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Message From the Chair

Trade Makes the World Go Round

By Robert J. Becerra

This issue of the *ILQ* focuses on Customs and Trade. Trade is the multitrillion-dollar engine that powers the world's economies, resulting over the last century in the greatest increase in global living standards in history. In turn, trade creates business and employment for many of our clients, who then hire lawyers to provide legal services in the highly regulated customs and trade environment. This symbiotic relationship makes it imperative, not only for the overall world economy, but also for our legal economy, that a vibrant world trading system exists.

ROBERT J. BECERRA

Global trade is under threat from many sides, however. We have seen the United States raising tariffs on products not only from China, but also from Canada and the European Union. In retaliation, they have raised tariffs on U.S. goods, sparking trade wars not seen since the 1930's. The result, for many global supply chains, has been chaos—with some winners and some losers.

One of the winners, in all this dramatic change, has been customs and trade lawyers, who frequently advise their clients on how to navigate these new vistas. In that vein, this issue of the *ILQ* offers several excellent and informative articles on a variety of legal issues in international trade. Yours truly has an article in this issue entitled "When the Gray Market Turns Black," and no, it does not pertain to black magic. It does, however, discuss the so-called "gray market" in the trade of goods as well as recent criminal prosecutions bearing on those markets. Other offerings in this edition include:

- Jeff Hagen's piece on strategic transfer pricing, a major aspect of pricing that often will portend whether one makes profits or losses on a transaction;
- Peter Quinter's and Tucker Thoni's insights on the PPE market during the COVID-19 pandemic; and
- Some good news from Elio Martinez and Peter Quinter about recent court cases that offer new hope to intellectual property owners who want to pursue a claim against a Chinese company or individual.

This edition of the *ILQ* also features an informative article from former ILS Chair Larry Rifkin, who provides a "beginner's guide" to immigration law. Also, Anda Malescu provides a timely and topical article on the Coronavirus's impact on employment visas, and we have a "Quick Take" on the Eleventh Circuit's decision to allow broad discovery in aid of foreign bankruptcies by Greg Grossman and Francis Curiel. Rounding out this edition's features is a "Best Practices" article by Carmen Hiers entitled "What Every Lawyer Must Know About Certified Translation." Overall, great articles on international law issues, the quality of which we have come to expect from your section's *ILQ*.

Regarding section news, although I have been chair for only a few short months, there are many exciting things going on. We are planning a leadership retreat on Florida's West Coast in early November 2020 to be held both live and virtually. At that retreat, whether you attend in person or via computer, we hope to present you with the return of the popular ILS Talks patterned after TED Talks. In the meantime, your section continues to provide excellent CLE content virtually through webinars. We recently published our International Law Deskbook 2020, available on The Florida Bar website, which will become a bible for those interested in international law, and an awesome tool for those reviewing for The Florida Bar board certification exams on either international law or international litigation and arbitration. I have my copy, and you should get yours.

Message From the Chair, continued

Review your weekly *Gazette* for the link to purchase the Deskbook, and for news about CLE opportunities offered by the ILS.

I hope you enjoy this issue of the *ILQ*, the finest serial publication on international law in Florida. But even more important, I hope you enjoy being a member of the ILS and the great opportunities it provides not only for education but for promoting your practice and networking with international practitioners. Your section has more than twenty standing committees, so there are plenty of ways to get involved and make a difference. For example, please consider getting involved with the committee working hard to put together the iLaw 2021, our premier annual conference, which will be held in Miami in late February. Contact me for more information on any of our committees, and I will steer you right.

I look forward, despite the challenges of COVID-19, to a great year, and I hope you all join me in making that hope a reality.

With best regards,

Robert J. Becerra
Chair, International Law Section of The Florida Bar
Board Certified in International Law
Becerra Law PA

From the Editors . . .

LAURA M. REICH

ANA M. BARTON

Dear section members, we have made it to Fall 2020—and what an unexpected year this has been, chock-full of unique challenges for the entire world! In our Spring 2020 edition of the *International Law Quarterly* (*ILQ*), entitled *Socially Distant, But Always Connected*, we noted the initial disruptive impact that the COVID-19 global pandemic was having on international practitioners, not to mention the upheaval of daily life routines we previously took for granted. Now, months later, social distancing, remote work, and virtual legal proceedings on Zoom have become the new normal. The legal industry has had to adapt—and adapt fast. We dare say, in many respects, the challenge has been met with remarkable success. So much so, that many predict virtual hearings and depositions are here to stay. The work-from-home model has been so widely accepted that many businesses are reexamining the size of their office space footprint. This section certainly rose to the occasion, hosting its mid-year annual meeting via Zoom and not skipping a beat.

In that vein, we are pleased to present you with the next edition of the *ILQ*, which focuses on issues of customs and trade. As aptly noted by Chair Bob Becerra, trade makes the world go round. As you read this, take a moment to examine your clothing, the cup of coffee you are drinking, and the technology without which you cannot live (particularly during quarantine!). Chances are most, if not all, of these items come from outside the United States, and we have access to them thanks to international trade. As elementary as it may sound, you cannot have a global economy without healthy trade regimes. And, with the movement of goods across borders, the movement of people naturally follows. Florida is no stranger to that phenomenon with its richly diverse community. Yet, the terms of international trade are constantly evolving, usually a reflection of the state of current international relations. As international lawyers, we need to be ready to advise our clients as to the ever-changing landscape. Some of the most significant recent trade developments have been the "trade wars" between the United States and China and the United Kingdom's withdrawal from the European Union (aka Brexit). In addition to political influences on trade, increased consumer awareness that individual purchase power and market decision making can affect trade on a larger scale also has played a role in driving trade policy, whether it be grassroots initiatives in support of free trade to aid micro-economies in developing countries or, on the other end of the spectrum, campaigns designed to prioritize and boost the sale of U.S.-manufactured goods.

Today, with most of the world facing heightened travel restrictions to limit the spread of the coronavirus, novel issues in international customs and trade are surfacing. Some of the articles in this edition highlight these timely concerns, including the competition for obtaining supplies of highly sought-after personal protective equipment, or PPE as it is commonly known, and the uncertainty that has ensued for foreign workers in the United States whose visas and employment status are at risk. We are certain you will come away from this edition of the *ILQ* with a deeper appreciation for how customs and trade affect us all on a personal level as members of a global economy.

In terms of noteworthy *ILQ* developments, we are thrilled to welcome Jeff Hagen and Neha Dagley to the editorial team. Their energy and contributions to the *ILQ* have ensured it continues to be a stellar publication we are proud to put forth.

We look forward to seeing you at the section retreat in November 2020, whether it be in person or virtually. Wishing you all a safe and sound remainder of the year!

Best regards,

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

QUICK TAKE

Eleventh Circuit Gives Green Light to Broad Discovery in Aid of Foreign Bankruptcies

By Greg Grossman and Francis Curiel, Miami

The Eleventh Circuit recently affirmed a district court's broad grant of discovery for use in five foreign bankruptcy proceedings to which the discovery applicant was a creditor-party.[1] This article will briefly examine how the (relaxed) standard set forth by this Section 1782 proceeding compares to the (less relaxed) standard set forth by two notable Chapter 15 cases.

In re Petroforte,[2] by now a well-known Chapter 15 case, involved the liquidation of one of Brazil's largest gas and ethanol distributors. During the liquidation, the Brazilian trustee found evidence of fraudulent transfers made to several entities, which led the Brazilian court to extend the bankruptcy case to include the transferees. The Brazilian trustee commenced a Chapter 15 proceeding in the Southern District of Florida to seek discovery to assist the Brazilian liquidation. The discovery targets objected, arguing that the subpoenas sought broad financial information about the non-debtor targets that exceeded the limits of discovery under Section 1521(a)(4)[3] and Rule 2004.[4] When the court interpreted the scope of "debtor" under Section 1521(a)(4), it held, in part, that the entities that were subject to the Brazilian bankruptcy extension order were "debtors" subject to Section 1521's discovery powers; however, with regard to any third parties who were not subject to the extension order, the trustee was entitled to broad discovery only when the debtor was a majority stockholder in the non-debtor discovery target.

In re SAM[5] likewise dealt with a Chapter 15 proceeding stemming from a Brazilian bankruptcy, wherein the debtor concealed corporate interests by transferring property to family members. The foreign representative sought documents relating to non-debtors who the foreign representative alleged were relevant to his investigation and potential recovery of assets of the foreign estate. The court focused on whether the foreign representative exceeded the proper scope of Rule 2004 discovery. It found that the foreign representative was entitled to discovery relating to (1) the transferees and (2) the non-debtor corporate entities in which the debtor had a majority interest or in those entities already found by the Brazilian courts to have participated in the debtor's asset concealment scheme. The foreign representative was not entitled to discovery relating to the non-debtor entities whose connections to the debtor had not yet been established in the Brazilian courts. The court further noted that the foreign representative's inquiries of non-debtors were to be narrowly tailored.

Notably, courts have analogized discovery under Chapter 15 with discovery under 28 U.S.C. § 1782.[6] An incongruity may now exist when comparing *Petroforte* and *In re SAM* to the Eleventh Circuit's recent case, *In re Victoria*.

In March 2018, Victoria, LLC (Victoria) filed a § 1782 application in the Southern District of Florida, seeking discovery for use in five pending Russian bankruptcy proceedings to which Victoria was a creditor. The bankruptcy proceedings pertained to either (1) Iliya Likhtenfeld[7] (the Debtor) or (2) his Russian companies. Victoria planned to object to the dischargeability of debt, but first needed proof that the Debtor failed to disclose his U.S. assets in the Russian bankruptcies.

To do so, Victoria requested testimony and documents relating to corporate governance, banking, financing, money transfers, business transactions, accounting practices, and the like, from (1) the Debtor; (2) Florida banks with which the Debtor did business; (3) Florida entities that the Debtor allegedly owned or was affiliated with; and (4) individuals affiliated with the Florida entities.

To support the existence of these affiliations, Victoria submitted Sunbiz corporate records. Some of these records showed that a woman—who lived at the same address as the Debtor—acted as (either current or former) manager and registered agent of two of the target Florida entities. Notably, the Debtor's name appeared nowhere on the corporate records of these two Florida entities. Discovery was nonetheless granted for use in the Russian bankruptcies. The shared residence between the Debtor and the manager of these entities proved connection enough.

Moreover, in support of its allegations that the subpoena targets were "closely related" to the Debtor, and that the targets "should have documents and knowledge of assets tied to the Russian [bankruptcies]," Victoria created and submitted a chart showing that many of the Florida entities shared the same address, principals, and registered agents. The entities were thus alleged to be interrelated to each other, although not all directly related to the Debtor himself.

Victoria also submitted two noteworthy declarations in support of its Section 1782 application. The first declarant alleged "upon information and belief" that the Debtor had (1) caused his Russian companies to enter loan agreements with no intention of repaying; (2) failed to repay the borrowed money; and (3) transferred the borrowed money directly or indirectly to his family members or trusted representatives. Ultimately, the declarant "believed" that the borrowed funds found their way into the United States and were used, in part, to support the Debtor's luxurious lifestyle in Florida. Neither the declarant nor Victoria submitted any other evidence to support these allegations or the connection between the borrowed funds and the Florida corporations. The second declarant stated that the Debtor had not disclosed any of his U.S. assets to the Russian bankruptcy court even though, "based on the [Sunbiz corporate records]," the Debtor owned and/or held officer positions in several Florida entities. Despite the tenuous connections between the Debtor

and some subpoena targets, the court granted the broad financial discovery request with few limitations. The aforementioned evidence (or lack thereof) was enough for this grant of discovery to survive through the Eleventh Circuit, which upheld the district court's ruling.

The disconnect between the above cases poses a noteworthy question—is the *Petroforte* limitation too narrow in light of the *In re Victoria* grant of discovery? Victoria, as a creditor seeking discovery assistance for use in foreign bankruptcy proceedings, was granted wide-ranging discovery relating to (1) the Debtor; (2) the Debtor's banks; (3) non-debtor associates; and (4) non-debtor entities, some of which showed little to no relation to the Debtor besides a shared address with the entities' manager.

The court did not inquire into the Debtor's ownership interests (or transfer thereof). Nor did it probe into the foreign courts' findings. Rather, the grant of discovery was based largely on uncorroborated beliefs and bare allegations. More so, it was based on reasonable suspicion that these target individuals and non-debtor entities were involved in the Debtor's transfer of assets to the detriment of his creditors. *In re Victoria* has introduced a more relaxed standard that loosens the restrictions placed on discovery requests for use in foreign bankruptcies. In light of this recent development, perhaps it is time to reassess the scope of discovery in Chapter 15 cases, too.

Greg Grossman *is a founding shareholder of Sequor Law focusing his practice on bankruptcy and insolvency litigation, creditors' rights, restructurings, bank litigation, and litigation involving the Uniform Commercial Code. Grossman is noted for filing the first Chapter 15 bankruptcy in the state of Florida where he successfully obtained "foreign main case" recognition of insolvency proceedings for a failed financial institution in Barbados.*

Francis Curiel *is a third-year JD candidate at the Florida International University College of Law and a law clerk at Sequor Law.*

Endnotes

1 *Victoria, LLC v. Likhtenfeld*, 791 F. App'x 810 (11th Cir. 2019) (hereinafter *In re Victoria*).

2 *In re Petroforte Brasileiro de Petroleo Ltda.*, 542 B.R. 899 (Bankr. S.D. Fla. 2015).

3 11 U.S.C. § 1521(a)(4) provides that, upon recognition of a foreign proceeding, a court may authorize examination of witnesses or the delivery of information with respect to the "debtor's" assets, affairs, rights, obligations, or liabilities.

4 Rule 2004 of the Federal Rules of Bankruptcy Procedure authorizes a court to order the examination of any entity so long as the examination relates to the acts, conduct, or property or to the liabilities and financial condition of the debtor, or to any matter that may affect the administration of the debtor's estate.

5 *In re SAM Industrias S.A.*, No. 18-23941-BKC-RAM, 2019 WL 1012790 (Bankr. S.D. Fla. 1 Mar. 2019).

6 *See In re Platinum Partners Value Arbitrage Fund L.P.*, 583 B.R. 803, 815 n.38 (Bankr. S.D.N.Y. 2018) (accepting arguments that Section 1782 is analogous to seeking discovery assistance under Section 1521 and that courts routinely read the discovery provisions of Section 1521 in concert with § 1782); *In re Hughes*, 281 B.R. 224, 230 (Bankr. S.D.N.Y. 2002) (noting that "when determining the scope of discovery permissible in a [Chapter 15] proceeding, [Chapter 15] should be read together with [§ 1782]").

7 Likhtenfeld was a Russian native and Florida resident.

When the Gray Market Turns Black

By Robert J. Becerra, Miami

Introduction

South Florida, with its large international trade business community and its unique geographical location placing it midway between the Americas, Europe, Africa, and Asia, has a large number of import and export distributors for a variety of products. These include electronics products such as computers, cellular phones, peripherals, and printers, to over-the-counter medical or dietary products, to food stuffs. The free flow of goods across borders and servicing of markets worldwide has caused purchasers and distributors to search for where products are available at the lowest possible costs in order to maximize profits upon sale and to service customers looking for the lowest costs of acquisition. Hence, we have the creation of what is called the gray market and product diversion.

What is the gray market and product diversion?

Gray market goods are products with legitimate, authorized trademarks that are intended for sale and use outside the United States but that are imported and sold in the United States without the consent of the U.S. trademark holder/manufacturer or the U.S. authorized distributor. In other words, gray market goods are genuine products bearing a trademark/name that was applied with the approval of the trademark holder for use in a country other than the United States.[1] Gray marketing/product diversion occurs when U.S. products are diverted by third parties from markets or distribution channels intended for them by the manufacturer and instead are sold in U.S. markets or distribution channels. This market exists because manufacturers price their products differently based on the market in which the product will be sold. For example, a manufacturer may sell a product in the Colombian market for half the price of which the exact same product would be sold in the U.S. market. This creates an incentive for a purchaser in the foreign market, in this example Colombia, to seek to resell the product back into the United States at a substantial premium/profit over its purchase price. This substantial premium over the purchase price obtained by the Colombian seller may still be a discount over what the U.S. manufacturer would sell the product for in the

Gray Market, continued

United States. Hence, purchasers in the United States will seek out gray market/diverted products because they will be cheaper than if they purchased the exact same product directly from the U.S. manufacturer or its authorized U.S. distributor. As has been stated by a federal court, the "gray market is a fact of life."[2]

Unlike counterfeit/black market goods, which contain unauthorized copies of trademarks, gray market goods may be lawfully sold in the United States if they are materially identical to the products manufactured for the U.S. market. Gray market goods that are materially different than those meant for the U.S. market violate federal law and regulations and thus cannot be sold legally in the United States. This article concentrates on what otherwise would be legally sold gray market goods.

The market for gray market/diverted products may be in the hundreds of billions of dollars, and major retailers such as Walmart, Costco, Target, and even Amazon are known to be participants. Popular gray market/diverted products include, but are not limited to, grocery items, electronics, medical devices, and auto parts. In recent times the terms *gray market* and *product diversion* have become synonymous.

The Advantages of the Gray Market

The gray market gives U.S. buyers access to genuine goods both in quantities and at prices that may not be available domestically. In addition, for overseas distributors, it allows them to sell excess inventory or products approaching expiration, and to take advantage of price arbitrage and excess demand in markets different than the ones originally intended when the product was sold by the manufacturer.

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Transfer Pricing Challenges in 2020

By Jeffrey S. Hagen, Miami

Transfer pricing refers to the rules and methods for setting fair, arm's-length prices for goods and services exchanged between companies that are related or have common control. Once pricing benchmarks have been determined, intercompany contracts are entered into with financial terms based on well-thought-out projections. Multinational companies could not have been clairvoyant, however, with regard to the worldwide economic disruptions occurring in 2020, resulting in transfer pricing mayhem.

This article first gives a necessary review of basic transfer pricing, as one cannot properly appreciate the magnitude of this year's effect on transfer pricing policies without understanding why transfer pricing exists and how it works. Next, the article discusses the impact of various 2020 transfer pricing disruptors. The third prong of this report suggests strategies to safely sidestep the current transfer pricing landmines.

What is transfer pricing?

Many imported goods are produced in foreign countries by a related party, meaning the exporter and importer of a particular good quite often share common control. The cost of goods sold (COGS) is a key factor in determining the importer's taxable income upon resale of the imported goods. Without transfer pricing laws to monitor related party behavior, multinational companies would stand to benefit financially by setting prices of imported goods at artificially high rates in order to minimize taxable gain earned upon distribution or resale of the goods. Such arrangements resulted in the establishment of the "arm's-length standard."[1] Similar to fair market value, this standard ensures that prices between related parties are set in the same reasonable range as prices would be for sales between unrelated parties. Treasury Regulations to Internal Revenue Code (I.R.C.) § 482 provide guidance on how to apply the arm's length standard in the United States. Similarly, the Organization for Economic Cooperation and Development (OECD) has adopted transfer pricing guidelines followed by most countries based on the arm's-length standard.[2]

While there are several acceptable transfer pricing methods, most compare the purchase price paid by the commonly controlled or related U.S. purchaser with that of unrelated U.S. purchasers deemed to be comparable. Other methods compare the profit earned by U.S. distributors upon subsequent resale. An analysis of the price and profit levels (and the COGS) of these uncontrolled comparable companies produces an interquartile range of expected prices and operating margins. If prices or profit levels fall too far outside of the expected interquartile range constructed from

comparable unrelated companies, a year-end pricing adjustment may be applied by tax authorities. Ultimately, the "best method" for analyzing a particular good should be chosen.[3]

Supporting evidence for the prices set by multinational companies should be documented in transfer pricing studies that describe, in significant detail, both the method that is chosen and the comparable companies selected. Comprehensive studies often compare the most recent three years of data from comparable companies to determine reasonable, arm's-length pricing. Prior year data may be used if there have not been changes that materially affect the reliability of the results.[4] It is not required to conduct a transfer pricing study; however, if a transfer pricing study is not completed and the IRS then audits the company's tax returns, government-mandated price adjustments and, in some cases, accuracy-related penalties for tax underpayment (as directed by I.R.C. § 6662)[5] will be imposed. Such penalties could be either 20% or 40% of the underpayment, depending on the nature of the "substantial or gross valuation misstatement."[6]

Formulating a sufficient transfer pricing study relies in large part on historical trends and predictive data. When the norms associated with setting transfer pricing benchmarks are severely disrupted, unusual profit outcomes result. Relying on a previously sensible but outdated transfer pricing study will not dissuade an IRS audit.

2020 Challenges

The global pandemic has disrupted production of goods, transportation efficiency, and consumers' purchasing habits. As a result, companies are experiencing actual costs that vary wildly from historical trends, in many cases due to underutilized capacity. This volatility has forced companies to consider the viability of pre-pandemic transfer pricing policies.

