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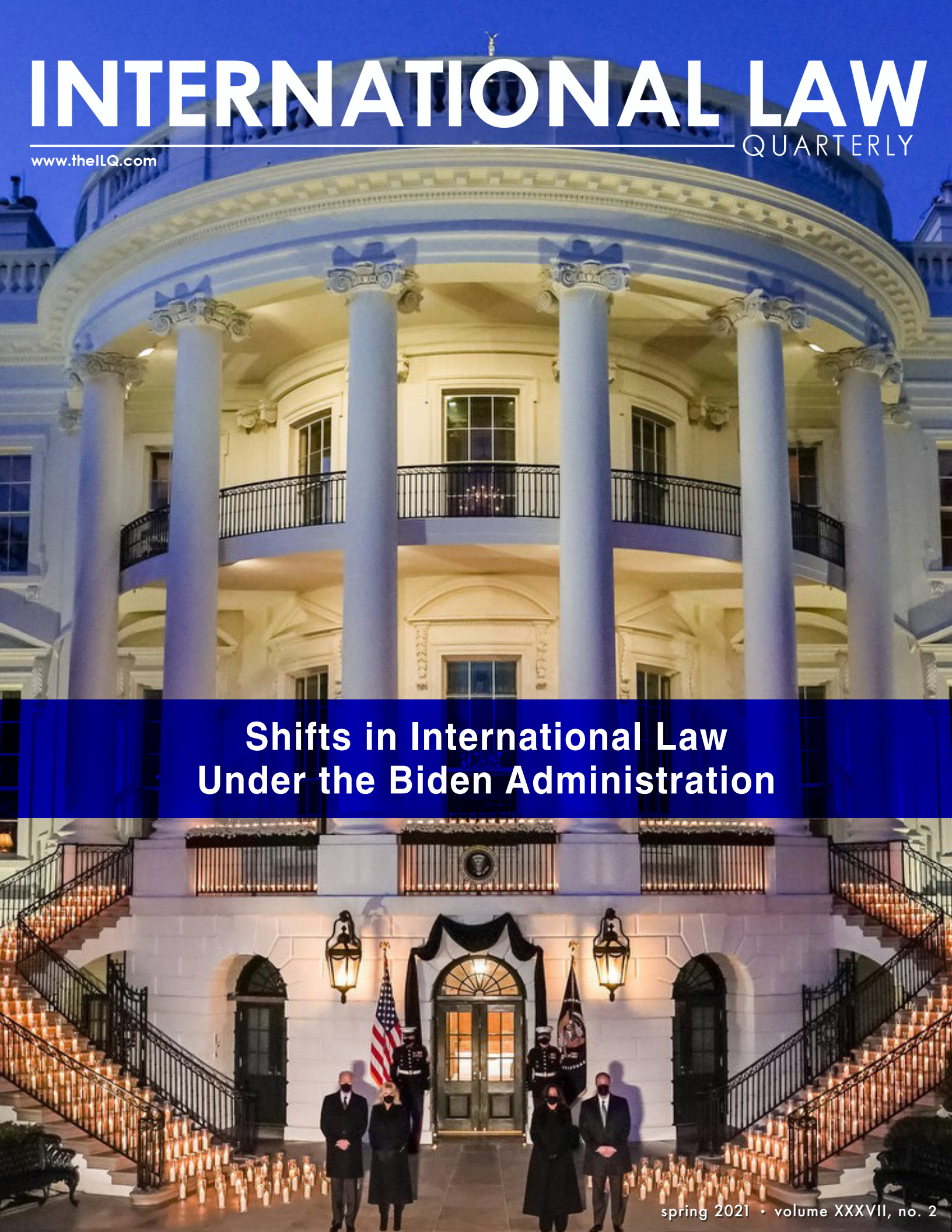

Shifts in International Law Under the Biden Administration

spring 2021 • volume XXXVII, no. 2

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This publication is prepared and published by The Florida Bar.

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Message From the Chair

Brave New World


ROBERT J. BECERRA

In the early 1930's, Aldous Huxley wrote the science fiction novel *Brave New World* set in a futuristic "World State" whose citizens are environmentally engineered into an intelligence-based social hierarchy—a society where huge scientific advancements in a variety of areas have created a dystopian society, which is then challenged by a single individual. In 2021, the coronavirus pandemic can be seen as environmentally engineering our society into a hierarchy where some engage in mask wearing and social distancing; some are able to easily obtain vaccines while many are not; and live interactions in organizations are frowned upon in favor of virtual, remote platforms, sometimes resulting in isolation, with its concomitant results.

As we transition into summer of our year, the sun really is coming out. As of this writing, approximately 60% of the U.S. adult population is fully vaccinated against COVID-19; the Centers for Disease Control has issued guidance recommending maskless interactions for those vaccinated; and with these developments, live events, with the therapeutic social interactions that come with it, are blooming around the country. Now, as in Huxley's novel, a single individual—your ILS chair—challenged the dystopian COVID-19 status quo by cheerfully holding the section's annual meeting and elections the weekend of June 25-27 at the Biltmore Hotel in Coral Gables. Over that weekend, the ILS got together to do the good work for which the ILS is known. It was great to see so many of you there.

But enough of all that fun. Despite the pandemic, your section has been hard at work. In February, we held, along with our ILS Hemispheric sponsor JAMS, the annual Richard DeWitt Memorial Vis Pre-Moot. For the first time, the Pre-Moot was held completely virtual, allowing the most participation by foreign law schools in the event's history. Law schools from Russia, China, Africa, Europe, the Middle East, and Latin America all participated, and the Pre-Moot was a smashing success, with thanks to the Pre-Moot committee led by Adrian Nuñez. Stetson University College of Law was our winner. At the end of March, we held a joint webinar program with the Rome Bar Association, with whom we have a collaborative agreement, with attendees from both sides of the Atlantic. In April, the section held a webinar with an all-star cast presenting on fraud and compliance in personal protective equipment transactions. Your section and its members were featured in a gender diversity panel at the ABA International Law Section's annual virtual meeting, moderated by ILS Past Chair Clarissa Rodriguez. We have continued our entertaining Lunch and Learn Series, sponsored by Fiduciary Trust International on their virtual platform, where we have transitioned hosting duties from yours truly to Clarissa Rodriguez. Each Gazette day, our ILS Gazette arrives in your inbox for some good weekly Gazetting. Kudos to Davide Macelloni for the good work he does there.

Enjoy this *ILQ* issue. Laura Reich and Ana Barton, our co-editors-in-chief, have managed it brilliantly as usual. This issue focuses on Shifts in International Law Under the Biden Administration and contains great articles from authors who have the foresight to predict such shifts in policy and the law. For me, I will leave predictions of the future to the powers of the late great Walter Mercado. The *ILQ* does our section proud, and I believe it is the finest publication put out by any Bar section. By the way, advertising in the *ILQ* is one of the perks of being an ILS sponsor this year. If your firm is not an ILS sponsor, you are missing out.

Message From the Chair, continued

This will be my last chair's message in the *ILQ*. Being chair this past year has been a rocket sled ride with all of its changes, challenges, and adaptations. I thank everyone for their involvement and help in making a challenging year for the ILS a pleasurable time to serve as chair. The ILS is only as good as those who volunteer and step up to do what must be done to keep the ILS thriving. For those volunteers, I can only say that I have been in the company of heroes.

With warmest regards,

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

From the Editors . . .

ANA M. BARTON

LAURA M. REICH

Dear ILS members and friends,

It is hard to believe that over 15 months have passed since the world entered the COVID-19 reality. We are all still talking about the effects of the pandemic and exploring our comfort levels as we return to "normalcy," whatever that may be! We also find ourselves in another period of adjustment, albeit a more positive one, as we explore returning to the office, making travel plans, and attending in-person events. Thankfully, vaccination rates in the United States continue to climb while daily new infection rates fall.

Adding to this ever-evolving situation are the new and changing policies ushered in by President Biden and his administration. In this edition of the *ILQ*, our authors focus on changes and expected changes in international law under the new administration. They offer predictions on how these changes will affect international legal practitioners and advisors. And while our crystal ball for predicting the future is a bit cloudy, we hope these articles will provide you with helpful guidance to navigate some of the expected legal changes.

First, in "The Biden Approach to Investor-State Arbitration and the Average U.S. Citizen," Monifa Hall discusses anticipated impacts on the future of the United States' participation in investor-state treaties. From there, Peter Quinter offers his view on "International Trade Under the Biden Administration," highlighting both consistencies with the prior administration as well as significant changes under the current administration. Next, a group of authors from the international firm of Reed Smith LLP cover an array of issues for consideration from a regulatory point of view in "What to Expect From a Biden Administration: Key Regulatory Takeaways and Tips." These issues include antitrust enforcement; white collar criminal enforcement; export controls and sanctions; national security and foreign investment; customs, tariffs, and trade policy; and SEC and CFTC enforcement.

Of course, immigration continues to be a hot topic under the Biden administration. Larry Rifkin walks us through key considerations regarding the COVID-19 travel ban, its history and exceptions, as well as recent guidance and changes in his article "Immigration Strategies for Investors, Entrepreneurs, and Corporations in the Post-COVID World." Next, Tereza Horáková brings us information on "The Pitfalls of Domesticating a Foreign Subpoena in New York Under the UIDDA." Horáková offers tips to Florida practitioners navigating the domestication process under New York's current law.

As always, we are pleased to bring you our recurring columns: Best Practices, Quick Take, World Roundups, and Section Scene. In Best Practices, Clarissa Rodriguez invites all qualified attorneys to explore board certification. In our Quick Take column, Yuriy Moshes offers tips for drafting investment agreements. Take a moment to update yourself on changes in the law around the globe in the World Roundups, written by our dedicated team of volunteers. Finally, we hope you will take a few minutes to enjoy the pictures in the Section Scene, showing ongoing activities and events in the International Law Section, which continues to thrive despite the challenges of the pandemic.

The editors of the *ILQ* wish you all a wonderful summer—we hope it is one that makes up for 2020's cancelled trips and plans!

Best regards,

Ana M. Barton
Laura M. Reich
co-Editors-in-Chief

QUICK TAKE

Five Tips for Drafting Investment Agreements

By Yuriy Moshes, Brooklyn

Investment agreements typically require well-drafted contractual language between two parties: (1) a company or a business and (2) a current shareholder or a new outside investor. These agreements can prove to be extremely complex. The terms of an investment agreement are crucial. Typically a business is dependent upon such an agreement for needed funds, particularly during the initial stages of a business, such as a startup, and investment in such a business can come with risks to the investor. Ensuring the terms of the agreement are agreed upon and legally binding and that they clearly state the risks involved will protect both the business and the investor.

Below are five tips for attorneys to consider while drafting an investment agreement to ensure a successful outcome:

1. Include All Main Provisions

When it comes to drafting a legal contract between a company and its investors, it is important to ensure all parties' rights are protected within the contract. Otherwise, the company risks falling into the 13% of startups[1] that fail due to disharmony between a business team and its investors.

Creating an outline of the contract in a way that is straightforward and comprehensible for all those involved will decrease misunderstandings and will result in a logical structure of the document.

An outline also aids in ensuring that nothing is overlooked and that everything agreed to during negotiations is specified in writing.

Contracts usually follow a common outline wherein definitions are listed and the responsibilities of the parties to fulfill the terms of the contract are delineated. The latter includes matters related to warranties, acquiring permits, and perhaps even the requirements of a specific jurisdiction, especially if the contract pertains to an international investment agreement.

2. Keep Everything Simple

Ambiguous language should be avoided at all costs in contract drafting. It can lead to a misconstrued understanding of the contract and can complicate the relationship between the parties. A misplaced comma can alter the meaning of what was originally intended, and consequently can lead to unintended results and legal risks.

Technical jargon and lengthy contracts are ripe for mistakes such as these. An attorney should look over the final draft of an investment agreement, or even better, write the agreement, so that it is clear and complete for all parties.

It is commonplace for English to be the *lingua franca* of an international investment agreement, even if neither of the parties is from a native English-speaking country. With this being said, using plain English in the contract is preferred over using flowery words, unnecessarily long phrases, or unneeded adjectives or adverbs, which usually only serve to complicate a contract.

Quick Take, continued

3. Cover the Management Issues

An investor often has a large impact on how a company's management operates and makes decisions, in part due to the investor's influence in drafting the investment agreement. For example:

- Investors are entitled to their interests being represented in management, such as having the power to appoint one or more individuals to the board of directors or possibly even maintaining the power to veto decisions on particular matters.
- Investors may simply be observers in the company's board meetings.
- Investors may demand that, while they may not have much say in what happens, all board meetings must include an investor director.

It is important for an investor to know his or her role and to be clear from the start what authority the investor has. For the company, it is important for the management to state who can serve on the board of directors and what actions will be permitted. An investor who is given a considerable amount of control could cause the company to abandon strategies or goals that the company's management may want to pursue.

Clearly defining and agreeing upon the roles of investors and the company's management team will enable everyone to work toward the best interests of the company. This includes having a plan for dealing with conflicts when they arise so that all parties are protected and remain motivated to work together to ensure the success of the business.

