 1 BAA: ". . . those who are capable of entering into contracts may use arbitration to resolve conflicts related to negotiable and pecuniary matters."

8 *See* Article 13 BAA.

9 *See* Article 11, III Lei 11.079/2004, available at http://www.planalto.gov.br/ccivil_03/_Ato2004-2006/2004/Lei/L11079.htm

10 *See* Article 8(1) BAA, ". . . the arbitrator has jurisdiction to decide ex officio or at the parties' request, any issues concerning the existence, validity and effectiveness of the arbitration agreement, as well as the contract containing the arbitration agreement." and Article 20 BAA, "the party who intends to argue questions related to competence, suspicion or prevention of arbitrators, as well as annulment, nullification, or ineffectiveness of the arbitration agreement, shall do it in the first opportunity after the beginning of the proceedings."

11 *See* Article 485(VII) Brazilian Code of Civil Procedure, ". . . a judge shall not rule on the merits when (. . .) the arbitral tribunal confirms its jurisdiction," available at http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2015/lei/l13105.htm

12 *See* Articles 22-B(1) and 22-A(1) BAA.

13 *See* ArticleS 33(1) and 32 BAA.

14 *See Copel v. UEG*, finding that the arbitration clause in a power purchase agreement signed between the parties was void because of the lack of previous statutory authorization to execute it. *See also Sulamérica v. ENESA* (the Jirau case) finally finding that issues of the existence, validity, and effect of arbitration clauses must be decided by the arbitrators and not by the courts.

15 *See* Article 31 BAA, "The arbitral award shall have the same effect on the parties and their successors as a judgement rendered by the Judicial Authority and, if it includes an obligation for payment, it shall constitute an enforceable instrument thereof." and Article 515(VII) Brazilian Code of Civil Procedure, establishing that arbitral awards are judicial executive titles and shall be enforced under the Code of Civil Procedure rules.

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should not prevent Members from taking measures to protect public health" and that "the Agreement can and should be interpreted and implemented in a manner supportive [of the] right to protect public health and, in particular, to promote access to medicine for all."[19] The DOHA Declaration placed this emphasis on access to medicine by including the language "in particular."[20] The DOHA Declaration also states that every state can issue compulsory licenses (which is, in effect, when a government allows someone to produce a patented product or process without the express consent of the patent owner or plans to use the patent-protected invention itself) and are free to determine exactly what precursors are necessary for states to issue the licenses.[21]

The DOHA Declaration also emphasizes the importance that members have in parallel importation. Parallel importation is importation without the consent of the patent holder of a patented product marketed in another country by either the patent holder or with the patent holder's consent.[22] The idea is that once patent holders or their authorized parties have sold a patented product, they cannot prohibit the subsequent resale of that product since their rights in respect to that product have been exhausted. Parallel importation is especially important here because, since products are being sold in the market at different prices, it may allow for more affordable medication at lower patented prices. This technique is of limited use in a market where there are only two manufacturers of a vaccine, however.

The HPV Vaccine and the Obstacles Developing Countries Face in Implementation

Ideally, the HPV vaccine should be available worldwide. The vaccine is the number one preventive measure to ensure that both women and men do not contract and spread HPV. Access to this vaccine in developing countries would undoubtedly reduce the mortality rate of a disease that is killing women at an alarming rate.[23] It is easy to say "expand access to reduce mortality," but there are many obstacles in the way of providing the vaccine to individuals in developing countries.

Since HPV is one of the most common STDs in the world, providing the HPV vaccine is obviously an effective start to combating worldwide STDs. HPV affects "at least 50% of sexually active people at some point in their lives"[24] and if left untreated "can lead to cervical, anal, and throat cancers."[25] Yet HPV is preventable with access to vaccines. The "two cervical cancer vaccines [currently] used globally [in] . . . the market [are the] quadrivalent HPV (qHPV) vaccine . . . and bivalent HPV vaccine."[26] The qHPV vaccine is produced by Merck & Co. Inc. (Merck), while the bivalent vaccine is produced by GlaxoSmithKline plc (GSK).[27]

As there are only two manufacturers of HPV vaccines worldwide, the lack of robust competition creates obstacles for developing countries—these two manufacturers decide the prices for the entire market for the drug.[28] As a result, prices remain comparatively high: "Vaccine [i]mplementation for vulnerable girls and women faces multiple barriers that include high vaccine costs."[29] And although the HPV vaccine is the plain solution to lowering the rates of cervical cancer, licensing of the vaccines has not translated to universal access to women. Again, price is the biggest obstacle when it comes to delivering the HPV vaccine to developing countries.