Treasury Regulation § 1.482-1(a)(3)[7] permits pricing flexibility, stating that, "[i]f necessary to reflect an arm's length result, a controlled taxpayer may report on a timely filed U.S. income tax return (including extensions) the results of its controlled transactions based upon prices different from those actually charged." Companies should be mindful if self-imposed transfer pricing adjustments that are respected in the United States are similarly respected in exporter jurisdictions.

If a company does adjust prices, it must meet customs rules to do so. These rules dictate that price adjustments appear as compensating payments. Downward compensating payments are payments from the exporter to the importer to meet the actual "transaction value" of the good. These payments are appropriate if goods are being purchased by consumers for less than before an economic downturn. Such adjustments can be properly made, according to U.S. Customs and Border Protection policy, if the following five criteria[8] are present: (1) a written *Intercompany Transfer Pricing Determination Policy* is in place prior to the importation and the policy is prepared taking I.R.C. § 482 into account; (2) the company uses its transfer pricing policy when filing its income tax return, reporting any adjustments; (3) the policy specifies how adjustments are determined; (4) the company maintains and provides accurate accounting details from its books and records of the adjustment; and (5) the adjusted price is an arm's-length price under customs rules.

Price adjustment payments are "upward compensating" when going from the importer to the exporter.[9] Some of these payments, known as "shortfall payments," are unrelated to the actual transaction value of the goods purchased, like compensation for failure to purchase anticipated volume and cancelled orders. According to *Chrysler v. United States*,[10] shortfall payments do not require a transfer pricing adjustment, as these payments relate to goods *not purchased*.

Attempting to adjust the prices of goods to account for an ongoing pandemic is likely to be futile. The pharmaceutical industry exemplifies this year's erratic price volatility. China maintains immense global market share in the production of ingredients for

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Electronic Service on Chinese Companies and Individuals

By Elio F. Martinez, Jr., and Peter Quinter, Miami

Intellectual property rights have been a source of tension between the United States and China for decades. Until recent years, the reluctance, if not outright refusal, of the Chinese government to enforce such rights has repeatedly led American companies to conclude that infringement of their copyrights, patents, and trademarks in China are part of the cost of doing business. China has developed a reputation as the "wild west" for intellectual property, where international laws are ignored and duplicating the works of others has become an accepted, and often encouraged, business model.

Shanghai, China

The principal difficulties for intellectual property owners stem from China's successful efforts to shield its companies and individuals from the impact of foreign lawsuits. Enforcing a U.S. judgment in China is very difficult. Indeed, the mere act of serving a Chinese company or individual with a U.S. lawsuit has historically compelled American litigants to jump through endless procedural and diplomatic hoops, with no assurance that their efforts will overcome what often appear to be insurmountable obstacles.

A trend in recent decisions by U.S. courts, however, offers new hope to American intellectual property owners. These decisions have facilitated and simplified service of process on Chinese companies and individuals, and the governmental shield that has allowed those companies and individuals to infringe with impunity has begun to crack.

The Hague Convention

The United States and China are both signatories to the Hague Convention, which provides for service of process worldwide. The process of effecting service under the Hague Convention involves proceeding through a designated central authority in the recipient nation, a process that can take months to complete. Article 10 of the Hague Convention, however, offers some relief from this procedural quagmire by opening the door to alternate means of service:

> Provided the State of destination does not object, the present Convention shall not interfere with –
>
> a) the freedom to send judicial documents, by postal channels, directly to the person abroad,
>
> b) the freedom of judicial officers, officials and other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination,

c) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination.[1]

The most significant part of Article 10 is Section (a), which opens the door to service of process "by postal channels."[2] This allows litigants to bypass the bureaucracy of a central authority and the questionable allegiances of the judicial officers and officials in the recipient nations charged with delivering summonses and complaints under Sections (b) and (c).[3] Had China not objected to service by postal channels, international plaintiffs could have served Chinese companies and individuals through the mail, a process that would have facilitated enforcement of intellectual property rights in China. Predictably, however, China did object, and that method of service is not available to intellectual property owners bringing suit in the United States.

Federal Rule of Civil Procedure 4(f)(3)

Faced with a lack of cooperation from the Chinese government, plaintiffs litigating in the United States against Chinese companies and individuals have turned to Federal Rule of Civil Procedure 4(f)(3), which opens the door to alternate methods of service. The Rule states, in relevant portion:

> SERVING AN INDIVIDUAL IN A FOREIGN COUNTRY. Unless federal law provides otherwise, an individual . . . may be served at a place not within any judicial district in the United States:
> . . .
> (3) by other means not prohibited by international agreements, as the court orders.[4]

Chinese companies and individuals wishing to engage in international business must establish means of communication with companies outside of China. This is often done through emails or other electronic methods that overcome obstacles imposed by distance and time differences. The best way for an American company to communicate with Chinese companies and individuals is electronically, which sets the stage for an alternate method of service of process under Rule 4(f)(3).

Under Rule 4(f)(3), federal courts have discretionary authority to direct service of process by other than normal means, provided such means are "not prohibited by international agreements." Fed.R.Civ.P. 4(f)(3).[5] Relying on the Ninth Circuit's decision in *Rio Props., Inc. v. Rio Intern. Interlink,* 284 F.3d 1007, 1016 (9th Cir. 2002), the Federal Circuit held that: "As obvious from its plain language, service under Rule 4(f)(3) must be (1) directed by the court; and (2) not prohibited by international agreement. *No other limitations are evident from the text*."[6] Moreover, "the decision to issue an order allowing service by alternate means lies solely within the discretion of the district court."[7]

Chanel, Inc. v. Zhixian

The 2010 *Chanel, Inc. v. Zhixian* decision out of the Southern District of Florida analyzed the propriety of serving Chinese companies and individuals in China by email or other electronic means. In that case, the plaintiff, Chanel, Inc., requested that the court authorize service of process by email because the defendant, Liu Zhixian, was avoiding regular service by (a) operating "anonymously via the Internet using false physical address information" in domain name registrations "to conceal his location and avoid liability for his unlawful conduct," and (b) relied "solely on electronic communications to operate his business."[8]

As a starting point, the court found that Zhixuan had indeed falsified his contact information, thus necessitating an inquiry into possible alternate service methods.[9] This was an important finding because Article 1 of the Hague Convention provides that the Convention "shall not apply where the address of the person to be served with the document is not known."[10] By establishing that Zhixuan was hiding from process, Chanel, Inc. opened the door to alternate methods of service. While the court did recognize that such alternate methods must fulfill due process requirements, it also outlined that

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Navigating PPE Transactions During a Global Pandemic

By Peter Quinter, Miami, and Tucker Thoni, Orlando

The COVID-19 pandemic has changed the way many businesses and individuals conduct their day-to-day affairs. It is difficult to imagine an industry that has not been forced to adapt its standard practices and procedures to accommodate COVID-19 concerns. This article discusses the current (and crazy) state of the global personal protective equipment (PPE) market during the COVID-19 pandemic.

PPE Market During COVID-19 Pandemic

One industry that has been particularly affected by the COVID-19 pandemic is the global market for PPE and other medical products. Indeed, since the outbreak of COVID-19, the demand for PPE and other medical products has been insatiable, and has far exceeded supply and global production capacity. The World Health Organization (WHO) has estimated that the global fight against COVID-19 requires 89 million masks, 30 million gowns, 1.59 million goggles, and 76 million gloves, *per month*.

In addition to increased use of PPE by hospitals and other historic PPE users, there are many industries that have been forced to become users of PPE, such as retail, hospitality, government, restaurant, education, office workers, etc. The PPE and other medical items that appear to be in the highest demand include face masks, respirators, nitrile examination gloves, and COVID-19 test kits; however, there is significant demand for many other items including face shields, booties, gowns, sanitizing wipes, ventilators, thermometers, hand sanitizer, among others.

The great disparity between need and availability has created a market that allows counterfeit, poor quality, and out-of-date products to enter the supply chain. During this public health emergency, the U.S. Food and Drug Administration (FDA) has attempted to resolve this challenge by issuing emergency use authorization (EUA) for unapproved medical products such as face shields and respiratory protective devices such as respirators and some surgical masks. All imported merchandise is subject to examination by both the FDA and U.S. Customs and Border Protection (CBP).

Further straining global production is the current trade war between China and the United States, which has

bled over into the PPE market with competing trade policies between the two countries with respect to medical products, including PPE, that were not well coordinated and often contradictory.

There have also been supply chain disruptions and breakdowns for many health care and other historic users of PPE. This coupled with many new end-users of PPE emerging into the market has caused the price of PPE items to skyrocket as demand dwarfs supply. Thus, in the current PPE seller's market, there is the potential for substantial profits[1] for those with the ability to procure a legitimate supply of PPE.

While a strong entrepreneurial spirit is a positive value firmly rooted in American culture and history, windfall profits and other "get rich quick" opportunities should be approached with an abundance of caution. A lesson from George Cason's classic *The Richest Man in Babylon* provides sage advice for those contemplating PPE transactions during 2020: "invest thy treasure with greatest caution that it be not lost. Usurious rates of return are deceitful sirens that sing but to lure the unwary upon the rocks of loss and remorse."

The demand has driven many new businesses into the PPE space, whether it be as a manufacturer, distributer, or end-user. While many of these new operators are bona fide businesses acting in good faith and trying to enter a new, expanding market for entrepreneurial or humanitarian purposes, there is unfortunately many more bad actors, fraudsters, and con artists, looking to prey on unwary, novice operators blinded by their eagerness for and expectation of windfall profits. Indeed, the amount of fraud and deception pervading the PPE market in 2020 is shocking and disturbing.

The authors of this article have substantial experience and expertise representing clients operating in various aspects of the PPE market during 2020, and this article provides anecdotal insights and suggestions on how to navigate these murky, pirate-filled waters without losing thy treasure.

Dynamics of PPE Transactions During COVID-19

PPE transactions during the COVID-19 pandemic are far from normal. The deal flow is unreasonably fast. Frenetic grossly understates the pace. Often parties without transactional history together (or in the PPE space) are negotiating transactions in the millions, if not billions, of dollars to be closed in a matter of days. Despite the closing success rates for these transactions being remarkably low,[2] deal fatigue does not appear to be relevant (at least from a client perspective), and the potential for substantial profits appears to keep clients constantly negotiating new transactions notwithstanding the prior misses.

The number of scammers operating in the current PPE market results in a great deal of skepticism and mistrust among transactional parties. Most conference calls start off with a series of vetting and verifying questions from each side prior to discussing the subject deal. It is important to verify that you are really speaking with who purports to be on the other line. Identify theft is rampant in this space, and sometimes people are not who they present themselves to be. The good news is that most parties understand the skepticism. Feelings (usually) do not get hurt when you ask someone to prove they are who they say they are, which is a terribly awkward way to begin a negotiation.

The current PPE market has been inundated with transactional brokers, which creates a host of issues. Some of these brokers are honest about their intermediary roles and are savvy operators that are effective at brokering a deal, while others are novice, unprofessional, and attempt to layer enough smoke and mirrors to deceive the counterparty into believing that the broker is the title-holding seller or cash-holding buyer. In these authors' experience, the latter significantly outnumbers the former.

The Compounding Effect

Many of these brokers are attempting to negotiate a dozen or more transactions simultaneously, and as

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Immigration Law for the International Practitioner – A Beginner's Guide and the Red Flags

By Larry S. Rifkin, Miami

The principal source of U.S. immigration law is found in the Immigration and Nationality Act (INA), as well as Section 8 of the United States Code.[1] Immigration law is also governed by regulations, cables, and memoranda, as well as precedent decisions from the Board of Immigration Appeals (BIA) and cases litigated in the federal courts. As such, knowledge of immigration law for international practitioners can be a daunting task, as this is a complex and vast field.

The first step in understanding this area of the law is to recognize that there are two categories of U.S. visas for foreign nationals: nonimmigrant and immigrant. Nonimmigrant visas are for foreign nationals wishing to enter the United States on a temporary basis (*e.g.*, tourism, medical treatment, business, temporary work, study, or other similar reasons). Immigrant visas, on the other hand, are issued to foreign nationals who intend to live permanently in the United States. Immigrant visas can be based on employment in the United States or a familial relationship. This article will serve as a beginner's guide for international practitioners seeking an understanding of some common nonimmigrant and immigrant visas, as well as the red flags and issues commonly seen when handling these types of cases.

NONIMMIGRANT BUSINESS VISAS

E-1 and E-2 Visas

Treaty Trader (E-1) and Treaty Investor (E-2) visas are reserved for citizens of countries with which the United States maintains a Qualifying Treaty of Friendship, Commerce, or Navigation.[2] The U.S. Department of State maintains a list of participating countries for E visas.[3] Nationals of participating countries, together with their employees, can obtain visas to work in the United States in order to trade with the United States, or develop and direct their investment in the United States under the auspices of the E-1 and E-2 visas. For applicants outside of the United States, requests for E visa classification are made directly with the U.S. Consulate in the foreign national's country of treaty nationality.[4] Upon visa approval, qualified E-1 and E-2 visa holders will be allowed a maximum initial stay of two years.[5] An E-1 or E-2 nonimmigrant who travels abroad may generally be granted, if determined admissible by a U.S. Customs and Border Patrol (CBP) officer, up to an additional two-year period of readmission when returning to the United States.[6] Principal E-1 treaty traders or E-2 investors may engage only in employment that is consistent with the terms and conditions of his or her status and the activity forming the basis for the E treaty status.[7] Spouses and children (under the age of twenty-one) of the principal applicant are entitled to E visa classification as well.[8]

To qualify for E-1 classification, the treaty trader must establish that he or she will be in the United States "solely to carry on trade of a substantial nature, which is international in scope, either on the alien's behalf or as an employee of a foreign person or organization engaged in trade principally between the United States and the treaty country of which the alien is a national."[9] The trade involved could be in the form of goods, services, international banking, insurance, monies, transportation, communications, data processing, advertising, accounting, design and engineering, management consulting, tourism, technology and its transfer, and some news-gathering activities.[10] *Substantial trade* is defined in the regulations as the amount of trade sufficient to ensure a continuous flow of international trade items between the United States and the treaty country.[11] *Principal trade* between the United States and the treaty country exists when over 50% of the volume of international trade of the treaty trader is conducted between the United States and the treaty country of the treaty trader's nationality.[12]

To qualify for E-2 classification, the treaty investor must establish that he or she has invested or is actively in the process of investing a substantial amount of capital in a bona fide enterprise in the United States and is seeking entry to the United States solely to develop and direct the enterprise.[13] The investment is defined in the regulations as the "placing of capital, including funds and other assets (which have not been obtained, directly or indirectly, through criminal activity), at risk in the commercial sense with the objective of generating a profit."[14] The regulations are silent on any financial threshold required for a treaty investor visa, but state that the capital must be "sufficient to ensure the treaty investor's financial commitment to the successful operation of the enterprise."[15] The regulations also state that the business enterprise must generate "more than enough income to provide a minimal living for the treaty investor and his or her family."[16]

Effectively addressing common red flags and/or pitfalls in the adjudication of E visas requires being aware of each individual U.S. Consulate's current policy and practice. For example, in the E-1 context, the applicant's burden of proof to establish substantial and on-going trade requires different documents depending on which consulate is adjudicating the application. In Buenos Aires, Argentina, for example, the U.S. Consulate currently requires purchase orders, bills of lading, sales contracts/contracts for services, letters of credit, carrier inventories, trade brochures, insurance papers documenting commodities imported into the United States, accounts receivable and accounts payable ledgers, and client lists.[17] In Rome, Italy, however, for the same type of visa, the U.S. Consulate currently requires a spreadsheet listing every qualifying transaction of international trade between the treaty

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Coronavirus Impact on Employees With H-1B, E-2, L-1, O-1, or Other Visas: Unemployment Benefits, Furloughs, Layoffs, Hour and Salary Reduction, and Working From Home

By Anda Malescu, Miami

Coronavirus impacts temporary employees in the United States differently based on the visa type they hold and their current employment status, with some employee visas being more rigid than others.

The prolonged health emergency caused by the COVID-19 pandemic has impacted U.S. companies and employers, who now have to consider employee layoffs, furloughs, unpaid leave, reduced salary or work hours, and the ability of employees to work from home. This is also the case for foreign employees who are working in the United States on H-1B, L-1, E-2, E-3, O-1, or other visas. Aside from issues with liquidity, companies must also remain compliant with U.S. immigration laws and consider the specific visa requirements for their foreign employees. Similarly, employees on visas should seek legal counsel to discuss their legal options to remain in status in the United States if there are changes in their employment circumstances due to the Coronavirus.

Certain visas, such as H-1B and E-3 visas, are subject to strict requirements in terms of wages paid to the foreign employees. As a reminder, H1-B and E-3 visas can be obtained only with an approved Labor Condition Application (LCA) from the U.S. Department of Labor (DOL) that requires the U.S. employer to pay wages at a rate of at least the prevailing wage specified in the LCA for the locality and position. Holders of other visas, however, such as E-1, E-2, O-2, L-1, or TN visas, are not subject to specific wage requirements as they do not require an approved LCA. Below we analyze how different company policies can impact foreign employees on various visa types.

Impact of Layoffs

Layoffs impact foreign employees the same regardless of the visa type—the foreign employee loses his or her

immigration status and has a sixty-day grace period before having to leave the United States.

Generally, foreign employees who are not legal permanent residents (green card holders) or who have an unrestricted right to work in the United States and are on a work visa, such as an H-1B, E-2, E-3, E-1, L-1, O-1, or TN visa (the work visas or, individually, a work visa), lose their immigration status when they are laid off by their U.S. employer. In addition, if a foreign employee on a work visa has applied and is in the process of obtaining a green card, then termination of the employee's employment terminates his or her eligibility for a green card sponsored by a U.S. employer. In other words, if a company terminates the employment of a foreign employee on a work visa, that visa holder will lose his or her immigration status as soon as the grace period is over and must leave the United States or change to another status. Further, if the visa holder was in the process of becoming a permanent resident through sponsorship by a U.S. company (EB-1, EB-2, EB-3), then, generally, when the company terminated the employee, it also terminated that person's eligibility for a green card. The terminated employee may still be able to have another U.S. employer sponsor him or her if the visa holder is at an advanced stage in the green card process.

Despite this, being laid off does not automatically leave the foreign employee out of status. An employee on a work visa has a sixty-day grace period to: (1) find another employer; (2) get reemployed by the same company; or (3) change to a different status. Failing these three options, the employee must leave the United States. If the employee is on an H-1B visa, E-3 visa, or has TN status and was laid off, but finds new employment, the new U.S. employer can file for a new H-1B visa, E-3 visa, or TN status while the employee remains in the United States for the sixty-day grace period. It is important to keep in mind that if a foreign national is on TN status, he or she cannot work during the grace period and can only work once the new TN petition has been approved. Another option exists if the border with Canada is opened, as the foreign national can simply go to Canada, reenter the United States, and obtain TN status at the border. Similarly, if the visa holder is on an H-1B or E-3 visa, he or she cannot work until a petition is filed by the new employer.

An employee on an L-1 visa working as a manager, executive, or specialized skill employee or an employee on an E-2 or E-1 visa cannot simply find a new employer and be transferred to the new employer, as is the case with the H-1B or E-3 visas.

For employees on the H-1B visa, when the employer terminates the foreign national, the company must meet certain requirements for the termination to be valid, including: (1) the employer must notify the employee of the termination; (2) the employer must notify U.S. Citizen and Immigration Services (USCIS) of the termination; and (3) the employer must offer to pay costs for the return of the employee to his or her home country. This rule does not apply to E-3 visas.

Impact on Unemployment Benefits

Generally, a foreign employee with one of the work visas is not eligible for unemployment benefits, but spouses of H-4, E-1, E-2, E-3, and L-2 visa holders may be able to qualify for unemployment benefits.

With the Coronavirus impacting jobs held by foreign employees in the United States on the work visas, most visa holders are wondering if they can apply for unemployment benefits in their state and if receiving unemployment benefits would be considered a public charge by the government, which would negatively impact their immigration record. Below, we discuss unemployment benefits for foreign workers on various visas, but please keep in mind that every state has its own requirements for unemployment benefits and foreign workers need to check with the state to see if they qualify, irrespective of immigration visa status.

The general rule to qualify for unemployment benefits in most states is that the employee must be immediately able and available to work at the time of filing the unemployment application. In other words, the

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BEST PRACTICES

What Every Lawyer Must Know About Certified Translation

By Carmen Hiers, Miami

We receive many requests from lawyers that go something like this: "We need you to translate a contract for us, but the translation must be done by a certified legal translator."

This is a perfectly reasonable and justifiable request. After all, a lawyer wants assurance that the work requested will be done by a qualified provider, and rightly so. There is a lot riding on these things—the outcome of a case and the reputation of the lawyer. But after years of providing translation services to law firms, we've come to understand what lawyers are actually asking for when they request a certified legal translator. We'll get to that later.

Here's what you need to know about certified translation:

(1) **The position "certified translator" does not exist in the United States.** There is no such thing as a certified translator, much less a certified legal translator, in this country. This is not the case in countries like Argentina, Costa Rica, Mexico, and many others where translators must pass a government-issued test and receive a license. In the United States, a translator becomes a translator when he or she translates. Having said that, a translator can become certified by the American Translators Association (ATA), a decades-old institution whose testing is quite stringent. The ATA also adheres to a code of ethics, which gives agencies like mine a great sense of comfort.