Operational details of an investment agreement are best kept private. While much of the content may be in the public domain, certain information does not need to be made publicly available.

4. Pay Attention to Minor Details

In any business investment agreement, important terms must be properly defined. Contracts usually start with the definitions of all the essential entities and people.

The relationship between the shareholders and the company dictates how the business is going to move forward. All possible scenarios and questions, such as payment schedules, confidentiality, etc., should be posed before moving forward and should be addressed in the legally binding investment agreement. This ensures everyone is provided with excellent and equal opportunity.

5. Don't Forget to Cover the Reasons for Termination

While it might be considered odd to think about how a company will be dissolved before it is even launched, it is best to consider exit strategies. Anything can happen at any point in time, and deals can go sour. Therefore, termination clauses should be included that address questions such as what will happen to shares, what will be done if an investor would like to transfer shares or chooses to stop investing, etc. Consequences for violating the rules in these provisions should also be stipulated.

Conclusion

Drafting an investment agreement can be complicated. While an effective agreement will include many details and must cover as many scenarios as possible, it should also be simple enough for a third party to understand. Therefore, when in doubt, it is always best to seek legal advice before an investment agreement is finalized.

Yuriy Moshes *of Moshes Law PC concentrates his practice in litigation and real estate transactions. He has successfully helped hundreds of homeowners in New York and New Jersey remain in their homes or, in the alternative, pursue liquidation options. He has also assisted clients with all forms of commercial and residential transactional work, including preparation of various types of contracts, as well as analysis of various issues that arise during the course of representation.*

Endnote

1 https://www.cbinsights.com/research/startup-failure-reasons-top/

The Biden Approach to Investor-State Arbitration and the Average U.S. Citizen

By Monifa Hall, Miami

President Biden's multilateral approach to international trade and investment may invite a new wave of investor-state dispute settlement arbitrations, but not necessarily the negotiation or ratification of new multilateral treaties. During his 2020 campaign, then-candidate Joe Biden promised to leave the Trump-era unilateral "America First" approach in the past, and instead shift to a more multilateral approach that involves rallying behind the United States' allies in Asia and Europe.[1] For investor-state arbitration, this likely will result in treaties and deals that prioritize U.S. citizens. President Biden previously pledged that he would not sign any new trade deals until major investments have been made that benefit the U.S. middle class.[2] With a more generous approach to international trade and investment than his predecessor, however, the Biden administration will likely see an influx of investor-state disputes, which have already seen an uptick since 2020.[3]

The investment arbitration system stands on a strong multilateral foundation. Protection of foreign direct investment is necessary, and the Biden administration has acknowledged its importance. President Biden has been critical of the dispute resolution system central to transnational investments, the investor-state dispute settlement system—more commonly known by its acronym, ISDS.[4] ISDS critics have long believed that corporations should not have access to special closed-door arbitration tribunals to make demands against host countries that are, in many cases, far less powerful than the corporations themselves.[5]

There is no question that investment arbitration fits into a multilateral framework approach to international trade and relations. By design, the protection of international investment reinforces adjacent multilateral principles. History has shown that states that trade with one another and share in investment opportunity are less likely to engage in armed conflict and are more likely to protect one another's interests. Peace and security,

The Biden Approach, continued

therefore, still depend in large part on trade and investment flows. The Trump presidency reversed dozens of Obama-era advancements in international trade and investment, resulting in an isolated United States, as evidenced by slogans like "America First" and the reemergence of nationalist values. This bilateral agenda did not create space for multilateral investment treaties and peaceful investor-state arbitration. Similarly, the Trump administration withdrew the United States from multilateral institutions—favoring hard U.S. power to the exclusion of traditional alliances.[6]

With the change in administration, and the new Democratic control of Congress, we are likely to witness a major shift toward multilateral reengagement. President Biden has promised to increase U.S. involvement with multilateral institutions including the United Nations, the World Health Organization, the Paris Agreement, and perhaps even the World Trade Organization.[7] How Biden directs his administration to respond to critics of ISDS, especially in the aftermath of the COVID-19 pandemic, will be a key indicator of U.S. intentions. While he has expressed interest in building on multilateral investments that benefit U.S. workers and infrastructure, he has made it clear that he has concerns about how some of these deals lack strong protections for individuals through provisions on labor and the environment.[8] He is likely to approach the major trade and investment arbitration questions of the coming years through the same lens, by considering first how participation will impact middle class U.S. citizens on an individual level.

The first quarter of 2021 is over, but it is not yet clear what we should expect from the new administration regarding investment arbitration. On one hand, we can expect the Biden administration to have a genuine desire to be part of multilateral frameworks and the investment protection system itself, as well large regional trade agreements. On the other hand, President Biden has made it clear that he is not in favor of the law-based dispute resolution system, ISDS, at the heart of multilateral investment treaties.[9] Moving forward, the question that will need to be answered is this: "How does ISDS benefit the average U.S. citizen?"

Monifa Hall *is an associate in the Litigation practice group at Greenspoon Marder LLP. She focuses on high-stakes, cross-border disputes. Representing companies and individuals, she has specific experience in intellectual property matters. While attending American University Washington College of Law she was a research assistant at the Center on International Commercial Arbitration, was a staff writer for the International Law Review, and competed in the Frankfurt Investment Arbitration Moot Court Competition in 2018. She was also president of the International Trade and Investment Law Society and an active pro-bono legal volunteer for the Mid-Atlantic Innocence Project. Before law school, Monifa interned for the U.S. Department of Homeland Security Federal Emergency Management Agency's Office of Equal Rights. She was born and raised in Miami and grew up in a Jamaican-American home.*

Endnotes

1 *See, e.g.*, Council on Foreign Relations, President-Elect Biden on Foreign Policy (7 Nov. 2020).

2 Joe Biden, Responses to Council on Foreign Relations Candidate Questionnaire (1 Aug. 2019).

3 *See generally* Recent Cases, *Cases*, ICSID World Bank Group, https://icsid.worldbank.org/cases/recent.

4 *See* Caroline Simson, *Biden Comes Out Against 'Special Tribunals' For Corporations*, Law360 (28 July 2020, 6:35 PM EDT), https://www.law360.com/articles/1295978/biden-comes-out-against-special-tribunals-for-corporations.

5 *See* Manuel Pérez-Rocha, *Biden's Top Trade Official Should Work to Protect Governments From the Rising Number of Corporate Lawsuits*, Inequality.org (14 Dec. 2020), https://inequality.org/research/biden-ustr-investor-state-dispute-settlement/.

6 *See* Patrick Pearsall, *The Biden Administration Approach to Investment Arbitration? Retail Multilateralism*, Kluwer Arbitration Blog (9 Nov. 2020), http://arbitrationblog.kluwerarbitration.com/2020/11/09/the-biden-administration-approach-to-investment-arbitration-retail-multilateralism/.

7 Sebastian Shehadi, How will the Biden presidency impact foreign investment?, Investment Monitor (30 Oct. 2020), https://investmentmonitor.ai/us/how-would-a-biden-presidency-impact-foreign-investment.

8 Joe Biden, Responses to Council on Foreign Relations Candidate Questionnaire (1 Aug. 2019).

9 *See* Simson, *supra* note 3.

What to Expect From a Biden Administration:
Key Regulatory Takeaways and Tips

Introduction

In the months since President Biden's inauguration in January 2021, his administration has demonstrated a desire to chart an aggressive course of industry regulation and enforcement, suggesting a potentially dramatic shift from the prior administration in how the federal government enforces our nation's business laws and regulations. As the new administration continues to fill the many open political positions across government agencies, and as those agencies begin to put the administration's imprint on regulation and enforcement policies and priorities, many industries and companies may find themselves facing new, and in some cases, unexpected, challenges in navigating their legal compliance. This article from Reed Smith LLP summarizes some of the most significant changes the authors expect to see over the next several years in the areas of antitrust enforcement; white collar criminal enforcement; export controls and sanctions; national security and foreign investment; customs, tariffs, and trade policy; and SEC and CFTC enforcement.

Antitrust

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SCHWARTZ

Several factors are likely to fuel a significant increase in antitrust enforcement under the Biden administration, including: (1) a desire to reverse the decline in enforcement under the Trump administration, particularly by the Department of Justice; (2) growing concern by Congress, policymakers, and the public about increased concentration and what is perceived as market power in a number of industries, particularly digital markets; and (3) a growing belief by antitrust enforcers and policy makers that the historic antitrust doctrines are insufficient to protect competition in today's economy and markets.

Takeaways

- Biden's nomination of Lina Khan to fill one of the two empty seats at the Federal Trade Commission (FTC) confirms that, as expected, the administration will be putting in place new leadership at the FTC and Department of Justice (DOJ) Antitrust Division who subscribe to the views of former antitrust enforcers. As another example, Tim Wu, a known critic of "big tech," is himself at work in the White House as a special assistant to President Biden for technology and competition matters. Expect them to substantially boost antitrust enforcement, and to shift antitrust law and enforcement policies toward promoting new theories of harm to competition (for example, "hipster antitrust") and lowering the bar for successful enforcement actions.
- Both the FTC and the DOJ Antitrust Division are very likely to increase enforcement efforts in merger, civil non-merger, and criminal enforcement. We also expect them to attempt to push the current boundaries of antitrust law while they pursue emerging and largely dormant theories of antitrust law.
- Efforts to amend antitrust laws to strengthen enforcement could gain traction. Senate Antitrust Subcommittee Chair Amy Klobuchar already has introduced legislation that would lower the standard of proof in merger cases (to "an appreciable risk of materially lessening competition"), lower the standard of proof of exclusionary conduct in Section 2 cases, and implement other reforms.
- Regardless of the fate of efforts to legislate substantive changes to antitrust laws, Congress is expected to significantly increase funding for antitrust agencies, enabling them to increase staffing to support their enhanced enforcement efforts.
- Expect both the FTC and the DOJ Antitrust Division to make great efforts to boost merger enforcement, including by investigating more transactions through Second Requests, and suing more often to stop deals including with respect to:
  - Mergers of firms in the health care, digital platform, and agriculture industries;
  - Mergers involving close competitors;
  - Mergers of firms in highly concentrated industries;
  - Acquisitions of "nascent" competitors thought to potentially reduce innovation (e.g., the FTC's and state AG's complaints against Facebook); and
  - The acquisition of "maverick" firms (firms that disrupt markets and larger, entrenched firms through low pricing and other competition).
- The agencies will likely aggressively pursue vertical theories of potential harm (foreclosing competition/refusals to deal and raising rivals' costs), and look for opportunities to challenge vertical mergers such as a merger of a supplier and its customer or distributor (as took place in the 2010 merger of concert promoter LiveNation and Ticketmaster).
- The agencies also are likely to insist on stronger remedies as a condition of approving mergers.
- We expect antitrust enforcers to significantly increase enforcement of antitrust laws against companies they believe are using their market or monopoly power to harm competition, and against parties to anticompetitive agreements. Expect them to:
  - Aggressively investigate and challenge no-poach agreements (including criminally) and other agreements affecting labor markets;
  - Aggressively investigate both potentially anticompetitive agreements and unilateral conduct in health care, digital platforms, and agriculture industries, as well as in other industries perceived to be heavily concentrated;

What to Expect From a Biden Administration, continued

  - Seek out potential Section 2 (monopolization) cases, and look for opportunities to shift the case law in its favor;
  - Attempt to reinvigorate largely dormant doctrines such as predatory pricing and refusals to deal; and
  - Closely scrutinize standard-setting and agreements involving SEPs (reversing current DOJ policy).
- The DOJ will do what it can to boost lagging criminal antitrust enforcement trends. Expect the DOJ Antitrust Division to aggressively investigate potential cartel activity, potentially in coordination with non-U.S. enforcement agencies. The division may also work with Congress to strengthen the antitrust leniency program under the Antitrust Criminal Penalty Enhancement and Reform Act.

Tips

- Stay informed. Changes are coming that could affect businesses. Stay on top of those changes so businesses can adapt if needed.
- Risk assessment. Assess company risks in light of the expected changes. Consider an antitrust audit.
- Compliance. Review and, if needed, enhance company antitrust compliance programs, and ensure they are effective and conform to the agencies' latest guidance.
- Mergers & Acquisitions. If a company is planning significant acquisitions this year, make sure the company realistically assesses antitrust risk and develops an effective merger clearance strategy early in the process.

DOJ Priorities – FCPA and Fraud

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After record-low levels of white collar investigations and prosecutions by the Trump DOJ, the Biden administration early on signaled its intent to take a more aggressive role in fraud and corruption prosecutions. The Biden administration has made a sharp break from the prior administration by emphasizing: (1) its intent to focus on foreign corruption; (2) prosecutions related to the misuse of COVID-19-related assistance programs—totaling US$5.3 trillion; and (3) collaboration with the Special Inspector General for Pandemic Recovery, which has opened up whistleblower programs and has received and vetted new matters to refer to law enforcement.