The vaccine should be given between the ages of nine and twenty-six years old, which equates to vaccinating more than 5 million women worldwide.[30] At US$404 per the three-dose vaccine, this is about a US$2 billion cost to deliver the vaccine to women worldwide.[31] "The high vaccine cost can be linked to the monopoly pricing power of vaccine manufacturers seeking to recover the high development costs."[32] Thus, funding from public sectors and "the aid of vaccine funding consortia" are extremely important to spreading the HPV vaccine to developing countries.[33]

Comparison of the HIV/AIDS Epidemic to the HPV Epidemic and the Legal Obligation Framework That Arose Under the ICESCR

At what point does a disease become a global crisis? There have been many epidemics throughout the history of the world; some preventable, some not. When one thinks of prior worldwide epidemics, one often thinks of HIV/AIDS. In fact, "HIV, tuberculosis and malaria" are specific examples mentioned in the DOHA Declaration as "control[able] diseases of public health importance."[34] At some point, nations and organizations acknowledged that the HIV/AIDS epidemic in developing countries was one of such concern that they were forced to step in and try to rectify the issue. Was it when 274,000 people were dying every year?[35] Was it when there was a US$13 price increase in drugs that left those in developing countries struggling to access medicines?[36] This section will compare the HIV/AIDS epidemic with the spread of HPV and will examine when and how health organizations and countries determine an epidemic to be of such importance as to oblige them to create a plan to combat a deadly disease.[37]

Since the first reported cases of AIDS in 1981, approximately 75 million people have been infected with HIV and there are approximately 37.9 million people currently living with HIV.[38] Between 1996 and 2005, activists and non-governmental organizations banded together to force states to provide treatment for HIV and AIDS.[39] Just like the main implementation obstacle to HPV vaccination, the biggest obstacle to access for HIV/AIDS medication is affordability.[40] Other obstacles include "underdeveloped healthcare infrastructure, and a lack of . . . testing, education, and prevention programs."[41] The biggest push toward affordability for the HIV/AIDS medication came after 2001 when UN Secretary General Kofi Annan released a report that emphasized the "role pharmaceutical corporations have in providing affordable access to HIV/AIDS drugs in developing countries."[42] This report was what was needed to push a sense of obligation onto corporations. After the report was issued, numerous pharmaceutical corporations agreed to provide the HIV/AIDS medication at lower costs for developing countries.[43]

There is no express legal obligation on corporations to provide health care access; however, there has been debate regarding whether there is a corporate and state obligation implied under the ICESCR. The ICESCR states that a developing country would be violating the right to health by "failing to influence pharmaceutical corporations' actions that restrict access to HIV/AIDS drugs."[44] Further, the ICESCR General Comment Number 24 declares: "States parties should ensure that intellectual property rights do not lead to denial or restriction of everyone's access to essential medicines necessary for the enjoyment of the right to health."[45]

The best example on how a state is able to step in to further its obligation to protect the rights to health of its constituents is South Africa. South Africa implemented the following:

> First, by seeking to limit the pharmaceutical corporations' patent rights . . . to prevent interference by third-party

> pharmaceutical corporations and to protect the right to health. Second, by legislating for the importation and production of cheaper generic HIV/AIDS drugs . . . [and] arguably attempting [to] improve access to HIV/AIDS drugs for its citizens.[46]

South Africa followed the ICESCR general comment protocol of trying to limit the power that pharmaceutical companies have to set the prices at an abnormally high rate by not allowing pharmaceutical companies' patents to be influenced by big money. Further, even though South Africa is limited in resources, the country was not in violation of any right to health due to the state making an effort to rectify the little access to HIV/AIDS medication.[47]

This South African framework is the best roadmap that developing countries can use for HPV vaccination implementation to ensure that a person's right to health is not being violated by the corporations and states. The framework is progressive and is in line with the legal obligations set forth by the ICESCR, one of the many legal documents that emphasize a person's right to the highest attainable standard of health.

Aside from imposing a legal obligation, there were other occurrences worldwide that helped developing countries gain access to HIV/AIDS medication at a lower rate. One of the most important ones was HIV/AIDS activists.[48] "From 1996 to 2001, the price of triple-combination HIV/AIDS therapy purchased from originator companies fell by 93 percent and generics became widely available in many developing countries at a discount of 97 percent."[49] There are also multiple non-governmental agencies that are committed to attacking the pricing of such essential medication.

All of these factors working together to expand access to HIV/AIDS medication by developing countries at affordable prices and to develop better health care infrastructure has helped reduce deaths from AIDS by 55% since 2004. Multiple people and organizations have banded together to help those in developing countries have access to lifesaving medication to combat HIV/AIDS. All of this is also possible to expand access to HPV vaccinations by developing countries. Indeed, HPV and the deaths from cervical cancer is an epidemic of its own that must be combatted. A similar plan of attack—including a report from an established world health organization, followed by states asserting and accepting a legal obligation and pressuring corporations to accept a similar obligation, and advocacy—could result in similar effects on HPV.