Still, much in the same way that a college degree doesn't guarantee competence, certification doesn't guarantee translation prowess or mastery. Further, the ATA only offers certification for certain language pairs. This means that the lawyers who call us (and many do) requesting translation from Indonesian or Greek or Farsi or Urdu would never have their documents translated by a "certified translator" because the ATA does not offer certification in those languages. And even when the language pair is certified and the ATA-certified translator is talented and competent (and we've used many who are), the ATA only certifies by language combination, not by discipline. So, the fact that a translator is ATA certified in Spanish to English, for example, doesn't mean she is specifically competent to translate legal, medical, engineering, or any other type of content . . . although many of them are experts in these and many other subject matters.

(2) **Education and experience matter more than "certification."** ATA certification, for those professionals who choose to pursue it, is a valuable credential. But the translator best suited for a particular type of work is the one with two important credentials: education and experience.

Aside from the obvious requirements of language expertise and writing ability, the best legal translators have a combination of credentials. One may be a retired lawyer with decades of experience and perfect fluency in one or more language combinations; another may be a linguist who holds a translation degree with a legal specialty and decades of legal translation experience.

(3) **The best way to ensure you have a qualified legal translator (certified or not) is to go through a**

Best Practices, continued

professional translation agency. A professional language services agency takes the time and effort to vet its linguists to ensure they have the right credentials to work on certain documents. The best agencies will match the translator to the needs of the project, for example, in those cases where knowledge of a specific legal discipline or a country's legal code is required. An agency can also take the burden off a paralegal or an office administrator in trying to find someone to translate. (We know your staff member has better things to do.) And even when a law firm relies on staff to locate translators, what about a large project that involves, say, 10, 50, or 500 different documents? An agency has the bandwidth to handle assignments of that size and larger, whether in one or several language combinations.

Finally, what lawyers are really asking for when they request a "certified legal translation" is a certificate of accuracy. Many lawyers (particularly in immigration) require them in order to be able to file documents in court. A certificate of accuracy is an affidavit stating that the translator is competent to translate in the required language combination and that the translation has been done to the best of the translator's knowledge, ability, and belief. Some agencies (like mine) go a step further and have the affidavit notarized to add an additional level of formality and credibility.

The bottom line: it's possible to get a certified legal translation, but not by a certified legal translator. But if you trust the translation provider and you obtain the required certificate, you'll be in good shape no matter what type of case requires translation services.

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WORLD ROUNDUP

ASIA

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Hong Kong - Special Administrative Region of the People's Republic of China

China's new National Security Law overshadows freedoms for Hong Kong.

Hong Kong was a British territory until 1997 when it was turned over to China pursuant to a "One Country, Two Systems" policy. The Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland the Government of the People's Republic of China on the Question of Hong Kong was signed at Beijing on 19 December 1984. The declaration references a proper negotiated settlement of the question of Hong Kong that would be conducive to the maintenance of the prosperity and stability of Hong Kong, and to this end, the agreement included in pertinent part: (1) "The Hong Kong Special Administrative Region will be vested with executive, legislative and independent judicial power, including that of final adjudication"; and (2) "The current social and economic systems in Hong Kong will remain unchanged and so will the life-style. Rights and freedoms, including those of the person, of speech, of the press, of assembly, of association, of travel, of movement, of correspondence, of strike, of choice of occupation, of academic research and of religious belief will be ensured by law in the Hong Kong Special Administrative Region [SAR]. Private property, ownership of enterprises, legitimate right of inheritance and foreign investment will be protected by law." Annex I to the Joint Declaration further set forth that China would establish the Hong Kong SAR "upon resumption of the exercise of sovereignty over Hong Kong on July 1, 1997." The Joint Declaration further provided that the National People's Congress and the PRC would enact a Basic Law of the Hong Kong SAR, and stipulated that "after the establishment of the Hong Kong Special Administrative Region *the socialist system and socialist policies shall not be practised in Hong Kong Special Administrative Region and that Hong Kong's previous capitalist system and life-style shall remain unchanged for 50 years*" (emphasis added).

Subsequently, the Basic Law of the Hong Kong Special Administrative Region was adopted in 1990, it went into effect in 1997, the year that British rule ended, and Hong Kong was returned to China. The Basic Law is essentially a constitution document for Hong Kong, which provides for, among other rights, fundamental freedoms such as those set forth in Article 27 that "Hong Kong residents shall have freedom of speech, of the press and of publication; freedom of association, of assembly, of procession and of demonstration; and the right and freedom to form and join trade unions, and to strike" and Article 30, which provides in part, "the freedom and privacy of communication of Hong Kong residents shall be protected by law." These are rights that did not exist in mainland China.

But on 30 June 2020, China passed a new law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (National Security Law). The text of the law itself was not revealed until it was passed. The passing of the new National Security Law has overshadowed the various freedoms provided for in the Joint Declaration and the Basic Law. The sixty-six-article law criminalizes four types of activity—secession, subversion of state power, terrorism, and collusion with foreign entities. Recent arrests are serious cause for concern, including the arrest of Jimmy Lai, a prominent pro-democracy media leader. The sweeping new National Security Law has been used by the People's Republic of China in recent weeks to smother the political freedoms, free speech, and press culture in Hong Kong, thus calling into question Hong Kong's future economic and trade status.

INDIA

Supreme Court of India enforces foreign arbitral award under a two-tier arbitration clause.

In *M/S. Centrotrade Minerals and Metals Inc. v. Hindustan Copper Ltd.*, Civil Appeal No. 2562 of 2006, the Supreme Court of India ruled on a case with a lengthy and complicated arbitration history. In a judgment dated 2 June 2020, the SCI dismissed Hindustan Copper Ltd.'s (HCL) objection to enforcement of a foreign arbitral award. The underlying arbitration agreement between HCL and Centrotrade Minerals and Metals Inc. (Centrotrade) provided for a two-tier arbitration clause; the first tier provided for arbitration in India, and the second tier provided for a right of appeal by arbitration to be held by the International Chamber of Commerce (ICC) in London.

The parties entered into a contract for sale of copper concentrate for delivery to the Kandla Port in the state of Gujarat. After all consignments were delivered and payments were made, a dispute arose between the parties regarding the weight of the copper concentrate. The matter proceeded to arbitration in India, and a nil award was entered on 15 June 1999. Centrotrade invoked the second tier of the arbitration agreement resulting in a favorable award entered on 29 September 2001. Before the arbitrator could enter the award, HCL filed a suit in the court of Khetri, Rajasthan, challenging the arbitration clause itself. Ultimately, the ICC proceedings continued, and the arbitrator requested HCL to submit its defense by a certain deadline, but it was filed late. After the entry of the award, HCL objected to the enforcement of the award on grounds that it was unable to present its case.

After two previous forays with the Supreme Court of India (as noted in paragraph 1 of the opinion), the matter came before presiding Justices R. F. Nariman, S. Ravindra Bhat, and V. Ramasubramanian, who ruled that the foreign award against HCL, dated 29 September 2001, shall be enforced finding that "HCL was never unable to present its case as it was at no time outside its control to furnish documents and legal submissions within the time given by the learned arbitrator." The court also found that the arbitrator had given ample opportunities to HCL to file documents and legal submissions and that HCL did not participate in the proceedings until August 2001 even though it was invited to do so, and it was only after the arbitrator informed the parties on 9 August 2001 of the forthcoming award that he received a correspondence from HCL's counsel. Additionally, extensions of time were granted to HCL and despite same, late submissions were made and even though late, the submissions were in fact reviewed by the arbitrator prior to the entry of the arbitration award.

In arriving at its decision, the court relied on a recent precedent, *Vijay Karia v. Prysmian Cavi E Sistemi* SRL 2020. Interestingly, counsel for Centrotrade referenced two U.S. district court opinions, one of them from the Southern District of Florida. *Four Seasons Hotels & Resorts B.V. v. Consorcio Barr, S.A.,* 613 F. Supp. 2d 1362 (S.D. Fla. 2009) was cited to demonstrate how the Southern District dealt with a respondent who withdrew from the arbitration proceedings; Judge K. Michael Moore found that the foreign party's withdrawal was not necessary to preserve its rights and accordingly it was not precluded from or unable to present its case.

India bans use of Chinese mobile apps.

On 29 June 2020, India's Ministry of Electronics and Information Technology issued a press release that the government of India banned fifty-nine Chinese-made apps. Citing section 69A of the Information Technology Act and relevant provisions of the Information Technology (Procedure and Safeguards for Blocking Access of Information by Public) Rules 2009, the Ministry invoked its power to issue the ban.

The press release further cited to "raging concerns on aspects relating to data security and safeguarding the privacy of 130 crore Indians" and stated, "that such concerns also pose a threat to sovereignty and security" of India. An additional forty-seven apps were banned, most of which were clones or variations of the originally banned apps. The apps included the immensely popular ByteDance's video-sharing app TikTok, Alibaba's UC Browser, and Xiaomi's Mi Community app.

The ban was issued soon after a border clash between India and China in June 2020, leaving twenty Indian soldiers dead in the clash that occurred in the Galwan Valley in Eastern Ladakh. The ban is befitting of the government's "Make in India" initiative, and Prime Minister Narendra Modi's Independence Day speech, less than two months after the initial ban, further reflected this notion: "If India wants to increase its contribution, then she herself will have to be empowered; she will have to be self-reliant or AatmaNirbhar. We must make ourselves capable of contributing towards world welfare. If our roots are strong and we are capable enough, we will be able to take steps towards world welfare. In this era of technology, our dependence on cyberspace is going to increase multifold. However, cyberspace offers its own risks and threats . . . [i]t can be a threat to the social fabric of our country, our economy and can even threaten the development of our nation; we are very well-aware of that. India is very cautious and is planning to take steps to combat these risks." In fact, days after the initial ban, the government of India launched a Digital India AatmaNirbhar Bharat App Innovation Challenge for Indian tech entrepreneurs and startups; the purpose was "to help realise the vision of Prime Minister for building a Digital India and using Digital Technologies for building an AatmaNirbhar Bharat."

The historical tensions between the two nuclear powers continue to rise in the economic space, and India is, without hesitation, tightening China's digital presence within its boundaries. A prolonging or compounding of this situation could have long-lasting effects on the trade relations between the two nations.

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LATIN AMERICA

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Brazil enacts data protection regulation, but implementation may be delayed.

In 2018, Brazil enacted the General Data Protection Law (LGPD), slated to come into force in August 2020. Due to the COVID-19 pandemic, the effective date will likely be delayed until 2021. The only definite effective date so far is that the administrative sanctions to be imposed by the National Authority (ANPD) were postponed to August 2021, according to Law 14.010. LGPD is pending a vote by Congress on a provisional measure to confirm whether the new law will come into force this year or on 4 May 2021.

The new data protection law, which regulates the use of personal data by the public and private sectors, is a significant improvement to Brazil's existing legal framework. The language that passed is the result of a broad discussion by stakeholders and citizens during the past few years. LGPD aims not only to guarantee individual rights but also to foster economic, technological, and innovation development through clear, transparent, and comprehensive rules for adequate personal data use.

Since personal data is becoming a valuable economic asset, Brazil has recognized the importance of protecting this type of data by following the same approach used by many other countries. Also, with the increase in the use of innovation and technology, the misuse of personal data has grown over the past few years.

In Latin America, some countries are ahead of Brazil regarding data protection laws. Chile, for instance, was the first country to enact a data protection law, in 1999. In 2013, the law was amended to be more aligned with the General Data Protection Regulation (GDPR). Argentina enacted its data protection law in 2000, and there has been recent debate on whether to update the law and make it similar to the GDPR. Colombia has had a data protection law since 2012, and Peru enacted its version in 2011.

Due to the increased use of technology, concern about personal data use has grown. Mechanisms to protect personal data will be necessary to avoid companies' misuse of data and to mitigate reputational risks. Therefore, companies must implement a privacy culture within their organizations and create internal policies and procedures to comply with data privacy regulations.

COVID-19 leads to cybersecurity challenges in Latin America.

The pandemic has put cybersecurity on the agenda of virtually every Latin American country. The need for employees to work remotely, and the resulting dependence on online services, has increased the threat of cybercrime. Increased incidences of phishing, ransomware, and other attempted (and successful) cyberattacks have been cited by the media, companies, and authorities since the beginning of the outbreak. In particular, cybercriminals find they can rely upon a deficiency of basic education about technology, a lack of regulation, and fear about the pandemic.

In March, Costa Rica faced a series of incidents caused by the so-called COVIDLock, a ransomware app that attracted users by supplying information and interactive maps regarding the coronavirus. As a result, several individuals, banks, and companies ware subject to scams.

The *2020 Cybersecurity Report for Latin America and the Caribbean* (the Report), released in July 2020 by the Organization of American States (OAS) and the Inter-American Development Bank (IDB), outlines the status of cybersecurity laws and strategies in Latin America and the Caribbean.

The Report acknowledges the progress of the region and points out that, at the beginning of 2020, twelve countries had approved national cybersecurity strategies: Colombia (2011 and 2016), Panama (2013), Trinidad and Tobago (2013), Jamaica (2015), Paraguay (2017), Chile (2017), Costa Rica (2017), Mexico (2017), Guatemala (2018), Dominican Republic (2018), Argentina (2019), and Brazil (2020). In general, however, these countries are still in early phases of developing adequate cybersecurity.

As stressed in the Report, changing this picture will require a joint effort by governments and international organizations to face the challenges of cyber risk by enacting specific regulations and structuring robust response plans. The needs brought about by the pandemic, as well as an increase in open banking initiatives, are motivating Latin American countries to improve their cybersecurity by adopting specific regulations.

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MIDDLE EAST

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United Arab Emirates-Qatar airspace dispute heads to ICAO.

As part of a larger regional dispute with Qatar, several gulf nations, including the United Arab Emirates, closed their airspace to Qatari aircraft. Qatar initiated several legal proceedings protesting the closure. In July (2020), the International Court of Justice found that the Council of the International Civil Aviation Organization (ICAO) has jurisdiction to hear the dispute. The case will now proceed on the merits before the ICAO.

WTO finds for Qatar's beIN in dispute with the Kingdom of Saudi Arabia.

As part of a broader dispute with Qatar, Saudi Arabia blocked Qatari-owned broadcaster beIN from broadcasting and refused to take action against alleged piracy of beIN's content by beoutQ. Qatar lodged a complaint with the World Trade Organization (WTO) in 2018. A WTO panel found that Saudi Arabia had breached WTO rules on intellectual property rights by failing to prosecute beoutQ for its piracy of beIN's content. The panel, however, did support Saudi Arabia's view that it could block beIN from obtaining legal counsel in Saudi Arabia on national security grounds.

Moroccan anticompetitive telecom dispute escalates.

Maroc Telecom is Morocco's leading telecom operator and controls about 60% of the Moroccan market. United Arab Emirate's state-owned telecom company, Etisalat, owns the majority interest in Maroc. The Moroccan government has a minority interest in Maroc. In early 2020, Maroc was fined US$344 million for anticompetitive practices by Moroccan government regulators. Shortly thereafter, Moroccan telecom company Inwi sued Maroc for more than US$620 million over alleged unfair competition. Inwi is majority owned by a holding company controlled by the Moroccan royal family.

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NORTH AMERICA

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Canada retaliates with C$3.6 billion in countertariffs in response to new U.S. tariffs on Canadian aluminum.

Canada plans to respond to newly announced U.S. tariffs on Canadian raw aluminum with C$3.6 billion in countermeasures on an extensive list of aluminum products, announced Deputy Prime Minister Chrystia Freeland on 7 August 2020. The U.S. announced a 10% tariff, effective 16 August, on raw aluminum imports from Canada after the United States failed to get Canada to impose quotas on its exports of the metal.

Freeland promised a "dollar-for-dollar" response that was "perfectly reciprocal" to the new U.S. tariffs. Among other products, Canada is considering a 10% tariff on aluminum cans; tinfoil; construction materials such as nails, staples, and screws; and household appliances such as washing machines.

International public interest groups criticize changes to Mexican copyright law.

On 24 July 2020, an international coalition of public interest organizations published an open letter in opposition to Mexico's new copyright law, enacted in accordance with the requirements of the United States-Mexico-Canada Agreement (USMCA) on free trade in North America. The letter writers argue that the Mexican copyright bill imposes undue burdens on Mexico, specifically by imposing United-States-type copyright protections without changing what they see as defects in the U.S. system. Among a myriad of complaints, the coalition argues that the new law's terms on digital rights management as well as the "notice and takedown" provisions are overly aggressive and biased in favor of copyright holders.

TikTok pledges to launch challenge to executive order demanding it find a U.S. buyer.

The Trump administration has accused TikTok, the popular Chinese-owned social media service, of being a national security threat and has applied pressure for a sale to a U.S. company. The administration claims that TikTok could be used by the Chinese government to track the locations of federal employees, to engage in blackmail, and to conduct espionage. TikTok responded to these concerns by saying it has never provided any U.S. user data to the Chinese government.

Representatives of TikTok claim that, even though they disagree with the U.S. government's national security concerns, they engaged in negotiations to find a solution that broke down in summer 2020. "To ensure that the rule of law is not discarded and that our company and users are treated fairly, we have no choice but to challenge the executive order through the judicial system," said TikTok in a statement on 7 August 2020.

Nevertheless, as the 20 September 2020 deadline imposed in the Trump administrations' executive order approached, the Chinese owner of TikTok chose Oracle as its U.S. partner, although it was unclear at the time of this publication whether Oracle would take a majority share in the app.

U.S. Citizenship and Immigration Services (USCIS) improperly denied Chinese investors' petitions for EB-5 visas.

A federal appellate court ruled on 19 August 2020 that USCIS unreasonably denied a group of Chinese investors' petitions for EB-5 visas. USCIS made its decision on the grounds that the investment did not sufficiently meet the EB-5 visa requirement that the investment capital be "at risk." The appellate court found that the capital investment in a series of nursing homes was sufficiently at risk because any return on the investment was dependent on the capital flow from the business and thus was "entirely subject to business fortunes."

U.S. airlines contact tracing plan faces start-up difficulties.

The Trump administration's COVID-19 response plan requires airlines to collect passengers' contact information for contact tracing purposes from U.S.-bound international passengers. Unfortunately, the debate over how and what data should be collected from passengers has dragged on for months.

In February 2020, the Centers for Disease Control and Prevention issued an interim final rule requiring airlines to collect particular data from international passengers and electronically submit them to Customs and Border Protection to facilitate contact tracing; however, airlines protested that they could not provide all the required information, particularly from passengers who booked online and/or through third parties. An interim solution is expected to be in place in September 2020.

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WTO Dispute Panel rules against U.S. tariffs on Chinese products.

As everyone knows, President Trump, who has called himself the "Tariff Man" since early 2018, had imposed an additional 25% customs duty on merchandise made in China imported into the United States. Trump stated he did so in response to China's practices related to forced technology transfers and intellectual property theft by China. The additional customs duties, which began the "trade war with China," were imposed pursuant to the emergency authorization provided in Section 301 of the Trade Act of 1974. In 2018, China filed a complaint with the World Trade Organization (WTO) against such additional customs duties alleging violations of the General Agreement on Tariffs and Trade (GATT). A Dispute Panel issued its report on 15 September 2020. The Panel determined the United States had not met its burden of demonstrating the reason for the imposition of the additional customs duties imposed on only Chinese products.

This is an extremely significant decision from the WTO. The WTO has not yet done anything to allow China or the other 164 WTO member countries to take action against the illegal tariff action by the United States. The WTO is based in Geneva, Switzerland, and was created in 1995 specifically as a forum for negotiating agreements aimed at reducing obstacles to international trade and ensuring a level playing field for all, thus contributing to economic growth and prosperity. The WTO also provides a legal framework for implementing and monitoring trade agreements and for settling disputes between member countries. The nondiscriminatory treatment by and among members is the core principle of the WTO, and yet it is directly adverse to the Trump administration's actions against China. International trade experts are now discussing what the member countries of the WTO will do as a penalty against the United States.

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WESTERN EUROPE

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EU Commission begins in-depth investigation into Google's acquisition of Fitbit.

Google announced last year it was buying Fitbit, a company headquartered in San Francisco that produces wearable technology products that measure the health and fitness of its users. The deal is valued at approximately US$2.1 billion. The EU Commission is currently investigating the impact of this proposed acquisition on the open-market economy and on effective competition in the EU.

Pursuant to Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), the Commission has a duty to assess mergers and acquisitions involving companies with a turnover above certain thresholds (Article 1 of the EC Merger Regulation). The objective is to create a system ensuring an open-market economy and effective competition in the internal market. According to the regulation, the process of reorganization should not lead to lasting damage to competition, but instead should increase the competitiveness of the European industry, improve growth, and raise the standard of living in the community.

After a transaction is notified, the Commission generally has twenty-five working days to decide whether to grant approval (Phase I) or to start an in-depth investigation (Phase II). Most of the notified mergers received by the Commission are cleared after a routine review.