SUSSMAN

Takeaways

- Criminal fraud and antitrust prosecutions declined to an all-time low during the Trump administration—down roughly 26% to 30%—while only 45% of "key positions" in the DOJ were filled as of November 2020.
- The Biden DOJ's top priority will be prosecutions related to the misuse of COVID-19-related assistance programs (over US$5.3 trillion of relief funds to date). Specifically, the DOJ will be investigating: (1) unemployment aid fraud; (2) CARES Act-related fraud; (3) price gouging and fraudulent PPE; (4) fraud in Paycheck Protection Program, which funneled over US$525 billion through thousands of financial institutions; and (5) fraud and counterfeiting related to the COVID vaccine.
- A Special Inspector General for Pandemic Recovery (SIGPR) has actively engaged in numerous proactive investigations with a goal of referring these matters for prosecution by the DOJ.
- Expect an increase in Foreign Corrupt Practices Act (FCPA) investigations. The economic downturn in 2020 (due to COVID-19) created multiple incentives for fraud. Historically, other FCPA case spikes occurred in 2001 and 2007-2009, correlating with other recessions.
- Expect an increase in False Claims Act (FCA) enforcement relating to COVID-19 relief funds. Provider relief funds—US$175 billion from the Centers for Medicare & Medicaid Services to hospitals and health care providers during the height of the pandemic—are a source of potential FCA cases in that providers must certify that they used the relief funds for COVID-19-related expenses.
- The Biden DOJ also is expected to increase investigations and prosecutions of banks for Bank Secrecy Act violations and money laundering lapses, particularly those involving China and Chinese entities, which have emerged as areas of anti-money laundering concern.

Tips

Businesses should:

- Tighten corporate compliance and training relating to third-party vendors in high-risk locations—especially China.
- Audit and review any COVID-19-related assistance businesses receive. Ensure there is a robust audit trail for all COVID-related government funds.
- Create and monitor whistleblower hotlines to ensure businesses are aware of potential fraud and misconduct before any government involvement.
- Proactively examine claims relating to whether hospital admissions were improperly upcoded to take advantage of the higher reimbursement associated with the treatment of COVID-19 cases.
- Immediately escalate SIGPR inquiries to businesses' legal departments because they could be a precursor to DOJ intervention.
- Create a response program for government subpoenas and search warrants. Educate executives and employees about their rights and responsibilities during a government investigation.

Export Controls and Sanctions

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JOHNSON

LOWELL

The U.S. government has enacted U.S. export controls and trade sanctions laws and regulations for reasons of U.S. national security and foreign policy. We expect these controls to continue to be an important part of U.S. policy. The Biden administration will likely expand multilateral cooperation and coordination with U.S. allies. President Biden has appointed experienced professionals, many of whom are veterans of the Obama administration, to positions of leadership in the U.S. Departments of Commerce, State, and Treasury. Industry should expect a recalibration of foreign policy under the Biden administration that includes the rollback of certain Trump administration policies, and an increased reliance on sanctions and export controls to address new foreign policy and national security challenges.

Takeaways

- To lead the U.S. State Department, President Biden nominated Anthony Blinken, a deputy secretary of state during the Obama administration. To lead the U.S. Department of Treasury, President Biden nominated Janet Yellen, former chair of the Federal Reserve Board. Blinken and Yellen were confirmed by the U.S. Senate in January 2021. For secretary of commerce, President Biden nominated Rhode Island Governor Gina Raimondo, who was confirmed by the U.S. Senate in March 2021. Under their leadership, it is expected that the Departments of State, Treasury, and Commerce will use trade sanctions and export controls to advance the Biden administration's foreign policy priorities, such as national security issues related to China, Russia, and Iran.
- The Export Control Reform (ECR), initiated during the Obama administration, resulted in the transition of items and technology from the jurisdiction of the U.S. State Department to the jurisdiction of the U.S. Commerce Department, Bureau of Industry and Security (BIS). As a result, items and technology previously controlled for export by the International Traffic in Arms Regulations (ITAR) are now subject to the Export Administration Regulations (EAR). Also during the ECR, certain items and technology transitioned from the U.S. Munitions List (USML) to the Commerce Control List (CCL). While most USML categories transitioned during the Obama administration, the rule effectuating the transition of USML Categories I (Firearms), II (Artillery), and III (Ammunition) became effective on 9 March 2020, with a transition end date still to be determined. Under revised USML Categories I, II, and III, certain firearms transitioned from the ITAR to the EAR. Before his election, President Biden opposed the transition of firearms to the EAR. Therefore, there is a possibility that further revisions will take place to export controls of firearms.
- The Export Control Reform Act (ECRA), originally introduced as a bipartisan legislation, was enacted into law in August 2018. A main objective of the ECRA is to identify and control the export of emerging and foundational technologies considered essential to the national security of the United States. Following a period of public comment and a multilateral approach, in June and October 2020, BIS published the final rules identifying the first technologies designated as "emerging technologies." In August 2020, BIS published an advanced notice of proposed rulemaking seeking public comments as part of the agency's effort to identify "foundational" technologies. We anticipate these efforts to continue under the Biden administration. Further, it is expected that the Biden administration will continue to use export controls to pressure countries that take acts that conflict with U.S. foreign policy and may impact U.S. national security. These efforts may include excluding parties from U.S. markets by, for example, listing them in the Entity List

What to Expect From a Biden Administration, continued

or requiring export licenses. There is an expectation that the administration may put pressure on China for its actions on Hong Kong.

- Regarding trade sanctions, the main focus is currently on what steps the Biden administration will take with respect to Iran and Russia. During the presidential campaign, candidate Biden signaled interest in revisiting the Joint Comprehensive Plan of Action (JCPOA) negotiated during the Obama administration. Currently, Iran is considered to be out of compliance with the JCPOA due to levels of uranium that exceed the limits established in the JCPOA. The United States will likely require Iran to get back in compliance with the terms of the JCPOA before agreeing to go back to the negotiating table. Iran, on the other hand, would like the United States to lift sanctions before reengaging. Talks have been taking place in Vienna between Iran and high-ranking diplomats from European nations and China. The United States cannot directly participate in these discussions because it is not a party to the JCPOA, but reportedly it has been engaged in indirect talks with ITAR. While it appears slow progress has been made, we should not expect an immediate return of the United States to the JCPOA or the lifting of sanctions. Also, there is no expected change to the non-nuclear-related U.S. primary sanctions against Iran.
- The Biden administration has taken steps to sanction Russian and Saudi Arabian parties for acts that took place prior to President Biden's inauguration. The U.S. State and Treasury Departments have imposed sanctions against Russian parties in response to the poisoning of Alexei Navalny, a Russian political opposition leader. The Biden administration also has imposed sanctions against Russian parties in response to Russia's actions in relation to the Solar Winds cybersecurity breach. With respect to Saudi Arabia, the Biden administration has imposed sanctions against Saudi Arabia Rapid Intervention Force and government officials over their roles in the killing of journalist Jamal Khashoggi in Istanbul in 2018.
- The Biden administration also is expected to take steps to pursue a new foreign policy plan with respect to Cuba, which may include readopting certain Obama-era policies that were rolled back by the Trump administration. It should be noted, however, that only Congress has the authority to lift the totality of the U.S. sanctions against Cuba. Finally, the expectation is that the current sanctions against Venezuela will remain in place during the Biden administration for the immediate future.

Tips

- During the early days of the Biden administration, we saw the use of trade sanctions and export controls to advance foreign policy and national security interests. With the administration's focus on recalibrating foreign policy, we expect the continued use of sanctions and export controls in the upcoming months, particularly with respect to China and Russia. These actions may impact U.S. and non-U.S. companies' ability to conduct business as usual, as new restrictions may be imposed on items or parties with whom they conduct business.
- Parties can take a number of recommended steps to ensure continued compliance with U.S. export controls and trade sanctions. In particular, businesses should ensure to continue screening their business partners to prevent inadvertently conducting business with an unauthorized party.
- Businesses should stay up-to-date on announcements from the U.S. Departments of Commerce, State, and Treasury regarding the enactment of new sanctions and export controls that may impact their products or markets where they conduct business. If a business determines that upcoming sanctions or new export license requirements impact its products or business partners, steps should be taken to evaluate compliance programs and contractual arrangements to determine how best to navigate the new legal requirements.

National Security and Foreign Investment

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CRAIG

WRONSKY

The Committee on Foreign Investment in the United States (CFIUS) is an interagency government committee authorized to review certain transactions involving foreign investment in the United States and certain real estate transactions by foreign persons in order to determine the effect of those transactions on U.S. national security. When CFIUS determines that a transaction poses a security risk, it can impose mitigating conditions or block or unwind the transaction in order to resolve its concerns. As CFIUS is a nonpolitical body with an objective derived from U.S. statutes, no material changes to CFIUS's practice are expected as a result of the change in administration; however, CFIUS will remain a critical force within U.S. national security strategy, and any party contemplating a cross-border transaction involving or reaching a U.S. business should consider the potential CFIUS implications as early as possible.

Takeaways

- CFIUS will continue to review and investigate a steady stream of transactions, albeit in a quieter manner than under the former administration. (It is expected that this administration will comment less frequently on CFIUS activity than the previous one.)
- All anticipated major changes to CFIUS regulations were fully implemented in 2020 (including broadened CFIUS jurisdiction, filing fees, new mandatory filing rules, and more). Minor changes to CFIUS regulations are possible, such as additions to the list of excepted foreign states and additions to the scope of critical infrastructure subject to CFIUS jurisdiction. Other U.S. agencies (such as the Department of Agriculture) might be added as permanent members to CFIUS to facilitate the use of that agency's expertise during the committee's review of transactions.
- The national security threat identified by the U.S. government arising from Chinese access to certain U.S. businesses long predated the Trump administration and will continue to be a priority under the Biden administration. CFIUS accordingly will continue to particularly scrutinize Chinese investment in the United States. It will also continue to scrutinize all investors' ties to China, such as partnerships or relationships with Chinese state-owned entities.
- CFIUS will continue its effort to identify and potentially investigate "non-notified" transactions that were completed months or even years ago without obtaining clearance from the committee. CFIUS has resources dedicated to identifying and investigating such transactions, and the committee is particularly focused on existing Chinese interests in U.S. businesses that could present a risk to U.S. national security.

What to Expect From a Biden Administration, continued

Tips

- Parties contemplating cross-border transactions involving or reaching a U.S. business—such as the direct or indirect acquisition of a U.S. business or seed funding in a U.S. business—should plan for and address any potential CFIUS implications as early as possible in the transaction timeline.
- Any U.S. business that anticipates raising capital should determine now if it is a "TID U.S. Business" for CFIUS purposes. This analysis focuses on whether the U.S. business is engaged in critical technologies, critical infrastructure, or sensitive personal data and has great significance to foreign investors and within CFIUS's practice.
- Foreign persons who previously acquired or invested in a U.S. business without notifying CFIUS should proactively prepare for potential CFIUS outreach and inquiry into the completed transaction. This is particularly true for Chinese investments in U.S. businesses, but such inquiries are not limited to investments originating from China.
- The use of a short-form declaration (as opposed to a formal written notice) is now available as a form of notice to CFIUS for all proposed transactions; however, while declarations afford an abbreviated review process (thirty days) and help to avoid CFIUS filing fees, parties should understand that the use of declaration is not appropriate in every case and can result in the parties ultimately being required to file a formal written notice, causing longer periods of CFIUS review and investigation and potential delays to the completion of the transaction.

Customs, Tariffs, and Trade Policy

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VENKATESH

The Biden administration's 2021 trade policy agenda is focused on tackling the COVID-19 pandemic and strengthening the economy. While Biden's policy agenda reflects a distinctly different approach to trade, we do not expect to see sudden, wholesale changes from the Trump administration's trade objectives. What we can expect, however, is a more multilateral rather than unilateral approach to developing trade policies and resolving trade disputes and renewed U.S. engagement with the World Trade Organization.

Takeaways

The Biden administration's 2021 trade policy outlines a number of key priorities:

- Biden's 2021 trade policy is in large part focused on tackling the COVID-19 pandemic and restoring the economy by strengthening domestic production of essential medical equipment and promoting long-term supply chain resiliency for equipment and supplies critical to protecting public health.
- The administration has indicated its plan to put workers at the center of its trade policy by including strong, enforceable labor standards in trade agreements.
- The administration's overarching goal of tackling climate change will be incorporated into its trade policy through its work with other countries, both bilaterally and multilaterally, toward environmental sustainability.
- Addressing China's coercive and unfair economic trade practices will remain a focus of this administration, but it will likely be addressed through a more comprehensive strategy that uses a variety of tools, not just tariffs, and involves coordination with friends and allies to pressure the Chinese government to end its unfair trade practices. The administration is expected to continue closely monitoring China's progress in implementing its commitments under the United States-China Economic and Trade Agreement and has recently indicated that China's publication of several draft and final IP-related legal and regulatory measures in 2020 fall short of the full range of fundamental changes needed to improve the IP landscape in China. The administration also has made clear that one of its top priorities with respect to China will be to address the widespread human rights abuses of the Chinese government's forced labor program that targets the Uyghurs and other religious minorities in the Xinjiang Uyghur Autonomous Region and elsewhere in the country.
- The administration has indicated a strong desire to repair its partnerships and alliances and to restore U.S. leadership around the world, including through reengagement with leadership in international organizations like the World Trade Organization.
- President Biden has expressed a strong commitment to trade enforcement, which is reflected by his appointment of Katherine Tai as the U.S. trade representative.