What Has Been Done for the Implementation of HPV Vaccines in Developing Countries? What Else Can Be Done to Improve Access?

As discussed above, states have a legal and moral obligation to enact laws and policies to help people achieve the highest attainable standard of health.[50] Aside from this, pharmaceutical corporations have a moral obligation and an arguable legal obligation to do the same. This legal obligation is not expressly placed on the pharmaceutical corporations but rather on the states to ensure that the corporations are not in violation of anyone's right to health.[51] This legal obligation that states have in ensuring that people's right to health is not infringed upon is enumerated in Articles 9, 10, and 39 of General Comment No. 14 in the ICESCR.[52] General Comment 14 took into account the ever-changing environment regarding unknown and new diseases and the effects that obstacles to implementation of lifesaving medication would have on the world population.

One of the largest movements toward expanding access for developing countries to the HPV vaccine has been undertaken by the GAVI Alliance (GAVI). GAVI is an internationally based organization that aims to conjoin the private and public medical sectors by increasing access for vaccines to children living in the poorest countries in the world.[53] GAVI has made strides when it comes to implementing a framework for ensuring that children in developing countries have access to HPV vaccination. With GAVI's support, by 2018, more than 3.9 million girls had received the HPV vaccination since the program began back in 2012.[54] Thus, the almost 4 million girls who have been vaccinated now have a much better chance at living life without the fear of contracting HPV.

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Aside from increasing vaccination of women in developing countries, GAVI has also helped implement programs for governments to create their own national immunization programs to introduce the HPV vaccines.[55] "In 2018 alone, four countries with the highest burden of cervical cancer: Ethiopia, Senegal, The United Republic of Tanzania, and Zimbabwe successfully launched an HPV programme."[56] Additionally, with public and private-sector support, GAVI has been able to help expand access to the HPV vaccine by negotiating record low prices for the medication. GAVI teamed together with UNICEF to purchase vaccines from Merck at US$4.50 per dose and from GSK at US$4.60 per dose.[57] Aside from this, GAVI and Merck agreed to possibly extending these low prices if the volume for the supply of vaccinations increases in the future.[58]

The GAVI alliance and its relationship with pharmaceutical companies to expand the reach of HPV vaccines to developing countries make it clear that pharmaceutical corporations can and have been helpful partners in combating HPV infections. Merck agreed to lower the pricing per HPV dose to ensure that GAVI can affordably purchase it—there is no express legal obligation for Merck to lower vaccine prices from US$100 to US$4.50, but it did. Such actions are reasons for tremendous optimism in the global fight against HPV.

Conclusion

HPV infection rates cannot be ignored as HPV will affect over 50% of sexually active people worldwide and is linked to cervical cancer, which is the "second most common cancer among women worldwide."[59] Looking at the international legal and moral obligations, it is easy to see that countries and states have an obligation to ensure that their people can achieve the highest standard of health. The murky area in the legal jurisprudence is on how to get national and corporate compliance to reach that level of health. Without doubt, resources in developing countries will not be the same as in developed nations as developing countries do not have the health care resources and infrastructure to be on par with other countries worldwide;[60] however, simply because a state does not have all the resources it needs does not mean the state can sit back and watch its people suffer.[61]

International law is not doing enough to help women in developing countries. The general comments issued after the ICESCR or the DOHA Declaration are not enough to impose obligations, particularly when it comes to corporations. Corporations do not have an express legal obligation to ensure that people have access to their medication and vaccines. The only indirect obligation of corporations is ensuring they are not violating the right to health that nations must enforce. But corporations are not expressly in violation of international guidelines by only giving access to vaccines to those who can afford them. This can be changed. It is not feasible to give corporations, and in this case, two pharmaceutical corporations,[62] the power to decide whether they choose to help the populations in developing countries that have been affected by HPV and are dying from cervical cancer. That is the point where enough is enough.

Much has been done by organizations like GAVI, which has worked with the public and private sectors to implement better frameworks for HPV vaccine

expansion; however, as much as GAVI has helped, it cannot succeed on its own. The agreements GAVI has with certain countries are valid for only so long. Once those agreements end, who's to determine what happens next? International organizations and nations should impose enforceable legal obligations on corporations to ensure they are not in violation of the human right to health by making it virtually impossible, or financially unfeasible, for these corporations to restrict developing countries' access to such important preventive medication. What has been done is not enough. We need to expand the definition of the right to health and of access to medicine to include certain state and organizational legal obligations when an epidemic is exponentially rising. Clearer international legal jurisprudence must be put in place regarding the right to health, not just comments and declarations issued after the fact. There needs to be more than just a moral obligation on corporations concerning the right to health—it must be an enforceable legal obligation. In this way, more can be done to help combat the ever-growing mortality rate associated with an almost entirely preventable infection.

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