In this case, the Commission decided to begin an in-depth investigation because of concerns that the acquisition could further strengthen Google's market position in online advertising by using the additional large amount of data from Fitbit. Besides many questions and concerns by the EU Commission, consumer groups from the United States, Mexico, Canada, Brazil, and Australia are worried the acquisition may deprive competitors of effective competition and lead to a misuse of customer data. With the acquisition, Google will obtain access to the database of Fitbit's users, with information about their health and fitness, and will also acquire the technology used by Fitbit. This increased data would give Google an advantage to personalize ads through its search engine and display them on websites. The Commission wants to ensure that data collected through wearable devices as a result of the acquisition will not interfere with the system of effective competition. Google responded that it would not use Fitbit's data for advertising purposes and that the deal is about the devices. The deadline for the Commission to make a decision is 9 December 2020.

Germany requires mandatory coronavirus test for travelers returning from risk areas.

On 8 August 2020, a regulation of Germany's Federal Ministry of Health entered into force that requires travelers returning to Germany from a so-called "risk area" to take a COVID-19 test upon arrival at the request of the public health department or another designated state institution. The German Federal Government examines, on a continuing basis, areas that are to be classified as risk areas. Several countries, including the United States, are currently considered a risk area. The mandatory COVID-19 tests are free of charge. Travelers may also present a negative COVID-19 test upon arrival that was taken no more than 48 hours earlier. The certificate of the negative test result must be in English or German. In addition, the test and the test certificate must comply with certain standards and must be either from a European Union country or another country approved by Germany's public health institute.

Persons arriving from a risk area must immediately report to the public health department in the region of their residence or destination in Germany and provide information on possible COVID-19 symptoms and test results. The obligation for a mandatory COVID-19 test upon arrival does not apply to travelers who only transited a risk area.

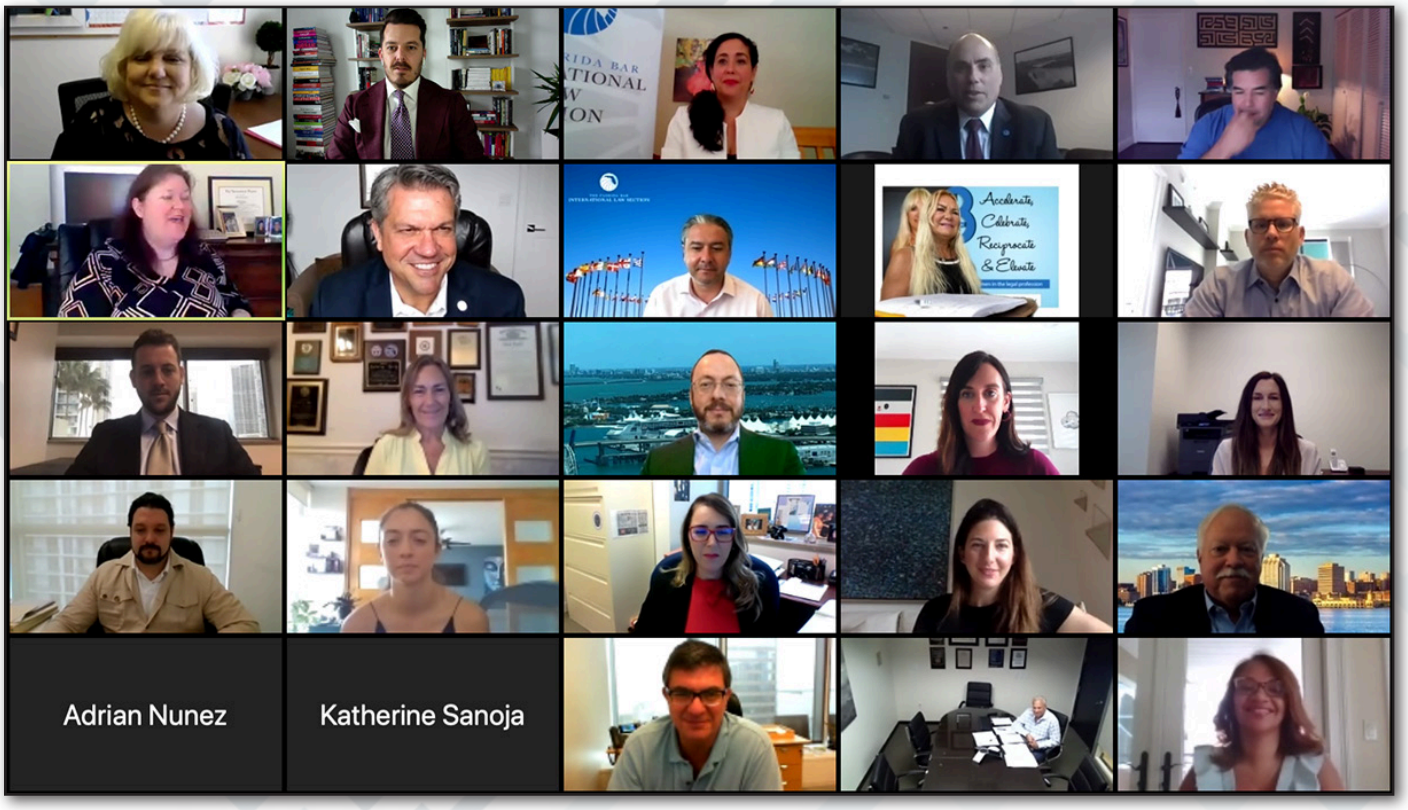
Susanne Leone *is one of the founders of Leone Zhgun, based in Miami, Florida. She concentrates her practice on national and international business start-ups, enterprises, and individuals engaged in cross-border international business transactions or investments in various sectors. Ms. Leone is licensed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

ILS Annual Meeting • 19 June 2020

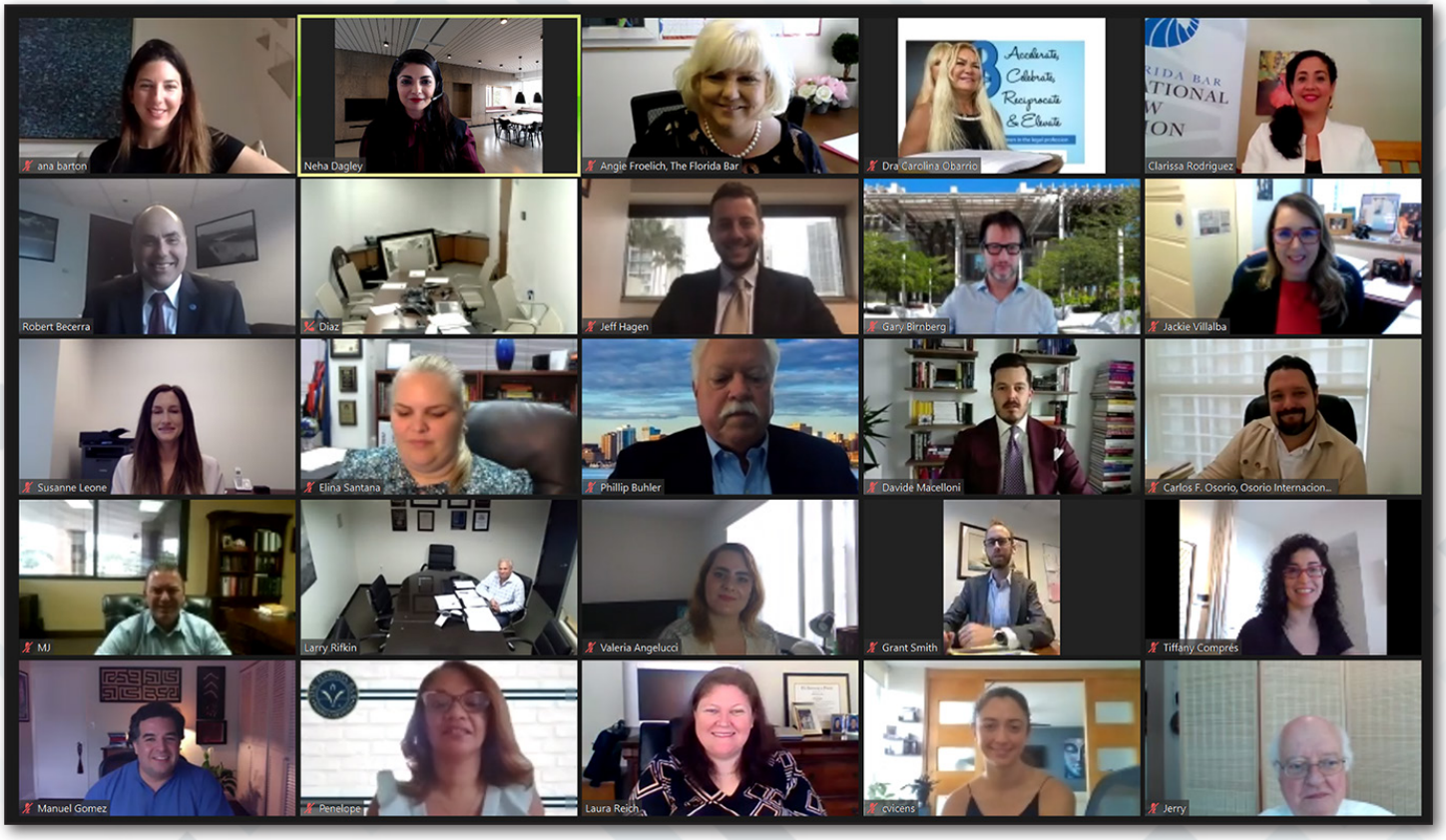
The International Law Section held its annual meeting during the **2020 Annual Florida Bar Virtual Convention Week**!

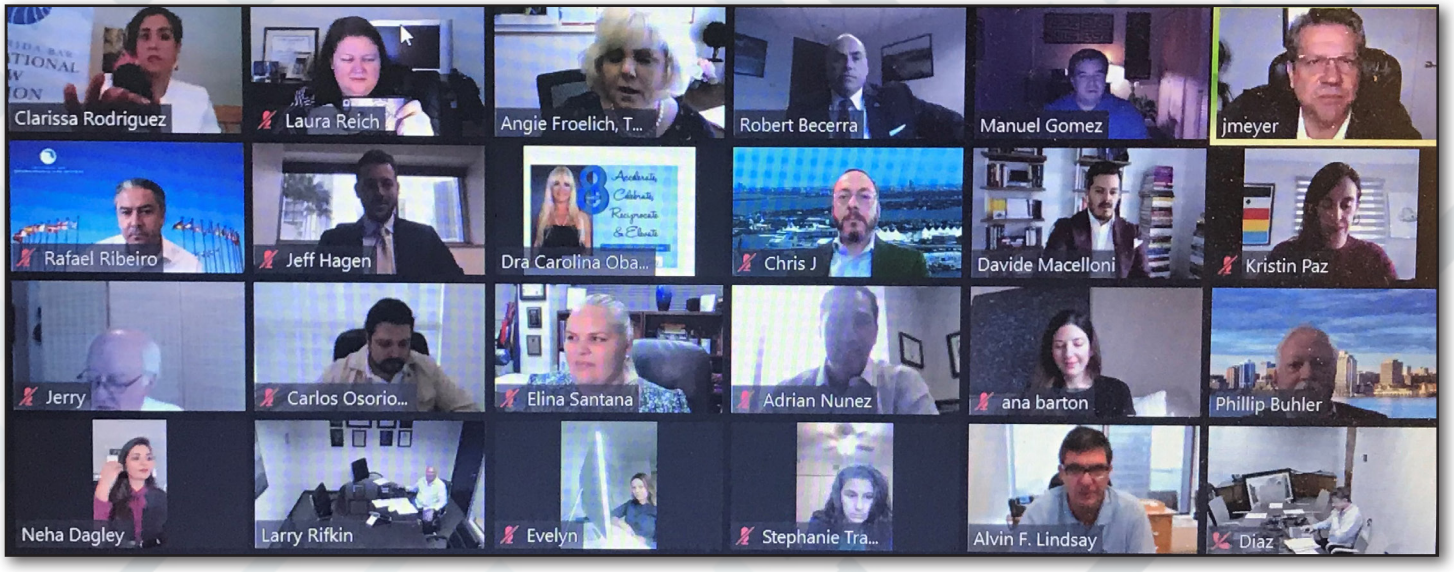
Alvin Lindsay

Laura Reich



ILS Annual Meeting *continued*

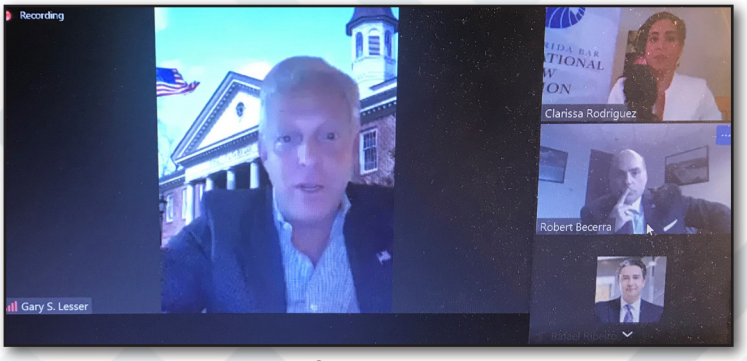




ILS Annual Meeting *continued*

Rafael Ribeiro

David Macelloni



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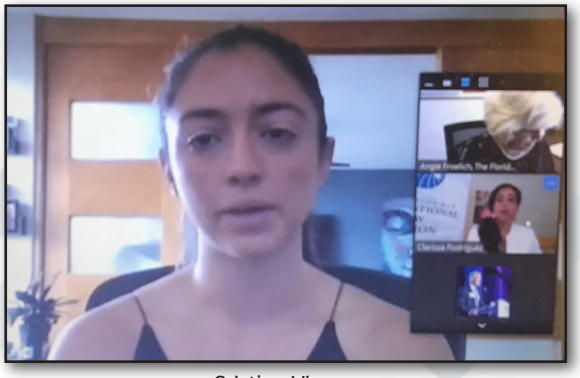
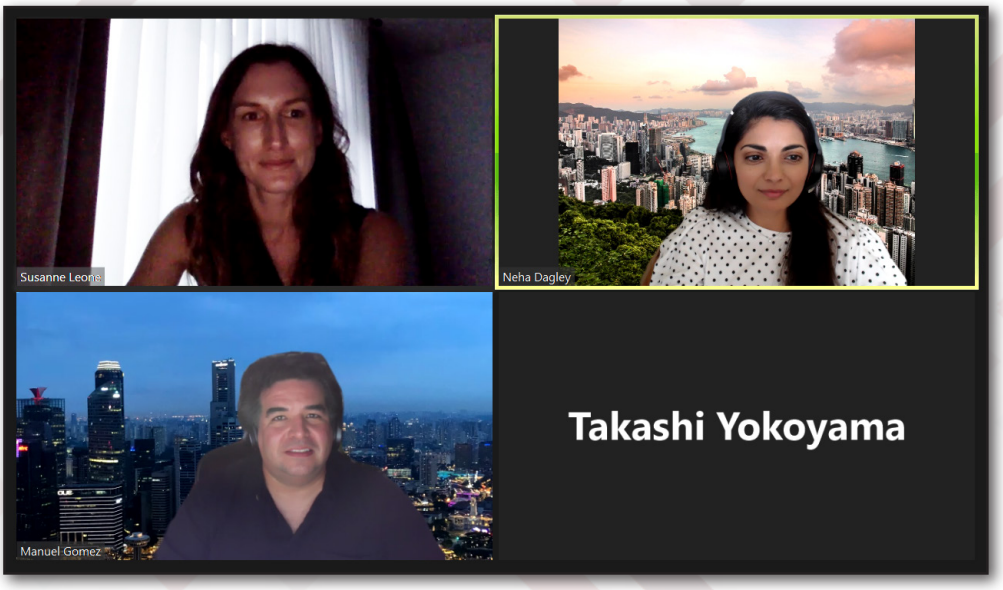


Cristina Vicens

ILS Asia Committee Meeting • 30 June 2020

The Asia Committee held its first virtual meeting with Chair Susanne Leone leading the discussion from Germany. Member Takashi Yokoyama joined the meeting from Japan. Also captured in the Zoom windows below are Neha Dagley, chair of the India Subcommittee, Professor Manuel Gomez, and Peter Quinter. Gaston Fernandez, chair of the China Subcommittee, also participated in the meeting, together with Margarita Muina.



Gray Market, from page 13

Why Manufacturers Dislike the Gray Market

Gray markets are ubiquitous. It has been estimated that gray market sales come to more than US$20 billion in the information technology sector alone. A study of manufacturers of health and beauty aids determined that gray market sales amounted to 20% of authorized sales in some markets and as much as 50% of authorized sales in others. In Malaysia, gray market cell phone sales have comprised 70% of the market. The problem is so substantial that multinational companies such as Motorola, HP, DuPont, and 3M devote full-time managers and staff to dealing with gray market issues.[3] A consequence of gray market activity is the watering down of exclusive rights to distribute a product. Instead of being the sole distributor or one of a select few establishments carrying a product, an authorized distributor of a manufacturer in a certain territory becomes merely one of many sources. The result is a drastic drop in margins as multiple outlets compete for the same customer.[4] This can lead to business disputes between manufacturers and their authorized distributors, resulting in liability for breaches of exclusive or territorial distribution agreements.

Therefore, manufacturers almost universally attempt to quash the availability of their goods on the gray market. First, manufacturers lose control of the distribution of their product on the gray market as they are often unable to trace the sale of their goods to ultimate end-users. They are unable to determine whether sales attributed to their authorized distributors are within their assigned territories, which may affect bonuses and incentives to those distributors. In addition, gray market sales of product prohibit manufacturers from enforcing discriminative pricing policies based on the territory where the product is being sold. This gray-market-created loss of sales and pricing control may result in lower profits to manufacturers than they would otherwise earn.[5] For example, if a manufacturer ordinarily would charge US$10 for its product if sold in the United States, and the same goods originally sold in

Africa at US$3 each are diverted to the United States, the manufacturer loses $7 it otherwise would have earned on the U.S. sale. Because of this potential loss in profits, many manufacturers have in-house departments, often called "product integrity" or "loyalty" departments, that investigate or audit the source of gray market sales in order to attempt to shut down such unauthorized distribution channels and to increase the manufacturers' profits, to the detriment of consumers who seek to obtain their products at lower prices.

When Gray Marketing Turns Into Black Marketing

Gray markets are not illegal.[6] A willing seller may sell genuine product they own to a willing buyer for a negotiated price in a free market economy. Distributorship agreements between manufacturers and their authorized distributors may restrict sales or certain territories or call for certain pricing, but breaches of such agreements are civil matters between the authorized distributors and their manufacturers who are parties to those distributorship agreements. Where gray markets may turn darker and become black markets is where the sales/purchase agreements between the distributor and the manufacturer are induced by the distributor through fraudulent statements to the manufacturer. The elements of fraud are (1) a material false statement or omission; (2) uttered with the intent to obtain something of value; and (3) something of value is obtained to the detriment of the victim. (For criminal liability for fraud, reasonable reliance on the fraudulent statement is not required; only that the false statement or omission be something that the victim would find material when deciding whether to make the sale.)[7]

For example, a gray market distributor/buyer may contact a manufacturer, and in response to inquiries by the manufacturer as to the destination of the product may affirmatively lie about such destination in order to intentionally circumvent territorial restrictions the manufacturer has in place in its distributorship network. Or, the gray market distributor may intentionally misrepresent the country where the goods will be sold for the purpose of obtaining preferential export pricing that would be otherwise unavailable to it but for its false statement as to the destination market. Then, having obtained lower than otherwise obtainable pricing from the manufacturer due to its fraudulent statements, the distributor turns around and sells the products into the U.S. market for huge profits. As a result of the distributor's fraud on the manufacturer, a U.S. buyer may receive the benefit of lower prices and the distributor receives the benefit of higher profits, but the manufacturer is basically tricked into selling its products for a price lower than it otherwise would have sold them into the U.S. market, thereby losing profits.[8]

Recent Cases

The U.S. Department of Justice recently brought two criminal cases in federal court in Miami involving the gray market/product diversion, which resulted in the convictions of all defendants via either guilty pleas or jury trial.

United States v. Javat[9]

Byramji Javat was the chairman of the Uniworld Group, a "global supply chain company" of, among other things, medical products, and a resident of the United Arab Emirates. Uniworld had an associated medical distributor in the United States. The government charged the defendants in the indictment filed in 2018 with conspiracy to commit wire fraud, wire fraud, and sale of pre-retail medical products. In that indictment, it was alleged that Javat and his co-conspirators, including his U.S. distributor, a customs broker, and warehousemen/freight forwarders, would obtain deeply discounted products regulated by the U.S. Food and Drug Administration (FDA) by falsely representing that the products were for export only when, in fact, Javat and his co-defendants knew and intended that the goods were to be sold in the United States for substantial profits. Specifically, Javat and Uniworld were falsely representing that they were purchasing products for export to an Afghanistan reconstruction agency with ties to the U.S. military in that country. When the manufacturers made the sale, Uniworld and Javat would cause the products to be picked up from the plant, and then the products were either diverted to Javat's U.S. distributor or exported and then immediately imported back into the United States. Since the U.S. manufacturers

believed the products were being exported to an Afghan government agency involved in reconstruction of the country, they offered Javat and Uniworld deep export discounts. As such, once the products were sold by Javat and Uniworld into the U.S. market, they were able to undercut the manufacturers' own domestic distributors and sell the goods for enormous profits.