What to Expect From a Biden Administration, continued

Tips

- Businesses should continue to exercise diligence regarding classification, customs valuation, and country of origin, areas where the U.S. Customs and Border Protection (CBP) is expected to continue enforcement efforts. Businesses should also pay close attention to imports that may present trademark or copyright infringement issues. Such imports may be at an increased risk of detention or seizure by CBP in light of the administration's and the United States-Mexico-Canada Agreement's focus on these issues.
- Given the numerous Executive Orders recently put in place that may impact global supply chains, businesses—particularly those involved in sectors considered critical to U.S. public health and national security—should evaluate their supply chains and consider potential diversification options, to the extent necessary.
- In light of statements by the Biden administration, U.S. importers are unlikely to see a widespread rollback of Section 301 tariffs on products from China and should continue evaluating all possible tariff mitigation options. Companies should also continue to monitor the status of Section 301 exclusions (particularly with respect to those related to the COVID-19 pandemic that are set to expire on 30 September 2021) and the outcome of Section 301 litigation pending in the Court of International Trade.
- U.S. importers should be on heightened alert regarding supply chain risks stemming from imports from the Xinjiang Uyghur Autonomous Region and should monitor Withhold Release Orders issued by CBP related to a number of products from this region.
- U.S. importers should closely monitor the United States' engagement with countries on the Office of the U.S. Trade Representative's (USTR) Priority Watch List—Argentina, Chile, China, India, Indonesia, Russia, Saudi Arabia, Ukraine, and Venezuela—included in the USTR's 2021 Special 301 Report. The USTR has indicated that these countries present the most significant concerns this year regarding insufficient IP protection.
- Given the administration's focus on restoring relationships with its allies, companies should continue to monitor the status of Section 232 tariffs and the exclusion process, particularly with respect to tariffs and exclusions applicable to products imported from countries that are U.S. allies.

SEC and CFTC Enforcement

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All signs indicate that the U.S. Securities and Exchange Commission (SEC) and the Commodity Futures Trading Commission (CFTC) under the Biden administration will be more aggressive in enforcement and regulation. This means more enforcement actions to protect investors' interests, and the likelihood of new regulations, for instance, the adoption of more disclosure requirements and guidance.

ACHILLES

MOK

Takeaways

- The Biden administration's nomination of Gary Gensler to be chairman of the SEC signals bold enforcement and new regulation. Gensler, during his tenure as CFTC chairman, did not hesitate to take on the establishment notwithstanding his many years at a major investment bank and financial services company.
- There will be continued emphasis on addressing retail fraud and protecting investors (a focus during the prior administration), plus renewed emphasis on regulation of and enforcement actions against financial institutions and public companies.
- Additionally, both the SEC and CFTC are expected to react to and address cutting edge, headline-grabbing issues such as the aftermath of GameStop and other meme trading, digital assets and cryptocurrency, and climate change risk.
- The SEC may implement environmental, social, and governance (ESG) prescriptive disclosure requirements or at a minimum provide additional guidance in this area. Disclosure topics will likely include: (1) a company's carbon footprint, greenhouse gas emissions, and risks to the business related to environmental issues and threats; (2) diversity on boards of directors and in the workforce; and (3) objective criteria for labeling investments as socially conscious or environmental. In March 2021, the SEC announced the creation of a climate and ESG task force in its Division of Enforcement.
- The CFTC will continue to focus on making a name for itself, whether in high-profile enforcement actions—in areas such as manipulation, spoofing, and bank secrecy, and also in areas where it is not traditionally the lead agency, like foreign bribery—or regulation. In March 2021, the CFTC announced the creation of a Climate Risk Unit to assess the risks posed by climate change on futures and options markets.

What to Expect From a Biden Administration, continued

Tips

- Now more than ever, regulated entities should be well prepared for examinations and other interactions with regulators. Those events should be taken seriously, and clients and their counsel will help themselves by anticipating SEC and CFTC staff areas of inquiry and possible skepticism.
- Issuers and regulated entities would be well advised to invest in and enhance their compliance departments and programs now. Doing so will cost a small fraction of potential attorney's fees compared to disgorgement and penalties from a lengthy investigation or enforcement action.
- More ESG disclosure requirements are coming, whether prescriptive or because of competitive or market pressures. If truthful disclosures might put a business at a competitive disadvantage—whether on issues of climate change risk, the company's carbon footprint, or the diversity of the board or workforce—now is the time to make changes that will have a positive impact on the company's future narrative.
- If an individual makes a living in a nontraditional area—like digital assets or cryptocurrency—that person should stay tuned and be prepared to weigh in. The SEC and CFTC under the Biden administration will not be shy about bringing more oversight and restrictions to such a playing field.

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International Trade Under the Biden Administration

By Peter A. Quinter, Miami

There have been several significant international trade policy shifts in just the first few months of President Biden's administration, following the tumultuous four years of the Trump administration. Even more policies, however, have stayed the same. This article will highlight some of the more significant legal, regulatory, policy, and procedural changes of interest to the general legal practitioner.

First, as background, let's recognize that all lawyers are "international lawyers" in that we are all consumers of international products and services. I just flipped over my Microsoft wireless keyboard, and as expected, it says "Made in China." If you drank a cup of coffee or tea today, you probably know that the coffee beans or tea leaves were grown in another country. From the perspective of an international trade lawyer, the coffee was not "made in" Dunkin' or Starbucks but rather in Brazil or Vietnam, and those tea leaves probably in India or Japan. The same can be said for our seafood, furniture, TVs, clothing, and just about any other thing. Those products were likely made overseas and imported into the United States through a long and complex logistics process called the "international supply chain."

Second, as consumers of products imported via the international supply chain, what the U.S. government allows to be bought and sold internationally, and what consumers purchase, greatly affects global trade. After all, the United States is (for now) the largest economy in the world, followed by China. U.S. international trade laws affect what we can purchase at the local store or on Amazon, and they also determine how much we pay for those items.

Third, without a doubt, the other major economic powerhouse in global trade is China. Yes, I am speaking about the People's Republic of China (PRC) and not the Republic of China aka Taiwan. Those of us who have travelled over time to that amazing country have seen it transform from an agricultural society where cars and computers were luxury items to a modern society where it seems that everyone has a new car and a smartphone, shops on Alibaba, and pays using Alipay or WeChat.

International Trade, continued

I have been a student of international trade for over thirty years, but it was not until the Trump administration that international trade was "weaponized." The Trump administration took an aggressive and belligerent stance on international trade with China. You probably heard about Section 301 (of the Trade Act of 1974) by which President Trump assessed an extra 25% customs duty on virtually all merchandise made in China. The objective was to punish China for engaging in what the Trump administration's U.S. trade representative described as "unfair trade practices" such as "forced technology transfers." Basically, the Trump administration accused the Chinese government of stealing intellectual property rights from U.S. companies operating in China. China retaliated by instituting its own additional tariffs on many U.S. products. U.S. importers had to pay billions of extra dollars collected by CBP, and some companies changed their sourcing from China to other Asian countries, and some to Mexico and Canada. The end result was that the United States imported a record amount of merchandise from China in 2020, more than during any prior year in history. Hence, many experts say that the policy of the Trump administration simply did not work.

Under the Biden administration, not a lot has changed regarding the international trade relationship with China. In 2021, China continues to be the #1 trading partner with the United States. The Section 301 tariffs imposed by former President Trump remain. Moreover, the exclusions by which thousands of companies were granted an exemption from paying the extra 25% on Chinese products lapsed on 31 December 2020. The Biden administration has not proposed any new policies or procedures to allow for such exemptions.

What is interesting to note in the Biden administration are the key players in international trade. On 2 February 2021, Alejandro Mayorkas was sworn in as the secretary for the U.S. Department of Homeland Security (DHS), which includes CBP, TSA, ICE, Coast Guard, Secret Service, and U.S. Citizenship and Immigration Services (CIS). Secretary Mayorkas is a lawyer, an immigrant from Cuba, and former director of CIS. The other significant person in international trade for the Biden administration is U.S. Trade Representative (USTR) Katherine Tai, also a lawyer. The USTR is responsible for developing and coordinating U.S. international trade policy. Public statements by Secretary Mayorkas and USTR Tai indicate the Biden administration is eager to engage in discussions with the Chinese government on a variety of international trade issues.

In the meantime, the U.S. Department of Commerce has initiated a record number of both antidumping and countervailing duty orders against certain products from many countries in the world. Antidumping duties are assessed against a product attempting to enter the United States that is priced at "less than fair value" so that the foreign supplier is attempting to take over the U.S. market for that product. In response, CBP collects an antidumping duty from the U.S. importer to make up for the difference in the "dumping" price. China is the focus of an estimated 80% of such orders. The U.S. Commerce Department has identified hundreds of products to be assessed the antidumping duty, ranging from bedroom furniture to toilet paper and from steel to garlic. Under the Biden administration, there has been no decrease in the record number of new investigations and new orders against Chinese products.

What is particularly popular as a means of enforcing U.S. labor standards around the world is the use of 19 USC 1307, which prohibits the importation in the United States of any merchandise mined, produced, or manufactured by forced or indentured labor. Such merchandise is subject to exclusion or seizure by CBP and may lead to a criminal investigation of the U.S. importer. For example, you may have heard that all disposable rubber gloves manufactured in Malaysia by Body Glove are no longer allowed to enter the United States. CBP has issued numerous Withhold Release Orders against U.S. importers who attempt to import merchandise made in the Xinjiang Uyghur Autonomous Region because of the alleged use of concentration camps by the Chinese government forcing Uyghurs to produce products for export.

... continued on page 46

ILS Mid-Year Executive Committee Meeting & Reception 11 March 2021

On 11 March 2021, the International Law Section successfully held its Mid-Year Executive Council Meeting, which was held outdoors live at Jungle Island in Miami, and via Zoom. Following the meeting was a cocktail reception, once again outdoors, with a great spread and, of course, cocktails. The Executive Council enjoyed seeing all those who attended live, who interacted and networked with each other, of course with masks and social distancing. Below are a few pictures taken during the event.

Bob Becerra, Jim Meyer, and Jackie Villalba

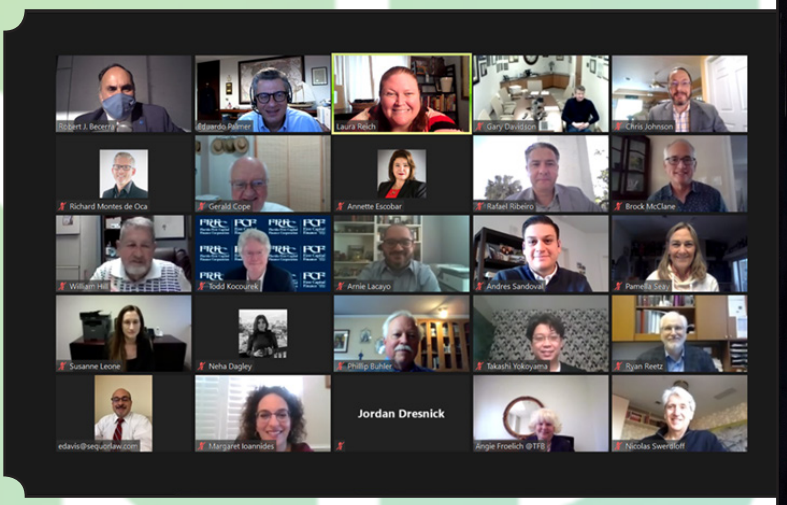
Nouvelle Gonzalo, Omar Ibrahem, and Fabio Giallanza

Jim Meyer and Jackie Villalba

Rafael Ribeiro, Nouvelle Gonzalo, and Clarissa Rodriguez

Adrian Nuñez, Cristina Vicens, Jeff Hagen, and Grant Smith

Back row: Al Lindsay and Nouvelle Gonzalo; front row: Rafael Ribeiro, Clarissa Rodriguez, and Jackie Villalba



ILS members join the meeting via Zoom.

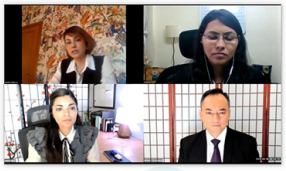
The ILS Executive Board: Rafael Ribeiro, Bob Becerra, Jim Meyer, and Jackie Villalba

ILS India Subcommittee Panel on Arbitral Awards in India ▪ 8 April 2021

The India Subcommittee of The Florida Bar International Law Section's Asia Committee hosted a panel discussion on 8 April 2021 on the topic "Routes and Realities of Enforcing Arbitral Awards in India: An In-Depth Talk on *Vodafone*, *Devas*, and *Cairn*." This discussion was moderated by Neha S. Dagley, chair of the India Subcommittee, who was joined by an incredible group of panelists from around the world: Edmund J. Kronenburg, Braddell Brothers, Singapore; Kshama Loya, Nishith Desai Associates, India; and Marike Paulsson, Albright Stonebridge Group, Bahrain.

The panelists discussed unique approaches adopted by foreign investors and India to enforcement of arbitral awards and investor-state arbitrations, particularly in three complex cases: (1) *Devas Multimedia Private Limited v. Antrix Corporation Limited* (ICC Case No. 118051/CYK); (2) *Vodafone International Holdings BV v. India* (I) (PCA Case No. 2016-35); and (3) *Cairn Energy PLC and Cairn UK Holdings Limited v. The Republic of India* (PCA Case No. 2016-07). These cases have received global attention over the past few years with key events taking place in the past year. All three cases involve significant arbitral awards against India, and a state-owned entity.

Routes and Realities of Enforcing Arbitral Awards in India: An In-Depth Talk on *Vodafone*, *Devas*, and *Cairn*



Devas

Devas Multimedia Private Ltd. v. Antrix Corporation Ltd.

(ICC CASE NO. 118051/CYK)

Vodafone

Vodafone International Holdings BV v. The Republic of India (I)

(PCA CASE NO. 2016-35)

Cairn

Cairn Energy PLC + Cairn UK Holdings Ltd. v. The Republic of India

(PCA CASE NO. 2016-7)

ILS Panel on Gender Diversity ▪ 14 April 2021

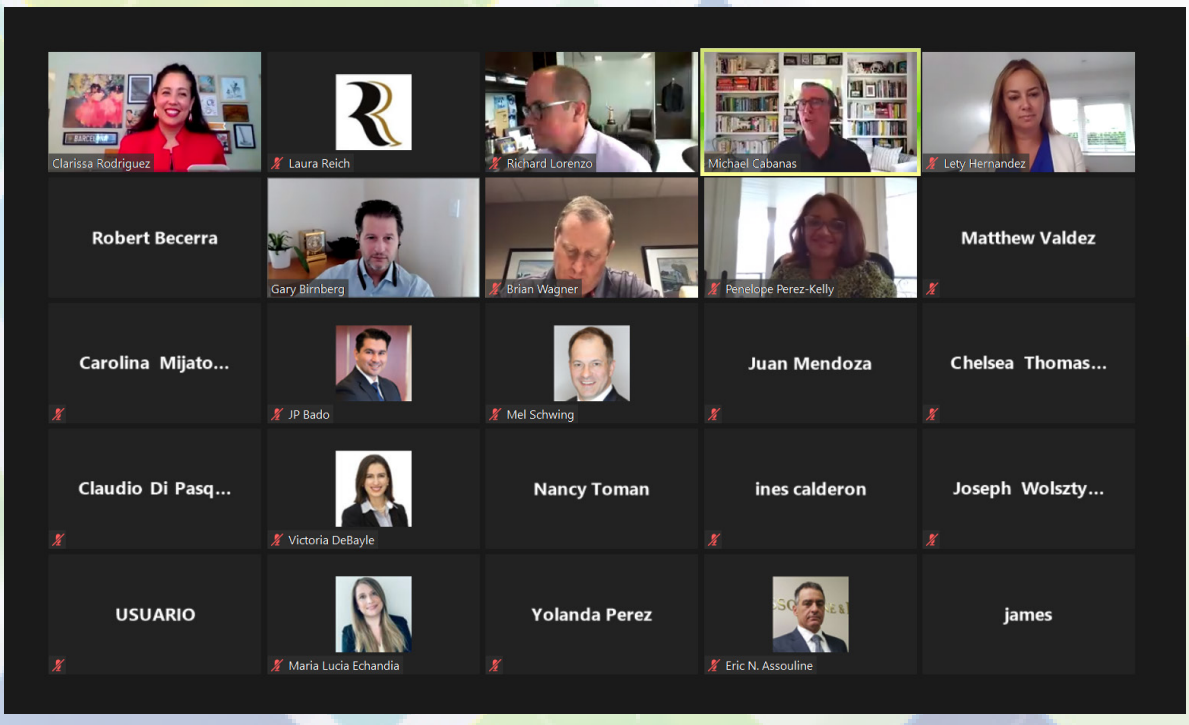
The ILS sponsored a panel on April 14 for the virtual annual meeting entitled "Keeping a Seat for Gender Diversity at the International Law Table," moderated by ILS Past Chair Clarissa Rodriguez of ILS Hemispheric Sponsor Reich Rodriguez and including as panelists ILS Treasurer Jackie Villalba of ILS Global Sponsor Harper Meyer; ILS Executive Council Member Cristina Vicens of ILS Hemispheric Sponsor Sequor Law; and ILS Executive Council Member Neha Dagley of Rivero Mestre. The panel was an incredible success. ILS hopes its members continue to talk about this critical issue and amplify all voices.

Panelists Clarissa Rodriguez, Neha Dagley, Cristina Vicens, and Jackie Villalba

ILS Lunch & Learn With Richard C. Lorenzo
20 April 2021

The International Law Section hosted its April Lunch & Learn via Zoom. ILS Immediate Past Chair Clarissa Rodriguez hosted the event, which featured a presentation by Richard C. Lorenzo, regional managing partner for the Americas at Hogan Lovells. Mr. Lorenzo focuses on international commercial litigation and arbitration for foreign and domestic clients. His time spent living in Latin America has attuned Lorenzo to the civil law system and political landscape of Spanish-speaking jurisdictions, which complements his English-language arbitration practices.

Clarissa Rodriguez interviews Richard Lorenzo.

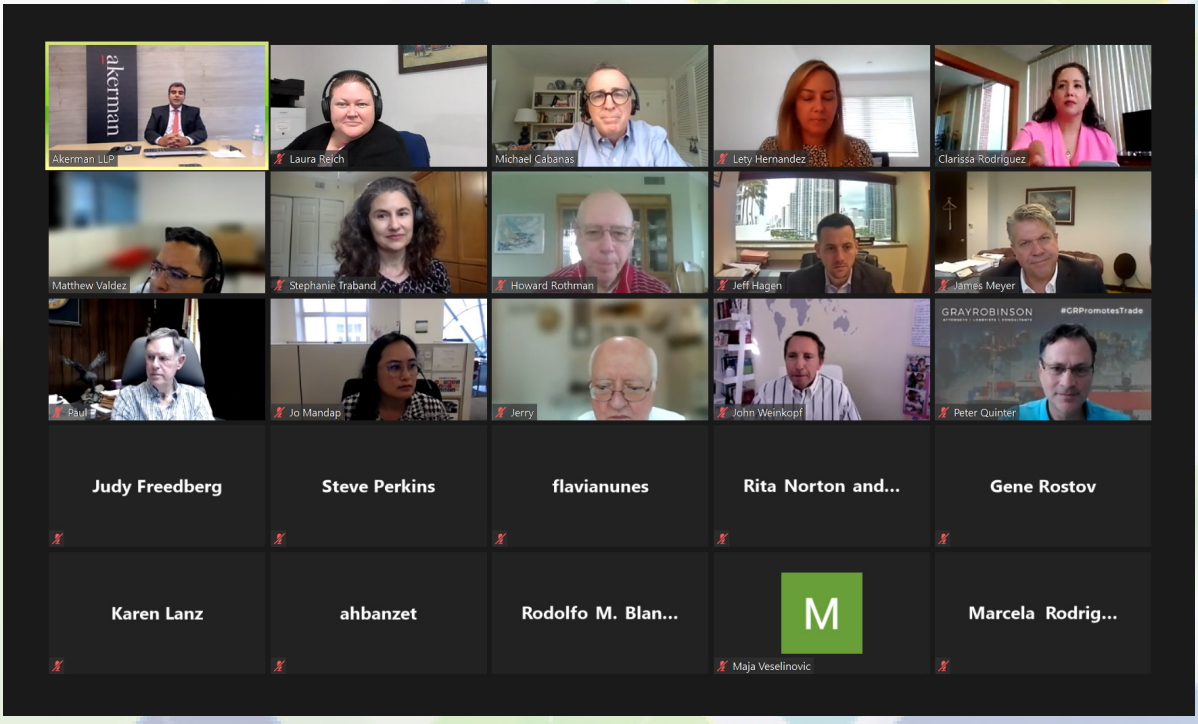


ILS members Zoom in to the ILS Lunch & Learn.

ILS Lunch & Learn With Otavio Carneiro ▪ 3 June 2021

International Law Section partner Fiduciary Trust International once again sponsored an excellent discussion session, featuring Otavio Carneiro. Moderator Clarissa Rodriguez asked Mr. Carneiro about his work during the Brazilian Olympic Games, his path in the law (starting when he was 13 and assisted a blind attorney by reading cases out loud to him), his love of sports, and his current practice.

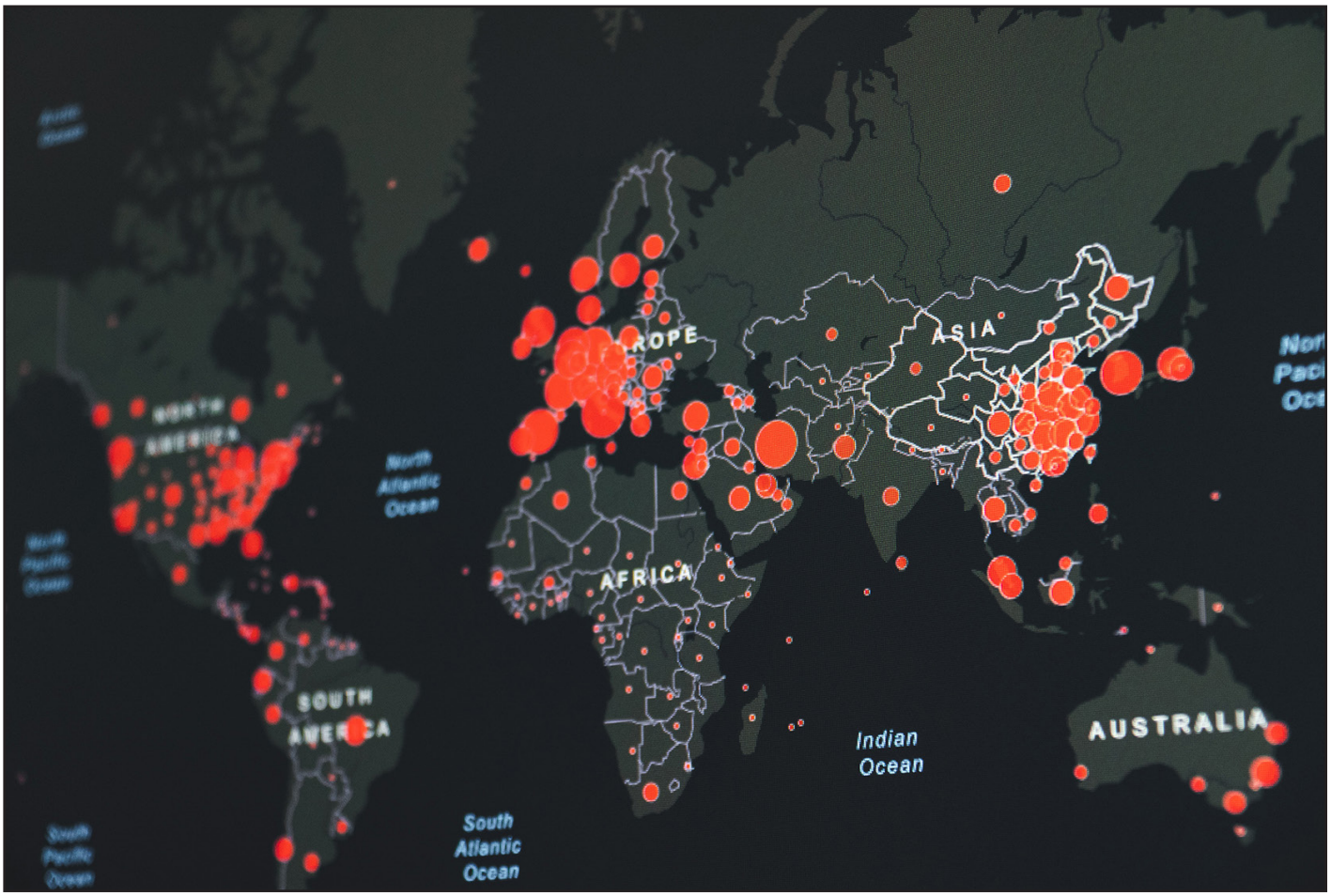
Clarissa Rodriguez interviews Otavio Carneiro.



Virtual sessions are expanding the reach of the ILS Lunch & Learn series.

Immigration Strategies for Investors, Entrepreneurs, and Corporations in the Post-COVID World

By Larry S. Rifkin, Miami



Since 31 January 2020, the U.S. government has increasingly taken measures to combat the spread of the coronavirus. As a result, extensive bans on entry and visa issuance were implemented as well as stricter entry regulations. While some of the bans on visa issuance have expired or been lifted, the COVID-19 travel ban remains in effect for certain countries. This article discusses the COVID-19 travel ban, its history, the exceptions, recent guidance and changes, and strategies on how business travelers can seek exceptions to overcome the stricter regulations to enter the United States.