Javat pled guilty to conspiracy to commit wire fraud in 2019 and was sentenced to ten years' imprisonment and was assessed a fine and forfeiture plus restitution; the warehousemen/freight forwarders also pled guilty and were given prison sentences, forfeitures, and fines; the customs broker was convicted at trial and sentenced to six years' imprisonment, restitution, and forfeiture.

United States v. Doekhie[10]

In this case the defendants, residents of South Florida, were managers in international distribution companies involved in selling infant formula and eye-care products regulated by the FDA. They were charged in 2018 by the U.S. Department of Justice with conspiracy to commit wire fraud, wire fraud, money laundering, and the illegal sale of pre-retail medical products. In this case, to obtain deep export discounts, Doekhie and his co-defendants told manufacturers that they were purchasing products for export to Suriname in connection with purported government procurement contracts. In fact, the defendants did not have such government procurement contracts, and never intended to export the products to Suriname. The products were sold in the United States, for tens of millions of dollars, earning them substantial profits due to the discounted prices at which they acquired the products. In order to hide the scheme from the manufacturers, products were often exported and then immediately re-imported into the United States, or an export was created using products different than those purchased from the manufacturers, creating a bogus paper trail the defendants could present to the manufacturers to show that the products were exported. In fact, from the inception, the intent of Doekhie and his co-defendants was to sell the products in the United States.

All the defendants were convicted at trial except for one, who earlier pled guilty. All convictions occurred in 2020. Sentencing is pending.

Guidance to Avoid Risk of Your Gray Market Turning Black

So, how does a business involved in the gray market avoid being involved in illegal product distribution? There are some steps that can be followed in order to ensure that a business's gray marketing does not turn into black marketing.

Do not purchase directly from the manufacturer.

A common thread of the two criminal cases discussed above is that the defendant distributors were in direct privity with the products' manufacturers. This created opportunities for the distributors to make false and misleading statements to the manufacturers when responding to inquiries as to the destination of the products, which affected pricing. The gray market exists as a secondary market where products are purchased in a location where prices are lower than where the distributor will sell those products, causing opportunities for profits. Avoiding the dissemination of false statements to sellers for the purpose of manipulating the acquisition price of the product is key to steering clear of an illegal, fraudulent transaction.

Do not affirmatively misrepresent the destination of the product being purchased.

When dealing directly with a manufacturer, the distributor is often asked the destination of the product, as the destination often affects the selling price. Export markets have different pricing structures compared to domestic markets due to a variety of factors, including comparative country income and regulatory and government policies, for example. Making a false statement as to destination to the manufacturer was a key element of the fraudulent schemes recently prosecuted by the U.S. Department of Justice where destination was material to the acquisition price of the product.

Gray Market, continued

Do not affirmatively misrepresent to the manufacturer the identity of your own customer.

Likewise, when dealing with the manufacturer, do not misrepresent, if you are going to disclose at all, the identity of your customer. In many cases, manufacturers will give special, exclusive discounts to charitable organizations, hospitals, and governments. In the cases recently prosecuted, the defendant distributors misrepresented that they were bidding on contracts for a reconstruction agency, military hospitals, and other charities to convince manufacturers to provide discounts even steeper than their usual export pricing. Remember that lying to get something of monetary value is illegal.

Do not create "dummy" shipments to create a fake export paper trail.

In the recently prosecuted cases, "dummy" shipments, namely shipments of products other than those purchased, or export shipments that were immediately returned to the United States, were performed by the distributors to create an export paper trail, which the distributors then showed the manufacturers to prove they were exporting the products. Creating such "dummy" shipments only creates inculpatory documentary evidence, which will be a prosecutor's dream at a trial. In addition, if any of the "dummy" shipment documentation was submitted to U.S. Customs and Border Protection or the Bureau of Industry and Security, in addition to being charged with fraud on the manufacturer, the distributor can also be charged with customs or export fraud on the government, a felony.

Conclusion

The gray market and product diversion can be useful and helpful in the worldwide marketplace for goods. Those markets can be effective to manage competitive pressures and distribution channels, to tap underserved markets, to eliminate excess inventory, and to assist the market to overcome supply constraints through authorized channels.[11] What the gray marketer or product diverter must be on the watch for is when the sales transactions being conducted contain an element of fraud and misrepresentations as to destination and end-user. It is with this fraudulent character, with misrepresentations made to the manufacturers/sellers, that the gray market turns black.

***Robert J. Becerra** is a Florida Bar board certified expert in international law. He concentrates his practice in the areas of civil litigation, white collar criminal defense, grand jury investigations, cargo loss, federal agency investigations, disputes between exporters and importers, trade based money laundering, export enforcement, FDA detentions and investigations, customs seizures and civil forfeitures, and other proceedings related to international trade. You may contact Mr. Becerra at rbecerra@rjbecerralaw.com or 786-401-4897.*

Endnotes

1 *CBP Enforcement of Intellectual Property Rights*, August 2012, at pages 9-10.

2 *United States v. Braunstein*, 281 F.3d 982, 992 (9th Cir. 2002).

3 *Competing with Gray Markets*, MIT Sloan Management Review, Fall 2004.

4 *Id.*

5 *See*, for example, Amended Complaint in *Abbott Laboratories, etc. et.al v. Adelphia Supply, etc. et.al*, Case No. 15-cv-05826-CBA-MDG, at DE-156.

6 *See Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 513 (2013); *Quality King Distributors, Inc. v. L'Anza Research International, Inc.*, 523 U.S. 135 (1998); *United States v. Weinstein*, 762 F.2d 1522 (11th Cir. 1985); *United States v. Costanzo*, 4 F.3d 658 (8th Cir. 1993).

7 *United States v. Takhalov*, 827 F.3d 1307 *opinion modified on denial of reh'ing*, 838 F.3d 1168 (11th Cir. 2016); 18 U.S.C. Sec. 1341 and 1343.

8 Perhaps the U.S. manufacturer would not have been able to sell the products in the United States for its higher domestic prices, and as a result, but for the gray market distributor purchases, perhaps the U.S. manufacturer would not have made any sales at all; that aspect of the gray market/product diversion transaction, which has been raised as defenses to loss or damages where frauds have been alleged, is outside the scope of this article.

9 *United States v. Byram Javat, et.al* Case No. 18-20668-Cr-Middlebrooks.

10 *United States v. Raoul Doehkie et.al*, Case No. 18-20989-Cr-Altman.

11 *Competing with Gray Markets*, MIT Sloan Management Review, Fall 2004.

Transfer Pricing Challenges, from page 15

pharmaceuticals—this was confirmed by Attorney General William P. Barr on 16 July 2020, when he declared, "America also depends on Chinese supply chains in other vital sectors, especially pharmaceuticals. America remains the global leader in drug discovery, but China is now the world's largest producer of active pharmaceutical ingredients, known as APIs."[11] When Chinese production or delivery of APIs is restricted or limited in any way, "severe shortages of pharmaceuticals for both domestic and military uses" in the United States could result.[12] Similarly, India is the world's largest producer of generic drugs, with a majority of the APIs it uses for production imported from China.[13] Both countries experienced factory lockdowns this spring, as both rely on manufacturing plants where social distancing is not practical. Significant price fluctuations and potentially no availability for certain drugs are possible if Chinese or Indian factories are forced to halt operations again—and a resurgence of the virus in the winter is likely, according to experts.[14] While the real-world impact of these market disruptions is most concerning,[15] commonly controlled companies bound by now outdated transfer pricing policies are in the unenviable position of predicting what to adjust prices to without knowledge of how local laws will evolve, even on a week-to-week basis.

COVID-19 is hardly the first disruptor of transfer pricing—in fact, 2020 has been full of transfer pricing turmoil, even before the pandemic, due to tariffs. Depending on the good, an importer's projected profit margin can be completely eliminated by a particular tariff. The U.S. trade war with China, for example, was already resulting in tariffs on 25% of the value of a host of products of Chinese origin. On 4 January 2020, President Trump issued a proclamation expanding tariffs on goods such as steel and aluminum to include items made mostly but not solely of such materials.[16] Wide-ranging tariffs can have an intense effect on the continued viability of intercompany agreements reached prior to the establishment of the tariffs, rendering carefully constructed transfer pricing studies obsolete.

Another trade war may also be looming. Importers of products from Europe remain watchful of 2020 OECD discussions regarding digital service taxes (DSTs). DSTs reject the traditional model of taxation—that a company is taxed in jurisdictions only where it has a nexus based on permanent establishment. Large U.S. companies that reap substantial digital advertising revenue, such as Facebook and Amazon, only pay tax in the United States despite connecting with users globally. Just last year, upon France's announcement of a potential DST, President Trump threatened to impose tariffs on French cheese, wine, and handbags, before the United States and France eventually agreed to a truce to allow global discussions to transpire first.[17] Several other European Union nations have now joined France in agreeing to impose DSTs on digital advertising giants, without international agreement on this issue, before the end of the year. On 10 July 2020, the United States reiterated that it would impose a 25% tariff on French goods.[18] Adding fuel to the fire, at discussions recently in Brussels, French Finance Minister Bruno Le Maire remarked, "France's response will be unchanged. If there is no international solution by the end of 2020, we will, as we have always said, apply our national tax."[19] Reasonable minds can disagree over whether DSTs violate long-standing tax policy or if DSTs are taxation developed to complement a twenty-first century global digital economy—an update to modern times. What is clear, however, is that the threat of tariffs imposed by the United States on countries that implement DSTs is already further complicating transfer pricing prognostication.

Whether due to a global pandemic or to tariffs stemming from trade wars old and new, 2020 thus far has been a perfect storm for throwing a well-intentioned transfer pricing policy into utter disarray.

Mitigation Strategies

As multinational companies monitor global developments, the IRS has indicated that it will not be abating its scrutiny of transfer pricing. On the contrary, on 14 April 2020, in the shadow of the snowballing pandemic, the IRS published a set of frequently asked

Transfer Pricing Challenges, continued

questions (FAQs) on transfer pricing documentation best practices.[20] The IRS in 2018 stated that "the quality of transfer pricing documentation ha[d] declined."[21] With this in mind and given the current economic climate, the FAQs specifically target net adjustment penalties[22] that are applied when a company exceeds thresholds in a transfer pricing adjustment. When companies are audited by the IRS, if after thirty days the expansive required documentation illustrating the reasoning for the price adjustment is not produced, the net adjustment penalty is automatically applied. The recent IRS release of these FAQs could be considered to be a warning shot.

The IRS FAQs do not change transfer pricing rules but serve to highlight that companies must have robust and meticulous documentation detailing reasoning for transfer pricing adjustments to avoid intense scrutiny upon audit. A hypothetical example from the FAQs involving an unexpected change in business circumstances is so relevant to the current global situation that I have reprinted it here:

> Documentation should thoroughly explain how the unforeseen business circumstances experienced by the company caused the observed financial results and how the losses were not caused by intercompany prices. This approach would address a core issue in the transfer pricing analysis and facilitate an efficient examination. By contrast, it would be counterproductive if, rather than addressing the business circumstances that caused the loss, the taxpayer instead manipulated its set of comparable companies. For example, the taxpayer might adopt an analysis in its documentation that includes companies not truly comparable to the distributor but cause the results of the distributor to fall within the interquartile range of comparable company profitability. This approach would result in additional rounds of Information Document Requests (IDRs).[23]

One simple and useful takeaway from the FAQs is that the IRS has requested transfer pricing studies be more "user-friendly" by including a summary of intercompany transactions. This is a refreshing reminder that IRS agents appreciate some consideration as well.

Apart from honest and complete documenting of business circumstances and adherence to I.R.C. § 482 and § 6662, there are strategies that companies can put into practice now that may be beneficial, such as reviewing intercompany contracts. Some contracts may contain *force majeure* provisions providing clear direction in the case of a global pandemic. In other agreements, there may not be a contractually prescribed solution. While amending the agreements may or may not be possible at this juncture, the doctrine of rescission could be a useful tool. Rescission allows taxpayers to undo related party transactions if the rescission occurs in the same taxable year as the original transaction and the parties are returned to the same position prior to the contract.[24] Multinational companies should consider if the rescission would be respected in non-U.S. jurisdictions. Taxpayers should also be wary of rescinding a contract and then entering into a new one as this could be invalidated by the IRS.[25]

Depending on the particular good or service, it may be advisable to avoid entering into restrictive advance

pricing agreements (APAs) going forward. APAs are fixed agreements between a taxpayer and tax authority on transfer pricing methodology over a period of time.[26] While APAs may save large companies effort and expense under normal circumstances, we have entered the *new normal*. Rigid, cost-saving mechanisms like APAs do not age well when 25% tariffs and global pandemics disrupt global markets.

Multinational companies would be well-advised to take a careful look at current intercompany agreements to determine if shifting pricing would be helpful to remain economically viable, while being mindful that such shifts will be heavily scrutinized by tax authorities, both in the United States and abroad. Belgian transfer pricing tax authorities, for example, have already created a COVID-19 workgroup for this purpose.[27] One shrewd point of analysis for companies considering transfer pricing adjustments could be the financial crisis of 2008. Although lockdowns and *force majeure* provisions are not synonymous with the 2008 economic downturn, information pertaining to consumers' habit adjustments in specific product sectors could prove valuable.[28]

In conclusion, this year has been challenging in nearly every respect, and how multinational companies will ultimately solve transfer pricing dilemmas is no exception. A further refocusing is likely to become necessary in the near future as the increasingly digitalized global economy forces a rebalancing of where "transactional value" is actually derived. While far from a how-to guide, my hope is this article has provided at least some clarity on how companies can move forward without feeling restricted by outdated agreements.

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Endnotes

1 Pike and Schuette, *The Classic Whip-Saw Effect of Customs and Transfer Pricing*. Bloomberg Tax (13 Jan. 2020), https://news.bloombergtax.com/transfer-pricing/insight-the-classic-whip-saw-effect-of-customs-and-transfer-pricing

2 *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* (last visited 13 July 2020), https://www.oecd.org/tax/transfer-pricing/oecd-transfer-pricing-guidelines-for-multinational-enterprises-and-tax-administrations-20769717.htm

3 Treas. Reg. § 1.482-1(c) codifies the "best method" approach.

4 Treas. Reg. §1.6662-6(d)(2)(ii)(A)(6).

5 I.R.C § 6662 details the types of transgressions that will earn a taxpayer an accuracy-related penalty or penalty for underpayment.

6 Karen, Ungar and Helou, *The Section 6662(e) Substantial and Gross Valuation Misstatement Penalty.* IRS (2020), https://www.irs.gov/pub/irs-apa/penalties6662_e.pdf

7 I.R.C § 482 and the corresponding Treasury Regulations address the allocation of income and deductions among taxpayers to ensure that controlled transactions are not structured to avoid taxation. Treas. Reg. § 1.482-3 in particular describes the methods to determine taxable income, including comparable uncontrolled price method, resale price method, cost plus method, comparable profits method, profit split method, and other unspecified methods.

8 Abad, Cody, Subramanian and Vance, *Transfer Pricing Changes May Result in Potential Customs Tariff Opportunities in a COVID-19 Environment*. What's New in Tax, KPMG (18 May 2020), https://home.kpmg/us/en/home/insights/2020/05/tnf-transfer-pricing-adjustments-potential-customs-tariff-opportunities.html

9 *Id*.

10 *Chrysler Corp. v. United States*, 17 C.I.T. 1049 (1993).

11 Remarks on China Policy at the Gerald R. Ford Presidential Museum, Department of Justice (remarks as prepared for delivery of William P. Barr, Attorney General) (16 July 2020), https://www.justice.gov/opa/speech/attorney-general-william-p-barr-delivers-remarks-china-policy-gerald-r-ford-presidential#_ftn10

12 Hearing Exploring the Growing U.S. Reliance on China's Biotech and Pharmaceutical Products Before the U.S.-China Economic and Security Review Comm., 116 Cong., at 25 (2019) (written testimony of Christopher Priest, principal deputy, deputy assistant director, Healthcare Operations Defense Health Agency), https://www.uscc.gov/sites/default/files/2019-10/July%2031,%202019%20Hearing%20Transcript.pdf

13 Blankenship, *India pharma manufacturing hub back up and running after COVID-19 lockdown*. Fierce Pharma (27 Apr. 2020), https://www.fiercepharma.com/manufacturing/india-pharma-manufacturing-hub-back-up-and-running-after-covid-19-lockdown-report

14 *Preparing for a Challenging Winter 2020/21*. Academy of Medical Sciences (UK) (14 July 2020), https://acmedsci.ac.uk/file-download/51353957

Transfer Pricing Challenges, continued

15 On 28 July 2020, the Trump administration took a step toward addressing this vulnerability by awarding Eastman Kodak a US$765 million loan under the Defense Production Act to begin domestic production of APIs for certain generic drugs.

16 Brown, *U.S.-China Trade War Tariffs: An Up-To-Date Chart*. Peterson Institute for International Economics (14 Feb. 2020), https://www.piie.com/research/piie-charts/us-china-trade-war-tariffs-date-chart

17 Rose and Thomas, *Macron and Trump declare truce in digital tax dispute*. Reuters (20 Jan. 2020), https://www.reuters.com/article/us-france-usa-tax/macron-and-trump-declare-a-truce-on-digital-tax-dispute-idUSKBN1ZJ24D

18 Tankersley, *U.S. Will Impose Tariffs on French Goods in Response to Tech Tax*. The New York Times (10 July 2020), https://www.nytimes.com/2020/07/10/business/us-will-impose-tariffs-on-french-goods-in-response-to-tech-tax.html

19 Leonard and Mohsin, *U.S. Tariff Threat Isn't Swaying France on Tech Giants*. Bloomberg Tax (10 July 2020).

20 *Transfer Pricing Documentation Frequently Asked Questions*. IRS (14 Apr. 2020), https://www.irs.gov/businesses/international-businesses/transfer-pricing-documentation-frequently-asked-questions-faqs

21 *Id*.

22 I.R.C § 6662(e)(1)(B)(ii).

23 *Transfer Pricing Documentation Frequently Asked Questions*. IRS (14 Apr. 2020), https://www.irs.gov/businesses/international-businesses/transfer-pricing-documentation-frequently-asked-questions-faqs

24 Revenue Ruling 80-58 addresses the prerequisites for a successful rescission.

25 Martin and Bettge, *Transfer Pricing implications of COVID-19: Revisiting prices, contracts, and APAs.* International Tax Review (15 Apr. 2020), https://www.internationaltaxreview.com/article/b1l6ngwjfc6fpd/transfer-pricing-implications-of-covid19-revisiting-pricing-contracts-and-apas

26 *Id*.

27 de Groote, *Bolster the resilience of your transfer pricing model*. KPMG (5 May 2020), https://assets.kpmg/content/dam/kpmg/us/pdf/2020/05/tnf-tp-belgium-may5-2020.pdf

28 *Id*.

Electronic Service, from page 17

"[c]onstitutional due process requires *only* that service of process provide 'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'"[11]

Citing multiple decisions throughout the United States, the court in *Chanel, Inc. v. Zhixian* found that service on Chinese individuals by email was not barred by international law, a key requirement of Rule 4(f)(3).[12] Further, the court cited multiple decisions throughout the United States where service by email was deemed appropriate.[13] Thus, the court found that Chanel, Inc. had established a basis for electronic service, stating:

> The undersigned finds that Plaintiff has diligently pursued various means of providing notice of these proceedings to Defendant. Moreover, Plaintiff has provided sufficient notice to defendant through the e-mails that did not bounce back (*citations omitted*) . . . Additionally, the undersigned finds that the e-mails that did not bounce back presumptively reached Defendant (*citations omitted*) . . . Consequently, the Court is reasonably satisfied that service upon Defendants via e-mail, under the unique facts of this case, is reasonably calculated to notify Defendants of the pendency of this action and provide him with an opportunity to present objections. Thus, in this instance, service by e-mail satisfies due process.[14]

Ensuring satisfaction of due process was essential in the *Chanel, Inc.* opinion, not only because the court found it a requirement under Fed.R.Civ.P. 4(f)(3), but also because it lessened the possibility of a later challenge of the court's ruling. It is not unusual for foreign companies and individuals (particularly those who make a concerted effort to hide their whereabouts) to elect not to defend lawsuits filed against them in the United States. Many of these defendants believe they will have two subsequent bites at the proverbial apple in attempting to evade execution of a default judgment against them, first by challenging the propriety of service, and second by arguing that entry of the judgment runs afoul of the laws of the nation where the plaintiff seeks enforcement. By focusing on whether Zhixian had received notice of the filing of Chanel, Inc.'s action and afforded the opportunity to defend, the court ensured that its ruling would survive possible future challenges. Indeed, the court even went one step further, authorizing a *second* method of service: public announcement in accordance with Article 84 of the Civil Procedure Law of the People's Republic of China.[15] This requirement of second service by a method of publication is something Florida courts authorizing electronic service would follow in later decisions.