COVID-19 Travel Ban History

As a result of the coronavirus pandemic, the administration of then President Donald Trump issued several far-reaching bans on entry and visa issuance by Presidential Proclamation or Executive Order, ostensibly intended to limit the spread of COVID-19 and to protect the U.S. labor market. On 31 January

2020, President Trump issued Proclamation 9984, imposing travel restrictions to and from China, effective 2 February 2020.[1] On 29 February, President Trump expanded those travel restrictions to foreign travelers from Iran.[2] On 11 March 2020, President Trump issued Proclamation 9993, effective 13 March, prohibiting the entry of most foreign nationals who traveled to the European-Schengen Area countries at any point during the fourteen days prior to their scheduled arrival to the United States.[3] On 16 March, President Trump extended the travel restrictions to foreign nationals arriving from the United Kingdom and Ireland.[4] On 24 May 2020, President Trump extended the travel restrictions to those entering from Brazil, effective 26 May.[5]

On 25 January 2021, President Biden extended the Trump COVID-19 travel ban for persons present during the fourteen-day period preceding their entry or attempted entry into the United States in the Schengen Area, the United Kingdom (excluding overseas territories outside of Europe), the Republic of Ireland, and the Federative Republic of Brazil.[6] President Biden also included the Republic of South Africa in the ban.[7] The president's rationale for extending the travel ban was that the COVID-19 outbreak in the United States continued to pose a grave threat to the health and security of the United States.[8] This ban continues to be in effect until terminated by the president, who is focused on relaxing some COVID-19 travel restrictions.

COVID-19 Travel Ban Exceptions

The following persons are exempt from the COVID-19 travel bans:

- any lawful permanent resident of the United States;
- any noncitizen national of the United States;
- any noncitizen who is the spouse of a U.S. citizen or lawful permanent resident;
- any noncitizen who is the parent or legal guardian of a U.S. citizen or lawful permanent resident, provided the U.S. citizen or lawful permanent resident is unmarried and under the age of 21;
- any noncitizen who is the sibling of a U.S. citizen or lawful permanent resident, provided both are unmarried and under the age of 21;
- any noncitizen who is the child, foster child, or ward of a U.S. citizen or lawful permanent resident, or who is a prospective adoptee seeking to enter the United States pursuant to the IR-4 or IH-4 visa classifications;
- any noncitizen traveling at the invitation of the U.S. government for a purpose related to containment or mitigation of the virus;
- any noncitizen traveling as a nonimmigrant pursuant to a C-1, D, or C-1/D nonimmigrant visa as a crewmember or any noncitizen otherwise traveling to the United States as air or sea crew;
- any noncitizen
  - seeking entry into or transiting the United States pursuant to one of the following visas: A-1, A-2, C-2, C-3 (as a foreign government official or immediate family member of an official), E-1 (as an employee of TECRO or TECO or the employee's immediate family members), G-1, G-2, G-3, G-4, NATO-1 through NATO-4, or NATO-6 (or seeking to enter as a nonimmigrant in one of those NATO categories); or
  - whose travel falls within the scope of section 11 of the United Nations Headquarters Agreement;
- any noncitizen who is a member of the U.S. Armed Forces and any noncitizen who is a spouse or child of a member of the U.S. Armed Forces;
- any noncitizen whose entry would further important U.S. law enforcement objectives, as determined by the secretary of state, the secretary of homeland security, or their respective designees, based on a recommendation of the attorney general or his designee; or
- any noncitizen whose entry would be in the national interest, as determined by the secretary of state, the secretary of homeland security, or their designees.[9]

National Interest Exception

Though the various country-specific travel bans cited to earlier in this article provide for a national interest exception (NIE) at the discretion of the Department of State, Department of Homeland Security, or their

... continued on page 48

The Pitfalls of Domesticating a Foreign Subpoena in New York Under the UIDDA When is a subpoena issued "under authority of a court of record"?

By Tereza Horáková, New York City

In 2011, New York adopted the Uniform Interstate Depositions and Discovery Act (UIDDA). Under CPLR 3119, which implemented the UIDDA in New York, either a New York clerk of court or a New York counsel can domesticate an "out-of-state" subpoena by reissuing the same, provided they receive the original or a true copy of the foreign subpoena. An out-of-state subpoena means "a subpoena issued under authority of a court of record of a state other than this state."[1] What does "under authority of a court of record" mean under New York law? Based on the following review of selected case law, this article (1) argues that New York courts have adopted an incorrect interpretation of the phrase, and (2) provides a tip to (not only) Florida practitioners on how to navigate the domestication process under New York's current law.

Kings County Supreme Court, New York
Photo: www.courthouses.co

At the outset, the issue seems to be a non-issue. The drafters of the UIDDA explicitly clarified that "[a] 'Court of Record' includes anyone who is authorized to issue a subpoena under the laws of that state, which usually includes an attorney of record for a party in the proceeding."[2] When read in tandem with Rule 1.410 of the Florida Rules of Civil Procedure, which authorizes attorneys to issue subpoenas, a foreign subpoena issued by a Florida attorney may be domesticated by a New York attorney without the need for any court involvement.[3] Moreover, the Florida Supreme Court adopts the Florida Rules of Civil Procedure.[4] Thus, Florida attorneys are authorized to issue subpoenas under the authority of the Florida Supreme Court.

So far, so good. At least one court relied on the UIDDA drafter's comments, applied the same logic, and reached the same conclusion, albeit in an unpublished opinion in *In Brightmore Home Care of Ky. Llc v. Commonwealth*,

No. 2019-CA-1409-MR, 2021 Ky. App. Unpub. LEXIS 44 (Ct. App. Jan. 22, 2021). There, the Court of Appeals of Kentucky held that because Kentucky statutes authorized the Kentucky Cabinet for Health and Family Services to issue subpoenas, the Cabinet's subpoena addressed to a non-party in Utah qualified as an "out-of-state" subpoena under Kentucky's version of the UIDDA.[5] Similarly, the United States District Court for the District of Minnesota relied on the UIDDA drafter's commentary as persuasive authority in holding that the UIDDA does not apply to arbitrations. *In Butler v. ATS Inc.*, No. 20-CV-1631 (PJS/LIB), 2021 U.S. Dist. LEXIS 70707, at *24-25 (D. Minn. Apr. 13, 2021).[6]

New York courts have taken a different approach. At least two New York courts have interpreted the "under authority of a court of record" language to mean that a foreign subpoena issued by a foreign counsel alone and then domesticated by either a New York counsel or clerk of court failed to comply with CPRL 3119. In *Boyarsky v. Acadia Realty Tr.*, the Supreme Court of New York for Westchester County quashed a subpoena issued by a Massachusetts attorney and domesticated by a New York clerk of court. The court held that:[7]

> [t]he only subpoena submitted in support of the petition and motion was the subpoena duces tecum issued by petitioner's Massachusetts counsel which was presented to the Westchester County Clerk for issuance pursuant to CPLR 3119. Accordingly, it does not appear that the scope of discovery set forth in the subpoena was determined by the Massachusetts court of record as contemplated by CPLR 3119.

Thus, the court's ruling appears to disqualify the Massachusetts subpoena as an out-of-state subpoena because there was no involvement of the Massachusetts court, despite Massachusetts law permitting notaries to issue subpoenas.[8] Provided that the issuing Massachusetts attorney was a notary public, the holding directly conflicts with the UIDDA drafters' comments. The same court later approved a subpoena initially authorized by an arbitral tribunal and then issued by a California clerk of court. *Matter of Roche Molecular Sys. Inc. (Gutry)*, 60 Misc. 3d 222, 228 (Sup. Ct. 2018) ("A commission to take an out-of-state deposition, issued by a clerk of the Superior Court of California, satisfies the definition of an 'out-of-state subpoena' provided in CPLR 3119(a)(1) and (4).").

Six years later, the Supreme Court of New York for Kings County relied on *Boyarsky* and quashed a subpoena issued by a Florida counsel for use in a pending Florida litigation. *Matter of Matter of Enf't of Non-Party Subpoena Duces Tecum Issued by Kings Cty. Clerk. E. Coast Jewelry Distribs., Inc. v. Jomashop, Inc.*, 2020 NY Slip Op 32293(U) (Sup. Ct.). The Florida subpoena was reissued by a New York clerk of court. The court reasoned that the record did not contain any original Florida subpoena issued under authority of a court of record, even though the Florida counsel filed a notice of production from a non-party under Rule 1.351 as well as a Florida subpoena issued by the Florida counsel who was also barred in New York.[9] Fla. R. Civ. P. 1351(b). It is unclear whether the court required that the Florida subpoena be attached to the proposed New York subpoena when submitting the same to the New York clerk of court, or whether the Florida subpoena needed to be issued by a Florida clerk of court or a judge.[10] Thus, *Boyarsky* and possibly *E. Coast Jewelry Distributors* seem to have applied the "under authority of a court of record" language in contradiction to the UIDDA drafters' comments.

Similarly troubling is New York First Department's holding in *Matter of Am. Express Co. v. United States V.I. Dep't of Justice*, 178 A.D.3d 426 (App. Div. 2019). There, the court quashed an administrative subpoena jointly issued by the attorney general and the commissioner of the Department of Licensing and Consumer Affairs of the United States Virgin Islands that sought the information in connection with an investigation of consumer protection law violations by American Express. The First Department quashed the subpoena primarily because it was preempted under federal law, but also noted that it was not issued "under authority of a court of record." The court held that "[a]lthough the subpoena need not have been issued in connection with a pending litigation,

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BEST PRACTICES

Become Florida Bar Board Certified in One of the Two Areas of International Certification

By Clarissa A. Rodriguez, Miami

Although I know it is hard to believe, I am still waiting for the call that Steven Spielberg and George Lucas are taking me up on my standing offer to play Indiana Jones in their next Hollywood blockbuster. Having not yet been called upon to serve as a hero/archeologist in real life either, I continue giving art law lectures, building my practice, mentoring, and encouraging everyone to become a member of The Florida Bar International Law Section (ILS), of which I am the immediate past chair.

Today, I write to tell you about how becoming board certified in either international law or international litigation and arbitration can be part of building a thriving practice. I became board certified in international law in 2015. I was contacted by Zach Shrader, a Florida Bar board certification specialist, who was encouraging eligible candidates to apply. Later, he followed up with me and made sure I applied. These days, the ILS and those of us who are certified do much of the "advertising" for board certification.

Very few state bars offer a certification in international law or international litigation and arbitration. This truly sets the state of Florida and our section apart! The ability

Best Practices, continued

to be known as an expert who has been subjected to additional requirements and testing is very appealing. As of the date of this writing, there are only *fifty* Florida lawyers who are board certified in international law. Only *thirty-four* Florida lawyers are board certified in international litigation and arbitration. Certification is a "feather in the cap" that separates these lawyers from other attorneys who might pitch for the same work or same opportunities. It is a testament to their hard work, dedication, and skill set.

I have also found that being board certified offers benefits to me specifically as a woman, a minority, and a practitioner of law who is under the age of forty. Being board certified has helped me in terms of marketing and speaking engagements, but mostly in client development. Again, experience matters, and board certification recognizes and validates that experience.

If you are preparing for the international law certification exam, I recommend you review the ILS International Desk Reference. This section-authored publication is a book that every international practitioner should own. Additionally, pay attention to the percentages of the exam dedicated to each topic covered in the multiple choice. Do not spend your efforts attempting to master an area of law that is worth only a few percentage points; instead focus on the areas for which the most questions will be asked. If you are preparing for the international litigation and arbitration certification exam, be aware that the authors of that exam have released a list of topics and textbooks to help you prepare. Remember also that essays are your time to shine and to show the exam reviewers that you know your craft. Good luck to all applicants!

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WORLD ROUNDUP

ASIA

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Hong Kong - High court's review of National Security Law drives continued concerns about Hong Kong's legal regime.

A recent review of Hong Kong's new National Security Law by its highest court suggests the changing environment in HKSAR. In *HKSAR v. Lai Chee Ying* (2021) HKCFA 3, the court ruled it had no jurisdiction to proceed with a constitutional review of the National Security Law. The new National Security Law passed by China in June 2020 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. The court in *Lai Yee Ching* stated, "[w]e have decided that there is no power to hold any provision of the NSL to be unconstitutional or invalid as incompatible with the Basic Law and Bill of Rights." This decision continues to drive concerns about the future of Hong Kong's legal regime.

INDIA

Cairn Energy prevails in landmark US$1.2 billion arbitration award against the Republic of India.

On 21 December 2020, a final arbitration award was issued in the matter of *Cairn Energy PLC and Cairn UK Holdings Limited v. The Republic of India* (PCA Case No. 2016-07). The underlying dispute arose out of tax measures applied by the Government of India to certain transactions undertaken by Cairn in 2006. The tax measures were retroactively applied to the 2006 transactions following an amendment made in 2012 to the Income Tax Act of 1961. Cairn's arbitration claims maintained that in making such retroactive application and taking subsequent enforcement measures against Cairn's investments, the Republic of India breached its obligations under the UK-India Bilateral Investment Treaty.

The three-member arbitration tribunal ruled in favor of Cairn finding the 2012 amendment and its application to Cairn breached the fair and equitable treatment clause of the UK-India Bilateral Investment Treaty (BIT). The tribunal found it had jurisdiction over Cairn's claims. It further found the Republic of India "failed to uphold its obligations under the UK-India BIT and international law" by failing "to accord the Claimant's investments fair and equitable treatment in violation of Article 3(2) of the Treaty." The award further ordered the following damages for the harm suffered by Cairn as a result of India's breaches of the treaty: (a) US$984,228,274 for the net proceeds that would have been earned from the planned 2014 sale of CIL shares plus interest; and (b) US$248,591,868 for withheld tax refund due with respect to AY 2012-13 (i.e., share sales to Vedanta) and AY 2010-11 (i.e., share sales to Petronas). Additionally, the tribunal ruled that India was responsible to pay Cairn's costs of arbitration and legal representation, including US$2,005,700.42 for arbitration costs and US$20,389,413.97 toward legal costs incurred in the arbitration proceedings.

On 22 March 2021, India filed a challenge in a court in The Hague in connection with the arbitration award. Cairn Energy is pursing various options to enforce the arbitration award against India, including registration of the award in multiple jurisdictions.

Amendment to Companies Act requires additional disclosures on cryptocurrency.

The Ministry of Corporate Affairs amended Schedule III of the Companies Act, 2013 via a notification dated 24 March 2021, with effect from 1 April 2021. The notification sets forth additional disclosure requirements governing the preparation of financial statements of an entity. Specifically, the new requirements mandate disclosure of (1) profit or loss transactions involving crypto currency or virtual currency; (2) the amount of currency held as of the reporting date; and (3) deposits or advances from any person for the purpose of trading or investing crypto currency/virtual currency.

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LATIN AMERICA

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Brazil's Supreme Court rules former Judge Sergio Moro's convictions of ex-President Lula were biased.

The rulings issued by former Judge Sergio Moro during the course of Operation Car Wash (*Operação Lava-Jato*), the largest anticorruption investigation in Brazilian history, which revealed a widespread bribery scheme at Petrobras, has been challenged before the Brazilian Supreme Court (STF) after former President Luiz Inácio Lula da Silva (Lula) filed for habeas corpus alleging Moro was biased during his (Lula's) trials.

Moro convicted Lula in 2017 for passive corruption and money laundering. The court of appeals upheld the conviction and increased the sentence to twelve years and one month of imprisonment. Lula was imprisoned on 5 April 2018. Lula's second conviction was in 2019, also for corruption and money laundering; however, this conviction was overturned. The former president was released in 2019, after the STF ruled that defendants could only be imprisoned after all appeals to higher courts had been exhausted.

Surprisingly, the decision that brought the case back to the media's attention was not the result of one of Lula's defense appeals but Justice Edson Fachin's single decision on a procedural issue. On 8 March 2021, Fachin set aside all of Lula's convictions by the Federal Court of Parana arising out of Operation Car Wash. Fachin ruled the federal court did not have jurisdiction to judge matters unrelated to Petrobras. For this reason, the court did not have the power to sentence Lula in four prosecutions that did not have any link to Petrobras. Fachin did not analyze the convictions themselves—it was a procedural (technical) ruling.

In summary, in Brazil, criminal jurisdiction is established under two main rules: (1) place of residence of the defendant; and (2) location of the offense; however, the case law established that cases from Operation Car Wash should be prosecuted in the Federal Court of Parana due to the connection between the crimes and the fact that the Operation Car Wash task force was based in Parana. Thus, Lula's cases were initially assigned to the Federal Court of Parana because the allegations came from the plea agreements settled under the Petrobras investigations. Subsequently, the case law clarified that the Curitiba jurisdiction exception only applied to Petrobras cases and not to any claim resulting from the Car Wash investigations.

With Fachin's decision, there was an expectation the STF would suspend the trial of Lula's defense appeal to declare Moro's decisions biased—since the procedures were considered null. The defense's request resulted from what is known as Car Wash Leaks, which made public alleged conversations between Moro and the federal public prosecutors, viewed as a joint effort to convict Lula, which would violate the due process of law principle. The STF decided to proceed with the ruling on Lula's defense appeal, and on 23 March 2021, the STF ruled the evidence showed Moro's behavior was biased.

Moro tried three of the five lawsuits against Lula. Thus, if the plenary court withdraws Fachin's decision on the jurisdictional issue, Lula will still have two other convictions against him, although there are discussions as to whether Moro's conduct also may have affected the other two cases. Nevertheless, at this moment, these decisions reinstate Lula's political rights, enabling him to be a candidate in the 2022 presidential elections.

MERCOSUL celebrates 30th anniversary.

In March 2021, MERCOSUL, the Southern Common Market, completed thirty years of cooperation among its state-members. It is made up of four Latin American countries—Argentina, Brazil, Paraguay, and Uruguay. Venezuela became part of the group in 2012 but was banned in December 2016 due to noncompliance with the bloc's rules.

MERCOSUL was created through the Assunção Treaty in 1991. MERCOSUL aimed to create deep integration within the state-members and to establish a common market, with free internal circulation of goods, services, and productive factors; creation of the common external tarif (TEC) on trade with non-member countries; and adoption of a common commercial policy.

The presidents of the state-members attended a virtual meeting on 26 March 2021 to celebrate the anniversary; however, the meeting revealed some discontentment with the bloc. President Luiz Lacalle Pou of Uruguay asked for more trade liberalization and stated that MERCOSUL could not burden its members. In response, President Alberto Fernandéz of Argentina stressed that if Uruguay believes MERCOSUL is a burden, it should leave the bloc. President Jair Bolsonaro of Brazil and Fernandéz disagreed on reducing the TEC. In addition, Bolsonaro stated it is important that the bloc is modernized and asked for new rules for the automotive and sugar sectors to comply with international standards.

MERCOSUL called a special meeting in April to consider these and other issues. A summary of this meeting was not available when this report was submitted.

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MIDDLE EAST

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Qatar suspends WTO dispute with United Arab Emirates.

As discussed in the past few editions, Qatar, the United Arab Emirates (UAE), Bahrain, and the Kingdom of Saudi Arabia have been involved in a series of international arbitrations related to the dispute and blockade between Qatar and most of the Gulf Cooperation Council. Among them was a case by Qatar against the UAE in the World Trade Organization (WTO) related to the border closure. Recently, all parties have taken steps to resolve the underlying political dispute between them. As part of those steps, Qatar has asked the WTO arbitral panel to suspend the proceedings.

British executive faces extradition after UAE court conviction.

Almost ten years ago, Oaktree Capital Management LP invested in the Gulmar Group, an undersea oil-services contractor, after Gulmar ran short of cash when the Venezuelan government seized its assets. Gulmar, along with a co-venture partner, subsequently won a large arbitration award against state oil company Petróleos de Venezuela SA, or PdVSA, but the ownership of the arbitral proceeds has now generated several disputes between Oaktree and Gulmar. The dispute led to a UAE court passing a jail sentence in 2016 on Martin David Graham, a senior vice president in Oaktree's London office, for purportedly stealing, on Oaktree's behalf, a portion of the US$644 million PdVSA arbitration award. Graham was recently arrested in the United Kingdom and faces extradition to the UAE.

Morocco considers legalizing medicinal cannabis.

In Morocco's impoverished Rif mountains, local farmers have been growing and selling cannabis for years. While it was illegal to do so under Moroccan law, authorities effectively turned a blind eye to the practice due to the consistent poverty in that area. That could be changing, however. In mid-March, the government approved a law to allow the cultivation, export, and use of cannabis for medicine or industry. Parliament will likely ratify the law soon. Many in the Rif region want the government to legalize it recreationally.

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NORTH AMERICA

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U.S. Vice President Kamala Harris faces pressure to address record migration from Mexico.

Having taken up the perennially thorny issue of Mexico-U.S. immigration, Vice President Harris faces criticism even from members of her own party over her failure to visit the U.S. southern border* and after she warned against migrating to the United States unlawfully. More than 175,000 undocumented migrants arrived at the U.S. southern border in April 2021, the highest number in more than two decades.

On a visit to Mexico, Vice President Harris and President Andrés Manuel López Obrador of Mexico agreed that both countries had an interest to address the root causes of migration. Harris traveled to Mexico and to Guatemala on a mission to boost economic development in the region.

*Since this writing, Vice President Harris visited the border at El Paso on 25 June 2021.

Controversial Keystone XL Pipeline project officially ends.

Following the Biden administration's revocation of a key cross-border presidential permit in January 2021, developer TC Energy has officially ended construction

of the Keystone XL Pipeline project, which would have carried oil derived from oil sands in Alberta, Canada, to the U.S. Gulf Coast. Supporters of the project maintained that the pipeline was safe and would have created thousands of jobs in construction and the energy sector. Environmentalists criticized both the particularly damaging nature of the oil derived from oil sands and the danger of transporting that oil through environmentally sensitive lands.

Ransomware/cyberattacks are here to stay.

Ransomware and other cyberattacks have become more sophisticated and widespread during the COVID-19 pandemic. That does not mean, however, that those attacks will go away when the pandemic does. Jaycee Roth, associate managing director in Kroll's Cyber Risk practice based out of Toronto, reports that 96% of all new cyberattacks now involve ransomware, much of which originates overseas. Roth, who works extensively with lawyers, said the pandemic "created a whole new pool of potential victims for cyber attackers."

Although U.S. and Canadian law firms are prime targets for attacks, few are adequately prepared to defend against a ransomware attack. Firms can lower their risk simply by engaging in automatic and routine backing up of data; however, the danger remains that a bad actor may gain access to and copy sensitive data—and threaten to publish it unless ransom is paid. Such attacks can only be defeated before they start, by investing in robust data security systems and by training employees to be on the alert for attempts to compromise data.

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

WESTERN EUROPE

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European countries temporary suspend AstraZeneca vaccine causing further delay in vaccine rollout.

Major European countries such as Germany, France, Italy, and Spain temporary suspended the AstraZeneca vaccine in March after several reports of blood clots in patients. The temporary suspension caused further delay in controlling the COVID-19 pandemic in an already struggling Europe.

The EU sought guidance and an official statement from the European Medicines Agency (EMA) before lifting the suspension. After a preliminary review, the EMA concluded the benefits of the vaccine outweigh the risk of side effects. According to the EMA, the vaccine may be related to rare cases of blood clots in connection with thrombocytopenia. Some patients showed low levels of blood platelets with or without bleeding, and others had clots in the vessels draining blood from the brain; however, the EMA stated further the vaccine does not increase an overall risk of blood clots. According to the EMA, there is also no link to a specific batch of vaccine or a specific manufacturing facility. In about 20 million vaccinated people, only 25 showed either of the above-mentioned symptoms. The reported cases were almost all in women under 55.

As a consequence of the temporary hold, appointments for vaccinations were cancelled and the vaccine rollout in Europe was further delayed. After the release of the EMA report, EU countries followed different procedures on how to continue administering the AstraZeneca vaccine to their citizens. Germany suspended the use of the AstraZeneca vaccine for people under 60. France approved to administer AstraZeneca vaccines only to people 55 and older, Sweden and Finland to persons 65 or older, and Iceland to persons 70 or older.

EuGH enters multimillion-dollar judgment against German telecommunication company and its Slovak subsidiary for breach of EU antitrust rules.

After years of legal battles, the EuGH entered judgment on 25 March 2021 and fined the German telecommunication company Deutsche Telekom and its Slovak subsidiary Slovak Telekom with a heavy penalty. Deutsche Telekom was fined with a competition penalty of €19 million, and an additional fine of about €38 million was imposed for Deutsche Telekom and Slovak Telekom together.

After an investigation by the European Commission in 2014, the Commission fined Slovak Telekom and Deutsche Telekom for "abusive conduct in Slovak broadband market," finding the companies had breached EU antitrust rules. The companies followed an abusive strategy for over five years to eliminate competitors from the Slovak market for broadband services. The Commission decided that Slovak Telekom refused to provide unbundled access to its local loops to competitors. Additionally, the company forced a margin squeeze on alternative operators. This behavior was detrimental to customers and competitors.

The parent company Deutsche Telekom is jointly and severally liable because it has significant control over Slovak Telekom. Deutsche Telekom is, for instance, a 51% shareholder of Slovak Telekom and also has the right to nominate the majority of Slovak Telekom's board of directors.

Therefore, it was concluded Deutsche Telekom is responsible for the conduct of Slovak Telekom. The Commission imposed an additional fine for Deutsche Telekom to ensure sufficient discouragement in the future and also to sanction Deutsche Telekom's repeated abusive behavior. The company had already been fined for similar conduct in Germany in 2003.

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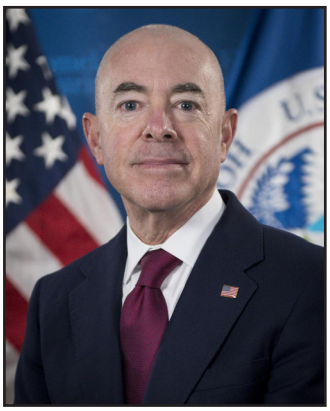
International Trade, from page 27



DHS Secretary Alejandro Mayorkas

USTR Katherine Tai

International trade enforcement by the Biden administration has also emphasized interdiction at the U.S. border of alleged counterfeit merchandise attempting to enter the United States. This includes not only the typical handbags, clothing, shoes, and cosmetics, but also medicine, tires, and electronics. Almost 85% of merchandise seized by CBP, worth billions of dollars, comes from China. Interestingly, in 2020 under the Trump administration, anything made in Hong Kong was considered to be "Made in China." As of 11 August 2020, it was (and is) no longer legally permissible to import products into the United States with the label "Made in Hong Kong." If you have any such merchandise, you may consider them collector's items. The Biden administration has made no efforts to change that policy.