Limitations on Hague Convention Objections

The reason why courts throughout the United States—including the Southern District of Florida in *Chanel, Inc. v. Zhixian*—have consistently authorized service of process by email or other electronic means on Chinese companies and individuals is because the Hague Convention is silent on email service. Thus, while China has successfully blocked service of process via

regular mail by objecting to service "by postal channels," pursuant to Article 10, its objection did not cover service by email, which was deemed something other than "by postal channels." No other international agreements bar service by email on Chinese companies and individuals.

"Where a signatory nation has objected to only those means of service listed in Article [10], a court acting under Rule 4(f)(3) remains free to order alternatives means of service that are not specifically referenced in Article [10]."[16] While Article 10(a) references "postal channels," it fails to mention service by email, online messaging system, or other electronic means. China's objection to service by "postal channels" therefore does not prohibit service by "electronic means."[17]

Recent Decisions in Florida

The past several months have witnessed an increasing number of cases where Florida courts have followed the lead of the *Chanel, Inc.* decision and authorized service of process by email on Chinese companies and individuals, for example, *Louis Vuitton Melletier v. Individuals, Partnerships et al.*, 2020 WL 4501765 (S.D. Fla. 9 June 2020); *Whirlpool Corporation v. Individuals, Partnerships et al.*, 2020 WL 4501788 (S.D. Fla. 28 April 2020); *Taylor Made Golf Company, Inc. v. Individuals, Partnerships et al.*, 2020 WL 3305383 (S.D. Fla. 13 April 2020); *Chanel, Inc. v. Individuals, Partnerships et al.*, 2020 WL 3272325 (S.D. Fla. 9 April 2020); *Apple Corps Limited v. Individuals, Partnerships et al.*, 2020 WL 3272270 (S.D. Fla. 24 March 2020). In each of these decisions, courts have also required that plaintiffs serve the unidentified Chinese defendants by posting the complaints on designated service notice websites created by plaintiffs. Again, this ensures that the Chinese companies and individuals are given notice and the opportunity to defend, while lessening the burden on plaintiffs to try to locate and serve defendants intent on hiding and avoiding service in a foreign nation unlikely to provide any degree of cooperation.

This trend by U.S. courts to authorize electronic service on infringers hiding in China is certain to provide greater assurance to intellectual property owners that their rights will be protected notwithstanding China's refusal to cooperate. Enforcement of judgments in China will continue to prove difficult, but American companies will at least be armed with judgments to use as weapons against infringers seeking to expand operations within the United States.

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Endnotes

1 Hague Conv. Art. 10, 20 U.S.T. 361.

2 Hague Conv. Art. 10(a), 20 U.S.T. 361.

3 *See* Hague Conv. Art. 10(b), (c), 20 U.S.T. 361.

4 Fed.R.Civ.P. 4(f)(3).

5 *See Nuance Commc'ns, Inc. v. Abbyy Software House*, 626 F.3d 1222, 1239 (Fed. Cir. 2010).

6 *See id.* at 1240 (emphasis added by Federal Circuit).

7 *Chanel, Inc. v. Zhixian*, 2010 WL 1740695, at *2 (S.D. Fla. 29 April 2010), *quoting Chanel, Inc. v. Lin*, 2009 WL 1034627, at *1 (S.D. Fla. 16 April 2009).

8 *Id.* at *1.

9 *Id.*

10 Hague Conv. Art. 1, 20 U.S.T. 361.

11 *Zhixian*, 2010 WL 1740695, at *2, *3 (emphasis added).

12 *Id.* at *2.

13 *Id.* at *3; *see, e.g.*, *Rio Props, Inc. v. Rio Int'l Interlink*, 284 F.3d 1007, 1018 (9th Cir. 2002) ("[W]hen faced with an international e-business scofflaw, playing hide-and-seek with the federal court, email may be the only means of effecting service of process."); *MacLean-Fogg Co. v. Ningbo Fastlink Equip. Co.*, No. 08C2593,

Electronic Service, continued

2008 WL 5100414 at *1 (N.D.Ill., 1 Dec. 2008) (holding that service of process via email comports with constitutional notions of due process); *Phillip Morris USA Inc. v. Veles, Ltd.*, 2007 WL 725412 (S.D.N.Y. 2007) (authorizing service of process by email upon online stores in trademark infringement case); *Popular Enters., LLC v. Webcom Media Group, Inc.* 225 F.R.D. 560, 563 (E.D.Tenn. 2004) (holding that email service was reasonably calculated to apprise a defendant of the lawsuit and provide an opportunity to respond); *In re Int'l Telemdeia Assoc.*, 245 B.R. 713, 719-20 (Bankr. N.D.Ga. 2000) (authorizing service by email).

14 *Chanel, Inc. v. Zhixian*, 2010 WL 1740695, at *3.

15 *Id.* at *4.

16 *Shinde v. Nithyananda Found.*, 279 F.R.D. 215, 219 (S.D.N.Y. 2011) (quoting *Gurung v. Malhortra*, 279 F.R.D. 215, 219 (S.D.N.Y. 2011)) (alterations in original).

17 *See, e.g., Microsoft Corp. v. Goldah.com Network Tech. Co.*, No. 17-CV-02896, 2017 WL 4536417, at *4 (N.D. Cal. 11 Oct. 2017) ("China's objection to Article 10 does not prohibit the email service the Court ordered in the instant case."); *Victaulic Co. v. Allied Rubber & Gasket Co. et al.*, Case No. 3:17-cv-01006, Dkt. 18, slip op. at 6-7 (S.D. Cal. 8 May 2020) ("the Hague Convention, to the extent applicable under the circumstances, does not prohibit service on a Chinese company through electronic means."); *see also Facebook, Inc. v. Banana Ada, LLC*, No. C-11-3619, 2012 WL 1038752, at *2 (N.D. Cal. 27 March 2012); *Williams-Sonoma Inc. v. Friendfinder Inc.*, No. C06-06572, 2007 WL 1140639, at *2 (N.D. Cal. 17 Apr. 2007) (allowing email service of defendants in countries that have objected to service via postal channels).

Navigating PPE Transactions, from page 19

discussed above, oftentimes these negotiations are with another broker. This has a compounding effect that creates the illusion of significantly more inventory and buyers than reasonably exist.

For example, assume that a business has 10 million boxes of nitrile gloves for sale and tells a single broker about the supply. The broker tells ten prospective buyers about the available goods; however, seven of the prospective buyers are in fact brokers masquerading as an end buyer. Those seven brokers each tell ten more prospective buyers, a substantial percentage of which are also brokers. It does not take a degree in mathematics to see where this is going. A few degrees removed, and thousands of transactions are being negotiated based on a single supply of goods.

Maybe somewhere down the line a broker decides to split up the lot and sell 3 million boxes to one prospective buyer, and 7 million boxes to another prospective buyer. If either prospective buyer is a broker, then the compounding effect repeats, and now there is a 10-million-box lot and a 7-million-box lot, both of which are being zealously marketed by an army of brokers. It is plausible, if not likely, that many of the brokers marketing the 7-million-box lot are simultaneously marketing the 10-million-box lot, blissfully unaware of what has occurred.

Maybe an enterprising broker decides to combine the lots and market a 17-million-box lot, and the cycle repeats itself. Now consider how many brokers might be splitting or combining lots, and how many phantom lots could be spawned from a single 10-million-box lot. This could occur with little to no "proof of life" (POL) with respect to the initial 10-million-box lot that was the genesis of the whole mess.

The compounding effect is equally problematic from the perspective of exaggerating the number of bona fide buyers looking for product. For example, assume that a business is looking to purchase 10 million boxes of nitrile gloves and provides a single broker a purchase order for such goods. The broker tells ten prospective sellers about the need for such goods; however, seven of the prospective sellers are in fact brokers as well. Those seven brokers each tell ten more prospective sellers, a substantial percentage of which are also brokers, and so on and so forth.

Maybe somewhere down the line a broker can't find a 10-million-box lot for sale, so it decides to split the order up and purchase 3 million boxes from one prospective seller and 7 million boxes from another prospective seller and issues purchase orders for each. If either prospective seller is actually a broker, then the compounding effect repeats, and now there are apparently buyers looking for a 10-million-box lot and a 7-million-box lot. It is plausible, if not likely, that many of the brokers sourcing the 7-million-box lot are simultaneously sourcing the 10-million-box lot, also blissfully unaware that both are ultimately for the same end-of-line buyer, which has only ordered 10 million boxes.

In addition to creating a mirage of significant inventory and large swaths of bona fide buyers, the brokers can create significant deal-flow issues. It is not uncommon for there to be five or more brokers working a single transaction. This can result in negotiation by the "telephone game," and as anyone who has had the pleasure of playing that game knows, the message you start with is often drastically different than the message at the end of the chain.

Another issue with negotiating through brokers is that they are not principals; brokers often tend to be primarily concerned with the transaction closing, and less concerned with the fine deal points expected by the seller and the buyer. This results in brokers agreeing to deal points that are drastically different than what the buyer and the seller require in order to transact. These communication issues will delay, if not kill, a transaction.

It has been our experience that PPE transactions are much more likely to close if the parties sign an irrevocable master fee agreement and a non-circumvention, non-disclosure, non-solicitation agreement; get the brokers out of the way; and let the buyer and the seller negotiate directly. Unfortunately,

many brokers are hesitant to do this, and like to keep an active role in the transaction, often to the detriment of all parties, including the broker.

In the current PPE market, the transactions start in a traditional sense. Buyers submit purchase orders or letters of intent, and the parties begin negotiating transactional terms (albeit there might be many brokers in between the end-user and the seller). From that point, these transactions very often run into a stalemate regarding whether the buyer will provide proof of funds (POF) prior to the seller providing proof of life (POL) of the product. This is driven largely because of the number of transaction brokers or flippers that are trying to use someone else's money or to sell someone else's goods. The authors are of the opinion that for an overwhelming number of PPE transactions being negotiated in 2020, neither party to the negotiation has the cash or the goods in its possession, and so, neither is able to promptly provide the POL or POF.

Proof of Life

No, we are not talking about a hostage situation, but in the shady, seedy world of PPE transactions in 2020, the existence of the goods is always at issue. In fact, it is the authors' sincere advice that anyone entering the PPE market in 2020 should presume that goods being offered for sale do not exist until sufficient, verifiable POL is provided with respect to the goods.

POL comes in a variety of forms, some of which are more reliable than others. The following is a non-exclusive list of the types of POL provided by sellers to get prospective buyers comfortable that the goods exist, so that the buyers will pay the bounty necessary for the seller to release the hostage.

(a) It is common for a video of the goods to be offered as POL. In such a video, the seller shows a warehouse full of product, opens a box and shows the contents, and provides a paper or recites some code or name to verify the video was prepared contemporaneously for the particular buyer. These videos are highly unreliable, easily editable, and are subject to a great deal of fraud. Even when genuine, there is no reasonable way to authenticate millions of units of a particular item of PPE by way of a five-to-ten-minute video. While receiving a POL video can be helpful, it is not advisable to rely on such videos as the sole or principal source for verifying existence of PPE offered for sale.

(b) Letters of attestation are commonly offered by legal counsel to a seller. In such a letter, the attorney will attest to his or her knowledge regarding the existence of PPE and its availability for sale by the attorney's client. For a transaction in a normal market, a letter of attestation is reliable, because if the representations in the letter are untrue or deceptive, the attorney could be subject to civil action from the misled party and to professional discipline from its state bar. As discussed above, the PPE market in 2020 is not normal, and frankly we have been disturbed, disheartened, and ashamed at what attorneys will attest to in writing on their firm's letterhead. While receiving a letter of attestation from the seller's attorney regarding the existence and availability of the goods is helpful (especially when such letters are from established, reputable firms), based on our experience we regrettably must advise clients not to rely on such letters as their sole or principal source for verifying existence of PPE offered for sale. It is prudent to request the documentation upon which the attorney was able to make such an attestation.

(c) SGS inspection reports are a good source for validating the existence of goods. The Société Générale de Surveillance (SGS) is a Swiss company that provides inspection services in a variety of industries including PPE. It is the gold standard with respect to inspections of PPE and is widely used to determine if the goods conform to the standard, quality, manufacturer's specification, and quantity advertised. SGS inspection reports are generally performed in the country of origin prior to the goods leaving the factory, and sometimes when the goods arrive in the country of destination. An SGS

quality and quantity inspection report (not to be confused with other SGS reports, such as an SGS test report) provides reliable information regarding the existence, quantity, and quality of goods; however, buyers should still vet the legitimacy of the SGS inspection report and the prospective seller's title or access to such goods before moving forward with a transaction.

(d) Logistical documents, such as bills of lading, air waybills, certificates of origin, and packing slips, are also a good source for validating the existence and location of goods. A bill of lading is a document provided as a form of receipt by a carrier to the person consigning the goods for transit. An air waybill is similar to a bill of lading but is provided by an air carrier as a form of receipt of goods to the person consigning the goods for transit. Most PPE is sourced from Asia, in particular China, Malaysia, Vietnam, and Thailand, so the logistical documents provide verifiable and reliable information regarding the existence and location of goods; however, buyers should still vet the legitimacy of the logistical documents and the prospective seller's title or access to such goods before moving forward with a transaction.

Keep in mind that an SGS inspection report or logistical documents are not feasible for goods that are not yet produced, and other means of certifying the supplier's access to the goods must be explored for a PPE transaction involving production. Documents confirming an association with a manufacturer or an authorized distributor are helpful. In addition, the authors have found a useful tactic is to request SGS inspection reports and logistical documents from prior deals to confirm that the supplier has transacted successfully on prior transactions with the manufacturer or other third-party supplier.

If the supplier raises privacy concerns, allow the supplier to redact the parties' names from the SGS inspection report, and remind the supplier that bills of lading and air waybills are publically available documents for which a party has no legitimate privacy expectation. Indeed, there are several companies, e.g., www.importgenius.com, that obtain all bills of lading from every port of the country and aggregate the data for commercial use by the public.

Proof of Funds

The seller wants to know that the prospective buyer is bona fide and capable of performing financially on the transaction. Due to the number of scammers, fraudsters, and con artists in the current PPE market, buyers are understandably concerned and apprehensive about sharing financial data and bank documents with prospective sellers.

POF comes in a variety of forms, some of which are more reliable than others. The following is a non-exclusive list of the various types of POF provided by buyers to get prospective sellers comfortable that the buyers are ready and able to perform financially on a given transaction:

(a) Letters of attestation are commonly offered by the counsel of a buyer. In such a letter, the attorney will attest to his or her knowledge regarding the client's access to funds necessary to perform on the subject transaction. As discussed above, letters of attestation from an attorney are generally reliable documents; however, in the current PPE market it is the unfortunate reality that placing much trust in letters of attestation is not prudent and could result

in losing thy treasure. All of the concerns regarding letters of attestation in the POL context are restated here with equal emphasis with respect to attestation letters regarding POF.

It is important to read the letter of attestation and see what exactly the attorney is representing with respect to his or her client's ability to perform financially on the subject agreement. Common representations made in such attestation letters include that: (i) the attorney has personal knowledge that his or her client has possession of liquid funds necessary to perform under the transaction; (ii) the attorney has the necessary funds on deposit in its escrow or IOLTA account; (iii) the client has "access" to such funds; and (iv) the attorney received an attestation letter from another attorney wherein the other attorney attested to the availability of the funds.

(b) Bank comfort letters are documents issued by a bank or other financial institution on behalf of its client to assure a supplier of goods of the financial ability of the client. Bank comfort letters are reliable documents, but, as discussed below, sellers should still vet the legitimacy of these bank documents and the prospective buyer's access to the funds described in the letter. In the current PPE market, many brokers are using "someone else's money," so assuring that the prospective buyer or broker has ownership or authorization to use the funds described in the bank comfort letter is very important.

Some banks have grown wary of issuing bank comfort letters in the current PPE market as they get widely circulated and misused. These more cautious banks have been issuing specific, one-time-use transaction codes so that a prospective seller can call the bank, provide the transaction code, and confirm the availability of the funds. This is generally reliable, so long as you confirm that the person you are talking to is actually affiliated with the bank, *see infra* section of Trust No One and Independently Verify Everything.

(c) Bank-to-bank confirmation, in the form of an MT199 or MT799, is a useful tool to verify funds while mitigating a buyer's concerns that its financial documents will be shopped or misused. The MT799 is a free format SWIFT message in which a banking institution confirms that funds are in place to cover a potential trade. The function of the MT799 is simply to assure the seller that the buyer does have the necessary funds to complete the trade.

(d) Escrow deposits, if the buyer is willing to fund an

escrow account with a reputable law firm, bank, or financial institution, are generally considered strong POF; however, manufacturers and distributors in China, Vietnam, Malaysia, and Thailand are typically not comfortable with escrow deposits as POF. For transactions occurring in the United States, escrow deposits should be reliable. Be sure to read your escrow agreement carefully to understand the distribution and other terms and request an escrow attestation letter from the escrow agent swearing and affirming under penalties of perjury to possession of the escrowed funds.

(e) Letters of credit are strong POF, so long as the issuer is a credit-worthy bank or financial institution. For buyers with the capability of posting a letter of credit, this is a preferred method of these authors, as it is more readily acceptable abroad. The recipient is generally able to monetize the letter of credit to fund the order. Letters of credit come in a variety of forms, but MT700s (and corresponding MT720s) and MT760s appear to be the most commonly used instruments.

For buyers without existing credit facilities or strong banking relationships, it will be tough to get a letter of credit issued from a top-tier bank in a reasonable amount of time. The banks are understandably cautious because of the amount of fraud and the number of new, amateur operators in the PPE market, so even with substantial funds on deposit with the bank, it has been these authors' experience that top-tier banks want three-to-six weeks of due diligence time to issue a letter of credit. If the buyer and the seller are new operators and have not done business together in the past, this timeframe can increase. For most of the brokered transactions being negotiated in the current PPE market, three-to-six weeks to provide POF is way too slow and simply will not work.

Trust No One and Independently Verify Everything

The number of scammers, fraudsters, and con artists that are in the current PPE space looking to defraud and scam unwary parties is unsettling. Considering that many of those unwary parties are chasing get-rich-quick transactions promising usurious rates of return with little to no capital risk on the part of the broker, it is somewhat predictable. Indeed, the unwary parties are often intoxicated by an expectation of significant (if not unreasonable) profits and are therefore more easily susceptible to untoward persuasion. The expectation of such profits often blinds parties from realizing that "it's too good to be true." Operators in the current PPE market need to be extremely cautious to not be too eager and to approach transactions with a healthy dose of skepticism. With all due respect to "The Gipper" (or President Ronald Reagan), in the current PPE market, the guiding principle should be "trust no one and independently verify everything."

Some of the fraud is very obvious, such as "wire me 10% as a deposit and I will send you an address to a warehouse with 1 billion N95 respirators"; however, there are more discreet con artists that can produce rather inspired fraudulent documents and schemes. As it often goes, the truly talented con artists are incredibly bright and talented individuals who would be wildly successful if they used their talents for legitimate means, e.g., Frank Abagnale, a security consultant known for his earlier career as a con man, check forger, and imposter when he was between the ages of fifteen and twenty-one. If something does not seem right or is too good to be true, listen to your intuition. Do not let your eagerness for profit allow you to be coaxed onto the rocks of despair and lost treasure.

It is difficult to overstate how important independent verification is with respect to any POL or POF materials you may receive. If you can verify the document in multiple ways, do so. Redundancies are useful and protect your treasure.

In the authors' experience only about one in ten bank documents being circulated are bona fide. In many instances the document is a complete forgery that the bank did not issue, and even when the document is actually from the bank, the party providing the bank document often is not the account holder and has

dubious access to such funds. In order to vet bank documents, the authors take the following approach (which has been known to irk some brokers and bankers):

(a) Do a visual inspection of the document and look for obvious signs of alteration or doctoring. Pay particular attention to different font styles and font sizes throughout a document.

(b) Confirm that the bank signatory is associated with the bank. Check the bank's website, other internet sources, and finally call the bank and ask to be connected to the purported signatory or for other confirmation that the signatory is associated with the bank. If the banker is able to sign an official bank document confirming that there are millions or billions of dollars in a given account, then someone at the bank's headquarters should be able to confirm the banker's association with the bank.

(c) Confirm that the phone numbers provided on the bank letter are associated with the banking institution. This can be done on the bank's website, general internet searches, and with a call to the bank's headquarters.

(d) Once the number is confirmed, call the banker and confirm the validity of the letter and the availability of the funds. Request that the banker send you an email from its official bank email address confirming that the person you spoke with is who he or she purports to be.

(e) Once received, confirm that the email address is affiliated with the bank. This can usually be found under the "contact us" tab on a bank's website, with many displaying their "info@" email address thereon. A call to the bank's headquarters is also useful in confirming that a given email address is associated with a banking institution.

There is also significant forgery and deception in the provision of POL documents. In the authors' experience, only approximately one in twenty SGS inspection reports is authentic and associated with the lot of goods to be sold. Due diligence on SGS inspection reports is pretty straightforward. Start with a physical inspection of the SGS inspection report to look for obvious signs of alteration or doctoring, but all you really need to do is email the document to the SGS headquarters in Geneva for verification, *certificates@sgs.com*. Bills of lading and air waybills can be similarly confirmed with the carrier and sometimes online.

In response to all of this fraud, it is important to practice good internet security and hygiene. To mitigate the ability for unauthorized use and doctoring of documents, use specific watermarks, password protection, secure file transfer, and encryption when preparing and transmitting purchase orders, bank information, letters of attestation, etc. Even with those prophylactic safety measures, it should be expected that your documents will be reused and misused.

Get Educated on the PPE Market

As discussed above, the size of the transactions being purportedly negotiated in the current PPE market is staggering and at times runs into the absurd and unfeasible. It is common for the quantities being discussed to be in the hundreds of millions, if not billions, of units. Every so often some broker will purport to have access to a trillion masks or boxes of gloves.

The casual nature in which brokers will refer to these lots, generally as a "10B lot" or a "3T lot," is alarming and speaks to the naivety of many operators in this space. Those numbers are difficult, if not impossible, to justify from a price, supply, or logistical standpoint. Understanding the supply in the market and the logistical undertaking necessary to move such supply is important to not falling down the rabbit hole into a fraudulent transaction.

While it is unclear how much, there is no doubt that the COVID-19 pandemic has led to increased production of PPE, with existing manufacturers ramping up production and many new manufacturing operations popping up in China, Southeast Asia, and even the United States. The increased production is a commonly used justification in response to questions about the validity of an incredible

quantity of a given lot of goods. This justification is a logical fallacy. Production is up because demand is insatiable. The demand significantly outpaces the supply, which seriously undermines brokers' claims to large inventories of ready stock being available for immediate sale. In the authors' discussions and representation of manufacturers of PPE, they indicate that post-COVID-19 supply is significantly less than pre-COVID-19 supply.

Study up on the logistics because the devil is always in the details. A useful heuristic the authors have used to ferret out bad actors purporting to be able to supply large quantities of PPE is to pepper them with logistical questions. If someone tells you they are going to load 5 million boxes of nitrile gloves on a single air cargo flight, you will know they are, at best, a novice because only about 150,000 to 300,000 boxes of nitrile gloves can fit on a cargo plane, and at worst, a fraudster out to steal your treasure. It is the authors' observation that parties with experience sourcing goods have a basic understanding of what is feasible from a logistical standpoint.

It is also important to have perspective on the logistical undertaking necessary to move millions or billions of units of anything (even something small like an N95 respirator or a box of gloves). The following link provides a visual depiction of what millions and billions of 3M 1860 N95 respirators amount to from a size standpoint: *https://globalresourcebroker.com/visualization-of-3m-1860-otg/*[3]. Similarly, a box of 100-count nitrile gloves is approximately 0.5 cubic feet, so if a broker is offering 1 billion boxes of medical grade nitrile gloves in stock in the United States and ready for sale, consider that this quantity amounts to 500 million cubic feet, which amounts to dozens of skyscrapers of pallets. For perspective, the empire state building is approximately 37 million cubic feet.[4]

Market data is also important to ferreting out the feasibility of an advertised lot of goods. Keeping with

the example of 1 billion boxes of nitrile gloves, which (unfortunately) is not an uncommonly marketed supply, consider the following: the top producer of gloves in the world is appropriately named Top Glove, which produced approximately 738 million boxes of gloves (or 73.8 billion gloves) in calendar year 2019.[5] When brokers offer for sale 1 billion boxes of gloves, they are saying they can procure for you at one time in one transaction more boxes of gloves than you would receive in a year if you instead purchased Top Glove. This is, of course, fantasy.

The PPE product that is most commonly marketed in a fraudulent manner is without question 3M Model 1860 N95 respirators. The quantities being offered for sale far exceed the number of 3M Model 1860 N95 respirators manufactured in the past couple of decades. The CEO of 3M is all over the news indicating that 3M produced approximately 550 million 3M Model 1860 N95 respirators worldwide in calendar year 2019, and it hopes to ramp up production to be on pace to produce 2 billion in 2021 (approximately 180 million per month), and that for calendar year 2020 production should comfortably exceed 1 billion worldwide.[6]

If someone has offered you 1 billion 3M Model 1860 N95 respirators for sale, it is almost certainly a fraudulent offer. It strains all credulity that someone could sell you nearly all of 3M's global production in one transaction. Tales of private lots and strategic stockpiles are also fantasy, as 3M Model 1860 N95 respirators only last for five years. If it seems too good to be true, it likely is. 3M has a fraud prevention department that was spun up in response to the widespread fraud being perpetrated with respect to 3M products during the COVID-19 pandemic. Here is a link to an informational flyer produced by 3M to help inform the public of certain signs of fraud: *https://multimedia.3m.com/mws/media/1860221O/covid-n95-selling-facts.pdf*.

As an aside, you should be careful when attempting to transact with respect to 3M products as the company restricts resale and markup of its products and has been aggressively pursuing price gouging, trademark infringement, and other causes of action against bad, and at times just unsuspecting, actors.[7]

As a final cautionary note on the importance of understanding the current PPE market, if you are going to try to get closer to the source of the product and engage directly with manufacturers and distributors in China, Vietnam, Thailand, and/or Malaysia, it is imperative that you have someone on your team with experience doing business in these countries, and it is strongly advised that you have boots on the ground in these countries to help facilitate the process and to protect against bad actors. Many unwary purchasers have received empty cartons or old, nonconforming, or damaged inventory only to be left holding the tainted goods and evaluating the prospects of collecting from an unfamiliar counterparty abroad.

Where is the scam?

The obvious scams such as the one discussed above regarding the need for a 10% deposit to get access to a warehouse with a billion 3M Model 1860 N95 respirators or requests for sensitive personal information, such as passport, SSN, personal bank account details, personal address, etc., are easy to identify and avoid, although it is likely that some all-too-trusting parties have been duped and lost their treasure to such schemes.

For the con artist marketing fraudulent goods, the motivation is obvious—to steal an unwary individual's money. Unfortunately, it is not always so obvious what the fraud is or what the motivation is for the person perpetrating such fraud. Consider the con artist forging bank comfort letters to be used in PPE transactions: Even if the unsuspecting seller does not ferret out the fraud, what does the con artist stand to gain? What is their end game? There are not clear answers, but the authors have some ideas of possible motivations:

(a) identify theft;

(b) to procure legitimate SGS inspection reports and logistical documents from a seller so that the con artist can perpetrate fraud by producing the legitimate POL documents received from you to another prospective buyer in hopes that the prospective buyer might send a deposit or the entire purchase price to the con artist;

(c) to determine the location of the goods to commit

some brazen, movie-like heist of the goods. Given the logistical undertaking, this is the least realistic purpose; and

(d) delusions of grandeur wherein certain brokers making up a seedy underbelly of the internet like to "negotiate" million- or billion-dollar transactions because it makes them feel important even though such individuals do not appear to have any business experience and have no reasonable chance of closing one of these transactions.

The most unnerving part for the authors is knowing that some fraud or tomfoolery is afoot but not being able to pinpoint the motivations or purposes furnishing the bad acts. A known issue can be frightening but is easily dealt with because you can identify the problem and face it head on. An unknown issue is not frightening because we are comfortable in our own blissful ignorance of the potential calamity. You cannot be scared by something you do not even realize exists. But a known unknown issue is by far the most frightening of all and is the type of thing that will wake you up in the middle of the night. To know an issue is present but not be able to fully identify or understand the issue is terrifying.

While the authors cannot pinpoint the motivations of con artists using fake bank documents, we believe there is truth in a quote made by the late NBC executive Don Ohlmeyer when pondering an unexplainable situation: "the answer to all your questions is money."

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Endnotes

1 While a healthy profit margin is generally considered a positive, it should be noted that sales of PPE are highly regulated by state and federal agencies and price gouging carries civil and criminal penalties. Indeed, about two-thirds of states have some restriction on price gouging applicable to PPE transactions: https://www.fmi.org/docs/default-source/gr-state/price-gouging-state-law-chart.pdf?sfvrsn=9058b75c_2; and states are currently pursuing new and stricter price-gouging laws and regulations in response to the rampant price gouging currently ongoing in the PPE market: https://www.nbcnews.com/politics/politics-news/states-push-price-gouging-measures-coronavirus-fuels-consumer-fears-n1163846

2 In the authors' experience and in discussions with other practitioners in this space, it appears that only approximately 5% to 10% of PPE transactions will close.

3 The authors have not independently verified this visual depiction.

4 https://www.esbnyc.com/sites/default/files/esb_fact_sheet_4_9_14_4.pdf#:~:text=%E2%80%A2%20The%20building%20weighs%20365%2C000%20tons%20and%20its,and%20730%20tons%20of%20aluminum%20and%20stainless%20steel

5 https://www.fm-magazine.com/news/2020/mar/top-glove-malaysia-coronavirus-demand-23152.html; https://www.thomasnet.com/articles/top-suppliers/nitrile-gloves-manufacturers-and-suppliers/#:~:text=Hartalega%20Holdings%20is%20the%20world's,for%20a%20variety%20of%20applications

6 https://www.bloomberg.com/news/features/2020-03-25/3m-doubled-production-of-n95-face-masks-to-fight-coronavirus; https://www.startribune.com/3m-says-it-s-on-track-with-n95-production-goals/571710872/?refresh=true; https://www.adweek.com/retail/3m-has-doubled-global-production-of-its-n95-respirators/

7 https://www.massdevice.com/3m-files-5-more-price-gouging-lawsuits/?utm_source=TrendMD&utm_medium=cpc&utm_campaign=Mass_Device_TrendMD_0; https://www.massdevice.com/3m-sues-nj-company-claims-it-tried-to-sell-n95-masks-at-six-times-usual-price/?utm_source=TrendMD&utm_medium=cpc&utm_campaign=Mass_Device_TrendMD_0; https://www.startribune.com/with-two-new-lawsuits-3m-has-filed-14-claiming-n95-fraud/571108192/?refresh=true; https://www.drugwatch.com/news/2020/05/12/crack-down-on-covid-19-price-gouging/; https://www.knobbe.com/blog/mask-and-gloves-supplier-accused-price-gouging-while-masquerading-authorized-distributor-3m

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countries during the last calendar year, U.S. Department of Homeland Security bills of lading and/or invoices, and U.S. tax returns for the business for the past two years.[18] Thus, international practitioners need to be aware of the differing documentary requirements among the consular posts, which are posted and constantly updated on each embassy's website.

In the E-2 visa context, international practitioners should similarly be aware of the differing policy requirements among consular posts. The Foreign Affairs Manual (FAM), the comprehensive and authoritative source for the U.S. Department of State's policies and procedures, states that with regard to E-2 investor visas, in order for the foreign national to be "in the process of investing," the foreign national must be close to the start of actual business operations before applying for the visa.[19] Immigration law practitioners have previously relied on this language in the FAM to prepare their E-2 visa cases by having their clients lease commercial space, remodel, obtain commercial licenses, etc., to establish that the business is close to commencing business operations. In practice, however, applicants seeking E-2 visas at consular posts in Bogota, Colombia, and Buenos Aires, Argentina, for example, have been denied E-2 visas and instructed to reapply after sixty days with sales reports, invoices, and other evidence of existing commercial activity before the investor visa will be approved. These consular practices, clearly in contradiction of the plain language in the FAM, are issues that international practitioners need to be aware of in order to properly counsel their clients.

H-1B Visas

The H-1B visa is a temporary (nonimmigrant) visa category that allows employers to petition for highly educated foreign professionals to work in specialty occupations that require at least a bachelor's degree or foreign equivalent. The INA defines a specialty occupation as an occupation that requires the "theoretical and practical application of a body of highly specialized knowledge and attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States."[20] Before the foreign national may apply for a visa or seek admission to the United States, the U.S. employer must file a petition with U.S. Citizenship and Immigration Services (USCIS) for determination of the foreign national's eligibility for H-1B classification.[21] There is currently an annual statutory cap of 65,000 H-1B visas, with an additional 20,000 for foreign professionals who possess a master's or doctoral degree from a U.S. institution of higher learning.[22] The H-1B registration period in the United States is open from March 1 to March 20. This past March, USCIS received 275,000 registrations, of which they chose the eligible registrations through a random selection process.[23] An approved H-1B petition for an alien in a

specialty occupation shall be valid for a period of up to three years.[24] The principal applicant's total period of stay may not exceed six years, with limited exceptions.[25] The spouse and children of an H-1B nonimmigrant are admitted as H-4 nonimmigrants for the same period of admission or extension as the principal spouse or parent.[26]

A common red flag issue to be aware of in the H-1B context is the narrow interpretation that USCIS officers are adopting, especially under the Trump administration, when adjudicating whether the proposed job listed on the H-1B petition qualifies as a specialty occupation. The rate of denials and requests for evidence for H-1B applications have drastically increased under President Trump's administration.[27] USCIS adjudicators are now increasingly stating in their requests for evidence that the proposed job offered does not require a bachelor's degree in a *specific* field, but rather that multiple disciplines can qualify for the position. It is now USCIS's position that if multiple disciplines can qualify for an H-1B occupation, then the occupation does not qualify as a specialty occupation. For example, in 2018, USCIS denied the H-1B petition for an applicant with a degree in mechanical engineering, holding that the job offered was not a specialty occupation because a person with a bachelor's degree or higher in mechanical engineering, computer science, or a related technical or engineering field could qualify.[28] Since multiple disciplines could qualify for the position, it was not deemed to be a specialty occupation.[29] The employer eventually sought relief in federal district court, and in 2020, the U.S. District Court for the Middle District of North Carolina held that USCIS cannot require a degree in a singular subspecialty in order for a position to qualify as an H-1B specialty occupation, finding that USCIS's current interpretation of the H-1B regulation was unreasonable and not entitled to deference.[30]

L-1A Visas

The L-1A visa is a nonimmigrant visa issued by the USCIS for foreign executives or managers being transferred to their company's offices in the United States.[31] This visa classification also enables a foreign company that does not yet have a U.S. office to transfer an executive or manager to the United States with the purpose of establishing an office.[32] The L-1A petition must be filed with USCIS by either the U.S. or foreign employer and approved before the foreign national living abroad can seek issuance of the visa at a consular post.[33] The spouse and unmarried minor children of the beneficiary are also entitled to L nonimmigrant classification.[34] L-1A beneficiaries are entitled to an initial period of admission for three years if the U.S. entity has been conducting business for more than one year, or for one year if the beneficiary is coming to open a new office that has been operating for less than one year.[35]

To qualify for L-1A visa classification, the U.S. entity must be the branch office, subsidiary, parent, or affiliate of the foreign company;[36] the beneficiary must have at least one continuous year of full-time employment at the foreign company as a manager or executive within the three years preceding the filing of the petition;[37] and the beneficiary will be employed in an executive or managerial capacity in the United States.[38] If the beneficiary is coming to open a new office, he or she must also establish that sufficient physical premises have been secured to house the new office and that the new office will, within one year of operation, support an executive or managerial position.[39]

Common issues in the adjudication of L-1A petitions relate to USCIS's interpretation of the terms *executive capacity* and *managerial capacity*, especially in the context of opening a new office. Often, USCIS adjudicators will request additional information from the petitioning company to explain the manner in which the beneficiary will be exercising executive or managerial responsibilities with the personnel proposed in the new office's business plan. For example, if a U.S. entity projects only four or five employees at the end of the first year of business operations, it is USCIS's position that the insufficient staffing of the new office will force the beneficiary to perform non-qualifying managerial or executive tasks involved in the day-to-day operations of the company. In such cases, USCIS may deny the L-1A

petition on these grounds. Proper preparation of the paperwork and review of the business plan and the five-year financial and personnel projections are paramount for a successful L-1A adjudication.

O-1 Visas

Under the O-1 nonimmigrant category, a foreign national may be "classified under section 101(a)(15)(O)(i) of the Act as an alien who has extraordinary ability in the sciences, arts, education, business, or athletics, or who has a demonstrated record of extraordinary achievement in the motion picture or television industry."[40] The employer petitioner must file a petition with USCIS for a determination of the alien's eligibility for O-1 or O-2 classification before the alien may apply for a visa or seek admission to the United States.[41] The petition may not be filed more than one year before the actual need for the alien's services.[42] USCIS requires a written contract between the employer/sponsor and the foreign national beneficiary, or if there is no written contract, a summary of the oral agreement under which the alien will be employed.[43] O-1 petitions are valid for a period determined by the director to be necessary to accomplish the event or activity and not to exceed three years.[44] The spouse and unmarried minor children of the O-1 alien beneficiary are entitled to O-3 nonimmigrant classification, subject to the same period of admission and limitations as the alien beneficiary.[45] Similar to the EB-1 immigrant visa, which will be discussed later in this article, the O-1 is for individuals of extraordinary ability in the fields of science, education, business, or athletics, and requires a level of expertise indicating that the person is one of a small percentage who has risen to the very top of the field of endeavor.[46] Beneficiaries must meet three of eight established criteria or submit evidence of a one-time extraordinary achievement (Pulitzer, Oscar, Olympic gold medal, etc.).[47]

The key differences between the O-1 and EB-1 visas, other than the former is for a nonimmigrant visa and the latter is for an immigrant visa, are that the O-1 petition requires an offer of employment; in contrast, the EB-1 petition does not. The O-1 applicant has to meet three of eight categories of acceptable evidence to establish extraordinary ability, while the EB-1 applicant has to meet three of ten categories. In addition, the amount of scrutiny and discretion involved in both cases is different. O-1 petitions are not subject to the two-part *Kazarian* test, which will be discussed later in the article. Therefore, evidence submitted in support of an O-1 is more liberally considered; however, a red flag in this area is that USCIS's discretion in approving O-1 applications is much narrower under the Trump administration. For example, high salary, one of the eight criteria for establishing extraordinary ability, is a relative metric that USCIS previously allowed to be proved by comparing the applicant's salary to data for salary averages in a given occupation from the Bureau of Labor Statistics (BLS).[48] Employers could make a statement regarding the applicant's compensation, and the stated compensation would be compared against BLS data. USCIS adjudicators now view this comparison as too simplistic. They now require specific corroborating evidence of the applicant's salary in his or her particular field beyond statements from the employer. BLS data is also no longer sufficient.

IMMIGRANT VISAS

Family Immigration

For foreign nationals seeking to reside in the United States permanently, a number of family-based petitions are available if they have relatives in the United States who are U.S. citizens or lawful permanent residents. To be eligible to apply for an immigrant visa, a foreign national must be sponsored by an immediate relative who is at least twenty-one years of age and is either a U.S. citizen or U.S. lawful permanent resident (green card holder). The immediate relatives of U.S. citizens include spouses, parents, and unmarried minor children (under twenty-one years old).[49] If the foreign national immediate relative is abroad, the U.S. citizen relative can immediately file an immigrant visa petition with USCIS on the foreign national's behalf.[50] Once the petition is approved, USCIS will forward the file to the National Visa Center for immigrant visa processing, which will then communicate with the appropriate consular post

to schedule an interview for the beneficiary once the immigrant visa file is complete. If the foreign national immediate relative is in the United States pursuant to a lawful admission, the U.S. citizen relative can file an alien relative petition and the beneficiary can submit an application for adjustment of status to permanent residence concurrently with USCIS.

Petitions for non-immediate relatives are subject to quotas, with the number of immigrants in these categories limited each fiscal year. Pursuant to the INA, U.S. citizens may file for their unmarried and married sons and daughters over twenty-one years of age, as well as their siblings. Lawful permanent residents can only apply for their spouses, unmarried children under twenty-one years of age, and unmarried sons and daughters over twenty-one years of age. As of July 2020, the approximate waiting period for unmarried sons and daughters of U.S. citizens to be eligible to process their immigrant visa abroad is six years; for spouses and minor children of lawful permanent residents, there is currently no waiting period, and an immigrant visa processing can commence as soon as the relative petition is approved; for unmarried sons and daughters of lawful permanent residents, the waiting period is five years; for married sons and daughters of U.S. citizens, the waiting period is twelve years; and for siblings of U.S. citizens, the waiting period is fourteen years.[51] The approximate waiting periods may fluctuate each month.

One red flag issue in the context of family-based immigration regards nonimmigrant intent. Pursuant to the Foreign Affairs Manual, the intent of a foreign national, who is also the immediate relative of a U.S. citizen, who enters the United States on a visitor or student visa is subject to scrutiny for a possible material misrepresentation.[52] As of June 2018, a foreign national who enters the United States on a nonimmigrant visa and within ninety days engages in conduct inconsistent with his or her nonimmigrant status will face a presumption of having made a willful material misrepresentation at the time of admission or application for the nonimmigrant visa.[53] Examples of inconsistent conduct within the ninety-day period of entry include: working without authorization, unauthorized enrollment in school, marrying a U.S. citizen or lawful permanent resident and taking up residence in the United States, and submitting applications for change or adjustment of status.[54] Though the presumption of willful material misrepresentation can be rebutted, it is easier to properly counsel clients to avoid the inconsistent conduct and the allegation of fraud.

Another red flag issue is present in family-based petitions filed by U.S. citizens for their siblings. As stated above, the current waiting period to obtain an immigrant visa in this preference category is fourteen years. Furthermore, the simple filing of an alien relative petition by the U.S. citizen sibling evidences immigrant intent on the part of the foreign national to reside permanently in the United States. This immigrant intent has been used by consular posts in the past to deny visitor visas, student visas, and other nonimmigrant visas. The government has also attempted to pass legislation with provisions to eliminate the sibling of a U.S. citizen family preference category.[55] Filing immigrant visa petitions in this category is risky, as it takes an inordinate amount of time to receive the benefit; it may bar the issuance of other nonimmigrant visas to your foreign national client, and the category may be eliminated.

Employment-Based Immigrant Visas

There are a number of alternatives for foreign nationals seeking permanent residence through employment-based petitions in the United States, including:

(1) Alien of Extraordinary Ability (EB-1). This is reserved for a small percentage of individuals at the very top of their fields of endeavor (sciences, arts, education, business, or athletics) who must meet three of ten established criteria or submit evidence of a one-time extraordinary achievement (Pulitzer, Oscar, Olympic gold medal, etc.).[56] No offer of employment is required.[57]

(2) Outstanding Professors and Researchers (EB-1). The beneficiary must establish international recognition for outstanding achievements in a particular academic field.[58] This category requires an offer of

employment from a university, institution of higher learning, or department of a private employer.[59]

(3) Multinational Manager or Executive (EB-1). Similar to the L-1A visa, this category requires the beneficiary to have worked in a managerial or executive capacity abroad for at least one year in the last three years and to come to the United States to work in a similar capacity for a U.S. employer that has been doing business for at least one year as a subsidiary or affiliate of the foreign company.[60] This category requires an offer of employment from the U.S. entity.[61]

(4) Alien With an Advanced Degree/Exceptional Ability (EB-2). This category first requires a labor certification from the Department of Labor (DOL) before the filing of an immigrant petition.[62] The labor certification process is to ensure that there are no qualified workers available in the United States in the regional jurisdiction where the job offer is located. This category includes beneficiaries with advanced degrees (bachelor's degree plus five years of progressive work experience in the field)[63] or exceptional ability (a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business).[64] The beneficiary may request that USCIS waive the labor certificate via a national interest waiver (NIW), wherein the beneficiary argues that it is in the best interests of the United States to do so.[65]

(5) Skilled Worker/Professional/Unskilled Worker (EB-3). This category requires a labor certification from the Department of Labor as well. Skilled workers have to be able to demonstrate two years of work experience; professionals have to demonstrate they have earned a U.S. bachelor's degree (or foreign equivalent) related to the occupation; and unskilled workers perform labor that requires less than two years of training or experience.[66]

One of the red flag issues to be aware of with EB-1 cases is that these cases are document-intensive. USCIS utilizes a two-part approach to the discretionary analysis of extraordinary ability: (1) determine whether the petitioner or self-petitioner has submitted the required evidence that meets the parameters for each type of evidence listed at 8 CFR 204.5(h)(3); and (2) determine whether the evidence submitted is sufficient to demonstrate the beneficiary or self-petitioner meets the required high level of expertise for the extraordinary ability immigrant classification during a final merits determination.[67] Thus, even after meeting the first part of the test, the foreign national still has to establish through a vague and undefined "final merits determination" that he or she is extraordinary.[68] Given the wide discretion afforded to USCIS adjudicators in EB-1 matters by memoranda, the success of these cases lies equally in the preparation of the case, including supporting documents, as well as the legal argument in support of the beneficiary's qualifications.

In EB-2 and EB-3 cases, one of the main issues with the adjudication of an immigrant petition for alien worker is to ensure that clients prepare accurate and truthful resumes with the necessary supporting documentation regarding their educational credentials and professional work experience. Practitioners have experienced countless instances where a resume states that a client earned a certain degree or worked with a particular employer for a certain number of years only later to find out the information was inaccurate or false when it was time to submit the educational credentials, evaluations, or letters of prior experience to USCIS. Practitioners need to verify, prior to commencing case preparation, the client's claimed education and employment experience and not simply trust in their client's representations.

CONCLUSION

This guide has presented a basic overview for international practitioners of some of the most common nonimmigrant and immigrant visas available to foreign nationals living abroad as well as in the United States. It is important to note that the regulations cited to in this article regarding nonimmigrant and immigrant visas have not changed substantially over the years; it is USCIS and the Department of State's policies and interpretations of the statute and the regulations that have changed, depending on the current administration in power at the time. The

field of immigration law is largely administrative in nature, governed by regulations, memoranda, executive orders, etc. In today's global society, it is imperative that we, as attorneys, have a basic understanding of various fields of law, including immigration, taxation, etc., in order to competently represent our clients. A consultation with an experienced immigration attorney, however, is always recommended, as a potential or current client may also qualify for other types of visas, and knowledge of the most current government policies is essential for the effective representation of our clients.

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Endnotes

1 8 U. S. C. § 1101 *et seq.*

2 8 C.F.R. § 214.2(e)(6).

3 https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/fees/treaty.html

4 9 FAM 402.9-11(A).

5 8 C.F.R. § 214.2(e)(19)(i).

6 https://www.uscis.gov/working-in-the-united-states/temporary-workers/e-1-treaty-traders and https://www.uscis.gov/working-in-the-united-states/temporary-workers/e-2-treaty-investors

7 *Id.* at (e)(8)(i).

8 *Id.* at (e)(19)(ii).

9 *Id.* at (e)(1)(i).

10 *Id.* at (e)(9).

11 *Id.* at (e)(10).

12 *Id.* at (e)(11).

13 *Id.* at (e)(2).

14 *Id.* at (e)(12).

15 *Id.* at (e)(14)(ii).

16 *Id.* at (e)(15).

17 https://ar.usembassy.gov/wp-content/uploads/sites/26/Ewebsite.pdf

18 https://it.usembassy.gov/visas/niv/e/e1/

19 9 FAM 402.9-6(B)(e).

20 INA § 214(i)(1).

21 8 C.F.R. 214.2(h)(1)(i).

22 https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-1b-specialty-occupations-dod-cooperative-research-and-development-project-workers-and-fashion

23 https://www.uscis.gov/news/news-releases/fy-2021-h-1b-cap-petitions-may-be-filed-as-of-april-1

24 8 C.F.R. 214.2(h)(9)(iii)(A)(1).

25 *Id.* at (h)(15)(ii)(B)(1).

26 *Id.* at (h)(9)(iv).

27 "H-1B Denials and Requests for Evidence increase under the Trump Administration," NFAP Policy Brief, July 2018 at 4.

28 *InspectionXpert v. Cuccinelli*, No.1:19cv65 (5 Mar. 2020).

29 *Id.*

30 *Id.*

31 8 C.F.R. 214.2(l)(1)(i).

32 *Id.* at (l)(3)(v).

33 *Id.* at (l)(2)(i).

34 *Id.* at (l)(7)(ii).

35 *Id.* at (l)(7)(i)(A)(2) and (A)(3).

36 *Id.* at (l)(1)(ii)(G)(1).

37 *Id.* at (l)(3)(iii).

38 *Id.* at (l)(3)(ii).

39 *Id.* at (l)(3)(v)(A)-(C).

40 *Id.* at (o)(1)(i).

41 *Id.* at (o)(2)(i).

42 *Id.*

43 *Id.* at (o)(2)(ii).

44 *Id.* at (o)(6)(iii)(A).

45 *Id.* at (o)(6)(iv).

46 *Id.* at (o)(3)(ii).

47 *Id.* at (o)(3)(iii).

48 *Id.* at (o)(3)(iii)(B)(8).

49 INA § 201(b)(2)(A)(i).

50 8 C.F.R. § 204.1(a).

51 July 2020 Visa Bulletin: https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2020/visa-bulletin-for-july-2020.html

52 9 FAM 302.9-4(B)(3).

53 *Id.*

54 *Id.*

55 S.744 - Border Security, Economic Opportunity, and Immigration Modernization Act113th Congress (2013-2014).

56 8 C.F.R. § 204.5(h)(2).

57 *Id.* at § 204.5(h)(5).

58 INA § 203(b)(1)(B).

59 8 C.F.R. § 204.5(i)(3)(iv).

60 8 C.F.R. § 204.5(j).

61 *Id.* at (j)(5).

62 *Id.* at (k)(4)(i).

63 *Id.* at (k)(1).

64 *Id.* at (k)(2).

65 *Id.* at (k)(4)(ii).

66 *Id*. at (l)(2).

67 *Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010).

68 Policy Memorandum: *Evaluation of Evidence Submitted with Certain Form I-140 Petitions; Revisions to the Adjudicator's Field Manual (AFM) Chapter 22.2, AFM Update AD11-14* (22 Dec. 2010).

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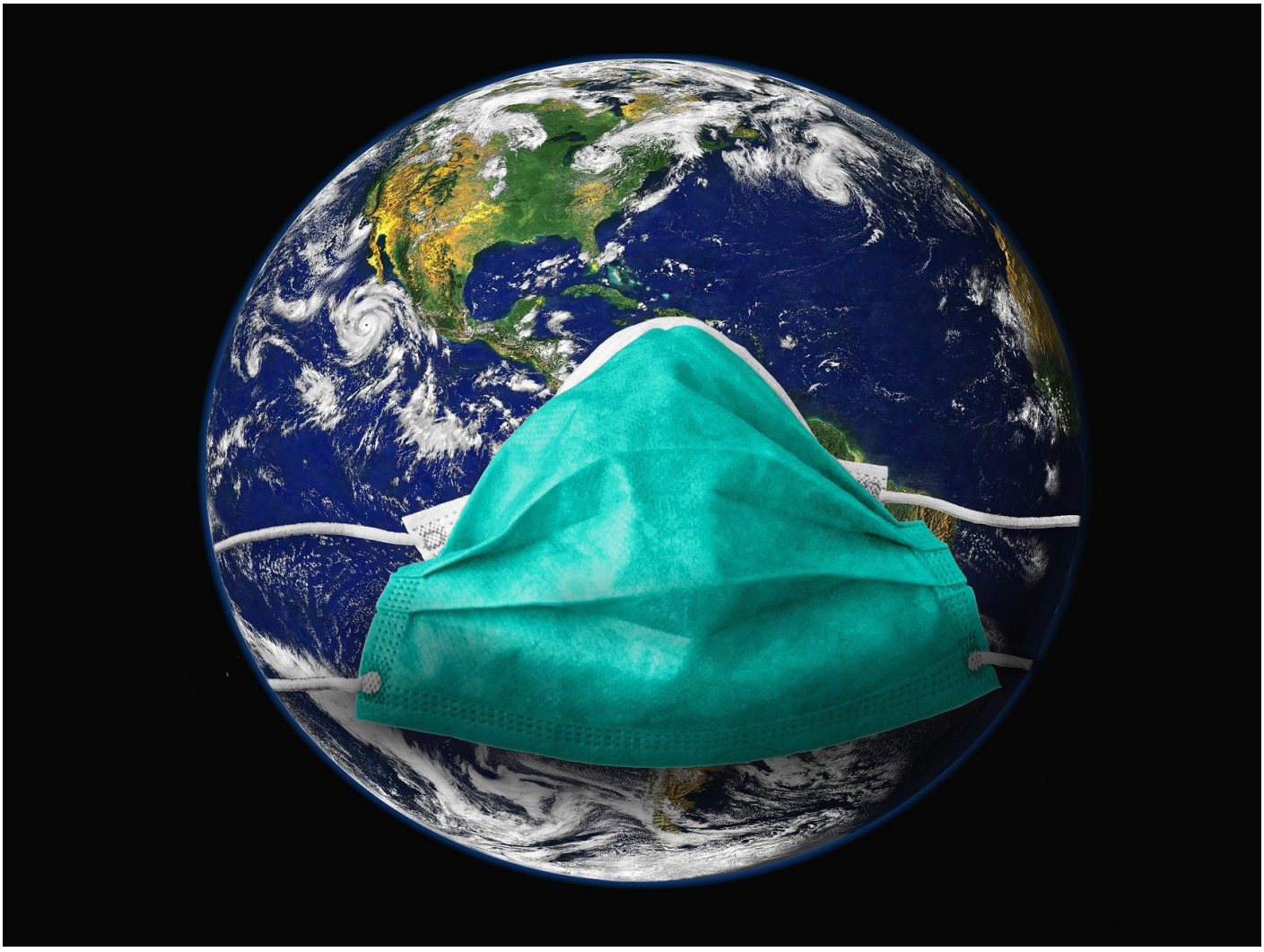
employee must be authorized to work in the United States after losing his or her job and at the time of filing for unemployment benefits. Foreign employees on work visas do not meet this requirement because they are authorized to work only for one company in the United States and not for other employers. As a result, if the company terminates such an employee, then he or she is not immediately able and available to work for another company because a work visa allows the foreign worker to work only for a specific company. In these cases, assuming the worker is not a legal permanent resident (green card holder) or has other unrestricted work authorization independent of any one employer, then this person is not generally eligible for unemployment benefits. Thus, if an employee is on a work visa and becomes unemployed, this person does not qualify for unemployment benefits because he or she cannot prove ability and availability to work for a U.S. company.

In some cases, certain visas (H-1B, L-1, E-1, E-2, E-3) allow the spouse of the principal applicant to obtain a separate visa, such as an H-4, L-2, E-3, E-1, or E-2 visa, and apply for work authorization that, if approved, allows the spouse to work in the United States for any company, including self-employment. Consequently, spouses with unrestricted work authorization may be able to apply for unemployment benefits if they lose their jobs because they can prove at the time of filing for unemployment benefits that they are able and available to work for any company in the United States. Please



keep in mind that every state has its own requirements for unemployment eligibility, and the spouse of a principal applicant should inquire with the state to check if he or she meets all the criteria for unemployment benefits, aside from the "able and available to work" requirement and the requirement to have an unexpired work authorization card (EAD).

Regarding the public charge rule, which went into effect on 24 February 2020, unemployment benefits were excluded from the rule. In practice this means that receiving unemployment benefits is not considered a public charge and should not affect a foreign worker's immigration record. It is possible, however, that when a foreign national applies for a visa, the immigration officers will ask and take into consideration that the applicant received unemployment benefits when assessing the case and circumstances.

Impact of Furloughs

Furloughs affect foreign employees differently based on the visa type, with H-1B and E-3 visa holder employees suffering the hardest impact.

Unlike layoffs, furloughs are temporary measures to remove financial pressure on a company by reducing payroll for a period of time. Furloughs differ from layoffs, where employment is permanently terminated, along with the salaries and benefits paid to employees. With furloughs, the employing company can bring the employees back, maintaining the employees' salary level and benefits. Furloughed employees are not paid their salaries during the furlough, though, which can be a major issue for foreign employees with H-1B or E-3 visa status.

In fact, for H-1B and E-3 visas, employers must pay a certain wage rate for their foreign employees as specified in the LCA, and as a result cannot easily furlough such employees. Furlough for employees on H1-B or E-3 visas is not possible because such employees must be paid the prevailing wage specified in the LCA to remain compliant with U.S. immigration laws; otherwise, they lose their legal status. In addition, an employer that furloughs H-1B or E-3 visa holders can also be liable for back wages. If an E-3 or H-1B visa employee has been furloughed, he or she has a sixty-day grace period to find other employment, extend or change status, or leave the United States.

Regarding furloughs of employees on a TN visa who are citizens of Canada and Mexico, the foreign employee may remain in legal status if there is a reasonable expectation that the employee will return to the same employer. If an employee is on a TN visa and has been furloughed due to the Coronavirus, the employee may be able to stay in status if there is an expectation that he or she will return to work for the same employer in the near future. This is possible for TN visa holders because this visa type does not require an approved LCA and the employer does not have to pay the foreign employee a prevailing wage, as is the case with H-1B and E-3 visas. Furthermore, if foreign workers want to renew their TN status while in the United States, they can file a petition to extend TN status by 3 years before the expiration of the current status and continue to work for the same employer while the petition is pending approval, for a maximum of 240 days.

For other visas types, such as E-1, E-2, L-1, and O-1, which do not require an LCA and prevailing wage, furloughs can be problematic because the foreign employees are not performing any work for the employing company and arguably are not maintaining the requirements for E, L, or O status. The employees must maintain the requirements of the E, L, or O visa status and continue to work in the area of expertise, in the same position, and for the same employer to maintain the status. If the L, E, or O employees are hired back in the sixty-day grace period under the same terms and conditions, then an argument can be made that their petition is still valid. In situations where there are substantive changes to employment conditions, it is important to notify USCIS of the change, seek further guidance from USCIS, or file for an amendment or a new petition.

Impact of Hour and Salary Reduction

Generally, the impact of hour and salary reduction on

foreign employees depends on the visa they hold—for E-1, E-2, L-1, O-1, and TN visa holders, salary and hour reduction is permitted as long as it is not a material change, while salary reduction is not permitted for H-1B and E-3 employees.

As discussed above, foreign employees who hold a visa that requires an LCA, such as H-1B or E-3 visas, are subject to stringent employment requirements. Changes in their salary or work hours can impact them greatly. For employees in the visa categories H-1B and E-3, the U.S. employer must pay the worker the wage specified in the LCA and visa petition. Employers cannot pay them a reduced salary that is below the prevailing wage specified in the LCA. If the employer cannot pay and has to reduce the salary below the prevailing wage, then the company may need to amend the petition with USCIS and obtain a new LCA. The same applies when the company wants to reduce working hours for an employee—a foreign employee cannot suddenly become a part-time employee. If the company wants its foreign employees on H-1B and E-3 visas to start working part-time, it must file a new LCA and amend the petition with USCIS. Note that the LCA regulations also forbid offering less favorable wages or benefits to H-1B workers than to U.S. workers in comparable positions if this will hurt their working conditions.

In general, salary reduction of employees on a TN visa has no impact on visa status. If an employee is on a TN visa, this means the employer can reduce the worker's salary without impacting his or her legal status in the United States; however, if there are significant changes in the employment terms and conditions, including salary, then filing an amended petition may be warranted under the circumstances. The impact of hour reduction for TN employees depends on the circumstances of each employee, but for the most part, a TN NAFTA professional transitioning from a full-time to a part-time employee would be considered a substantive change in the employment, requiring an amended petition to be filed.

Similar to employees on TN visas, employees on E-1 and E-2 visas are not required to work full-time for a U.S. company; however, USCIS provides that if there is a substantive change in the employment terms and conditions, then the E-1 or E-2 employees must obtain prior approval from USCIS. Generally, if there is a reduction in the hours worked by an E-1 or E-2 employee but the employee continues to perform the job functions described in the application and works in the same position as a manager, executive, or specialized knowledge employee, then the reduction in hours does not impact the legal status of the E-1 or E-2 employee as long as it is not material and the employee does not become a part-time employee permanently. The same applies for the salary reduction. Such reductions are permitted as long as they are temporary. If such changes in salary and work hours become permanent or are material, it is then necessary to file an amended petition with USCIS and to obtain a new E visa. The same applies to employees with L-1 and O-1 visas.

Impact of Working From Home (Temporary Remote Work)

For foreign employees on E-1, E-2, L-1, O-1, and TN visas who are asked by their employers to work remotely from home during the COVID-19 pandemic, temporary remote work does not impact their immigration status. These types of visas do not require an employee to work at the physical location of the employer, and as a result are more flexible with regard to the physical location of the employee while performing his or her duties. If an employee continues working in the same position and performing the same job functions for the same employer, even if working remotely, then there is likely no material change and there is no need to file an amended petition. For employees in L-1 visa status, USCIS will likely be forgiving of any remote work arrangements based on the number of policies the agency has relaxed in an effort to minimize the impact of COVID-19.

Employees in H1-B and E-3 visa status are subject to site visits by USCIS to ensure compliance with the petition and prevailing wage requirements. The visas that involve an LCA, such as H1-B and E-3 visas, are subject to minimum wage and working conditions, and the employer must continue to comply with the LCA wage

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and notice requirements for the working location. Due to the COVID-19 pandemic, if an H1-B or E-3 employee works from home or another new unintended location that is in the same metropolitan area as the usual work location, then the employer does not need to file a new LCA to list the new location. Instead of filing a new LCA, the employer must provide an electronic or hard copy, posting notice at the new location, including the home location, for ten calendar days.

If the new work location is not in the same metropolitan area as the usual work site, meaning that the H-1B or E-3 employees are now working in another county, then the employer can use the short-term placement rule for a maximum of thirty days (or sixty days if certain conditions are met). In other words, if the foreign employee works at the new location for thirty (or sixty) days only, then the employer does not need to file a new LCA. If, however, the employee will work at the new location for more than thirty (or sixty) days, then the employer must file a new LCA and an amended petition with USCIS before the thirty- or sixty-day period has lapsed.

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