Lastly, let's talk about the significance of international trade embargoes and sanctions. That is when the U.S. government, usually beginning with an Executive Order from the White House, and then followed up by a regulatory change effected by the Office of Foreign Assets Control (OFAC), an agency of the U.S. Department of the Treasury, identifies entire countries, corporations, or individuals that are prohibited from doing business in the United States or with any "U.S. person." A U.S. person includes any citizen or permanent resident wherever they are located, and any U.S. corporate entity and subsidiaries. So, if you are a U.S. citizen, and you move to France, you are still subject to U.S. export control laws. Once again, under the Trump administration, a record number of foreign companies, organizations, and individuals were sanctioned, meaning that no U.S. person could do any business with them. Think sanctions against Russian persons and companies that are connected to the invasion of the Crimea (formerly Ukraine). Another example is the United States adding numerous Chinese government officials to the list of prohibited persons in response to the reported Uyghur genocide and human rights abuses in Hong Kong and Tibet. Of course, China and Russia have created their own lists of persons and companies that are no longer welcome to visit their countries or do any business with their companies.

What does all this mean for international trade with the United States? Let's be clear; in 2020, for the first time, despite all the chaos and bombastic statements by former President Trump, China became the #1 trading partner with the United States, beating both Mexico and Canada. My prediction is that will continue, despite President Biden's announcements of initiating a free trade agreement between the United States and the European Union (EU). What I do expect to be different under the Biden administration is a departure from the Trump administration's "America First" program in that the Biden administration will cooperate with our country's partners and allies in negotiating with China.

Other predictions for the Biden administration over the next four years:

1. The sanctions against the Maduro regime in Venezuela are stricter than ever. Those sanctions will remain until the Maduro regime is gone, and then normal trade relations will resume with our former significant trading partner, especially for oil.
2. I remain hopeful that the 60-year-old U.S. embargo against Cuba will finally end. The president has much authority in international relations. Remember, the ILS led a delegation of lawyers to Havana in April 2016 when President Obama relaxed enforcement of certain OFAC regulations. Such activities were immediately halted under the Trump administration, and tourism and other cultural exchanges of Americans to Cuba plummeted. It will

take an act of Congress to remove the embargo.

3. The international relations between the United States and Iran were "hot" under the Trump administration, with Iranian gunboats attacking oil tankers in the Persian Gulf. There remains an embargo by the United States against Iran, except for some food and medical products. The Biden administration has actively pursued negotiations with the Iranian government as part of the "Iran Nuclear Deal" whereby Iran would again be allowed to sell its oil on the international market.

In conclusion, the United States remains the greatest producer of goods and services in the history of the world. Our American culture from the very formation of this country was created by international trade. In our everyday lives, we drive foreign-made cars, eat foreign-made food, use foreign-made electronic devices (you are looking at one now!), and we do all this without even thinking about it. International trade is here to stay, and increasingly so in this wonderful globally connected world where you can track your Apple iPad made in China from the manufacturer to delivery at your door, where the transit time between port of departure and port of entry has been reduced, and where generally the price of goods in the international supply chain has been reduced because of technological changes. So, enjoy that cup of coffee or tea in the morning. Whenever you do so, please remember, you are actively involved in international trade.

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

The online form can be found on the website under "Member Profile."

Immigration Strategies, from page 35

designees, the State Department has *only* provided specific guidance and information on NIEs for certain travelers from the Schengen Area, the UK, and Ireland. On 10 July 2020, the secretary of state announced that certain travelers from Schengen Area countries could resume traveling to the United States, if, as determined by a consular officer, they qualify for an NIE.[10] The national interest determination covered certain technical experts and specialists, senior-level managers and executives, treaty traders and investors, professional athletes, and their dependents, and allowed for a job creation and economic benefit/impact argument as a basis for the NIE request.[11]

On 2 March 2021, the secretary of state revised the prior NIE guidance for the Schengen Area, the UK, and Ireland, and rescinded four categories of travelers, including their dependents, who were previously eligible for an NIE.[12] The four rescinded categories are technical experts and specialists; senior-level managers and executives; treaty traders and investors; and professional athletes.[13] These travelers are no longer automatically eligible for consideration for an NIE for travel to the United States unless they qualify under another NIE category. Furthermore, the secretary of state also imposed a new, far stricter standard for national interest determinations, limiting them by granting them only to travelers seeking to provide vital support for critical infrastructure.[14] The DHS-defined critical infrastructure sectors are chemical, commercial facilities, communications, critical manufacturing, dams, defense industrial base, emergency services, energy, financial services, food and agriculture, government facilities, health care and public health, information technology, nuclear reactors, transportation, and water/wastewater systems.[15]

Finally, the latest guidance from the secretary of state also stated that NIEs based on the creation or retention of U.S. jobs or economic impact argument, on their own, will no longer be accepted at the posts and instead will be referred to the State Department in Washington, D.C., for approval by the assistant secretary of consular affairs.[16] Embassies and consulates are no longer authorized to approve such requests. These cases require significant justification and compelling circumstances and must now be approved in Washington, D.C., so practitioners should be cognizant of a much longer processing time in those cases.

Procedure for Requesting a National Interest Exception

Even though U.S. embassies have begun to resume routine visa services, the level of services offered will vary depending on the post, its available resources, and any relevant COVID restrictions it and the host country have implemented. To successfully schedule a visa appointment and to be eligible for subsequent visa issuance for clients in the restricted countries, attorneys must proactively demonstrate their clients' eligibility for a specified NIE. Attorneys should also review the consular post's website for NIE guidance and if none is available, then email the post to confirm nonimmigrant visa (NIV) scheduling procedures, including how to obtain an NIE waiver and eligibility/process requirements. NIEs, when granted, are generally valid for travel within thirty days of issuance and allow one entry into the United States.

NIE Guidance From U.S. Consulate General in Frankfurt, Germany

The U.S. Consulate General in Frankfurt, Germany, issued relevant guidance on 8 March 2021 to alert German businesses to changes to the NIE policy for travelers to the United States.[17] The guidance stated that no previously issued visas or NIEs will be revoked due to the new policy.[18] The guidance also gave examples of what type of travel qualifies and does not qualify for NIE consideration. According to the guidance, NIEs can no longer be approved for senior executives traveling to the United States to observe operations, hold regular meetings, or conduct routine operational travel.[19] The guidance also advises that "senior-level employees, investors and treaty traders (including individuals with valid E-1 and E-2 nonimmigrant visas or applications) whose travel does not provide vital support of critical infrastructure sectors or critical

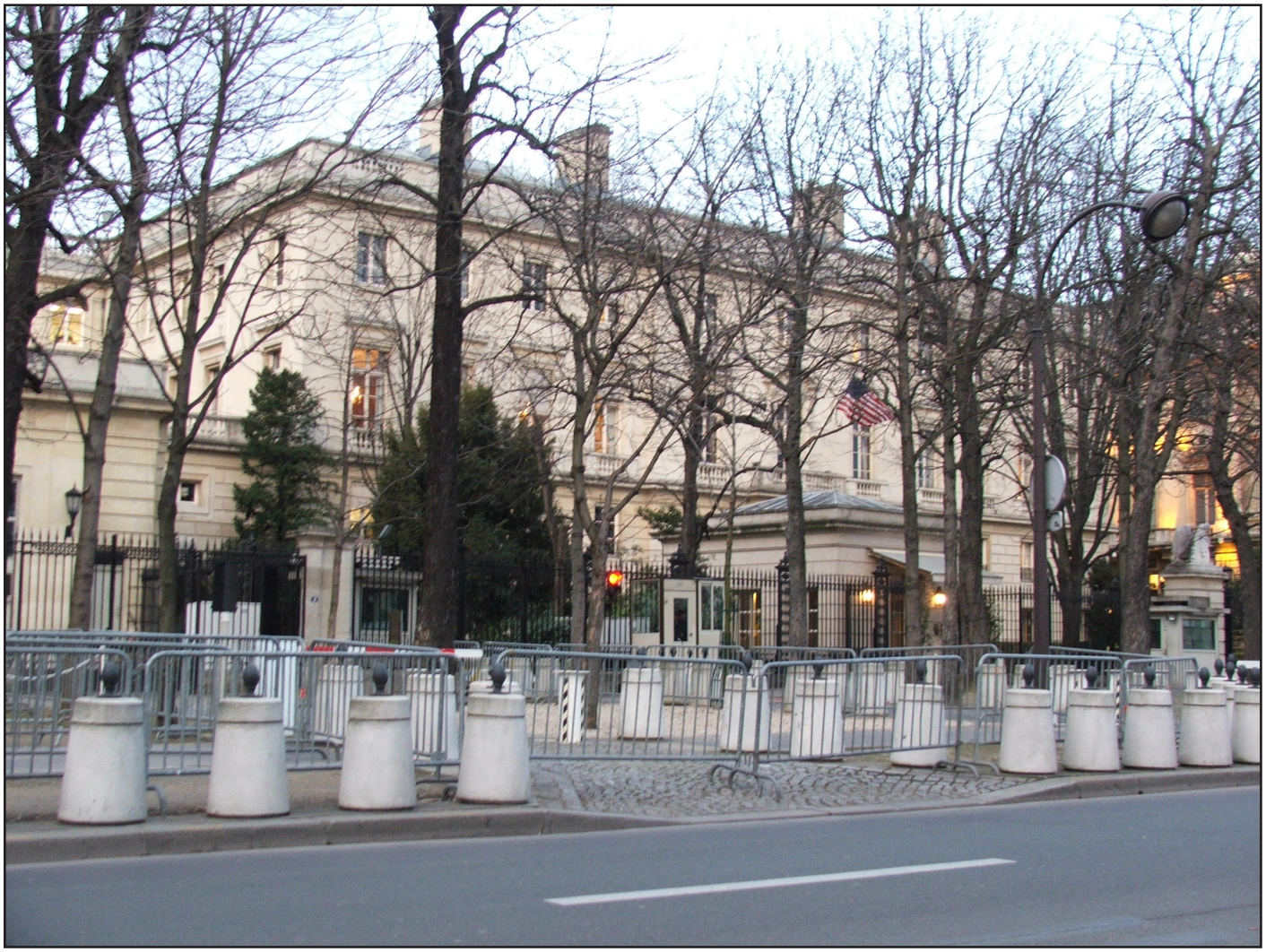
Immigration Strategies, continued

infrastructure linked supply chain" no longer qualify for NIE consideration.[20]

According to the guidance, the following types of travel *do qualify* for NIE consideration:

- Individuals who provide vital support of critical infrastructure sectors. Vital support "pertains to the installation, acquisition, maintenance, and essential safety training necessary to sustain the supply and production chains in the referenced sectors, as well as other functions performed by specialists or other individuals that are essential to continuity within a given sector."
- Public health professionals, as their travel will help to alleviate the effects of the COVID-19 pandemic.
- H-1B, L-1A, and L-1B applicants seeking to resume ongoing employment in the United States in the same position with the same employer and visa classification.[21]

In cases of travelers attempting to enter the United States under new H-1B applications, the guidance states that technical specialists, senior-level managers, and other workers whose travel is necessary to facilitate the immediate and continued economic recovery of the United States are eligible for NIE consideration.[22] In order



U.S. Embassy in Paris, France
Photo: Wikipedia

to qualify, the applicant is required to meet at least two of the following five criteria:

1. The petitioning employer has a continued need for the services or labor to be performed by the H-1B nonimmigrant in the United States.
2. The applicant's proposed job duties or position within the petitioning company indicate the individual will provide significant and unique contributions to an employer meeting a critical infrastructure need.
3. The wage rate paid to the H-1B applicant meaningfully exceeds the prevailing wage rate (see Part F, Questions 10 and 11 of the Labor Condition Application) by at least 15%.
4. The H-1B applicant's education, training, and/or experience demonstrates unusual expertise in the specialty occupation in which the applicant will be employed.
5. Denial of the visa pursuant to P.P. 10052 will cause financial hardship to the U.S. employer.[23]

In cases of travelers attempting to enter the United States under L-1A classification, the guidance states that senior-level executives and managers filling a critical business need of an employer meeting a critical infrastructure qualify for NIE consideration.[24] The applicant must meet at least two of the following three criteria and cannot be traveling to establish a new office in the United States:

1. The applicant is a senior-level executive or manager.
2. The applicant has spent multiple years with the company overseas, indicating a substantial knowledge and expertise within the organization that can only be replicated by a new employee within the company following extensive training that would cause the employer financial hardship.
3. The applicant will fill a critical business need for a company meeting a critical infrastructure need.[25]

NIE Guidance From U.S. Embassy in Paris, France

The U.S. Embassy in Paris, France, posted the following guidance on its website as of 2 April 2021 regarding NIE requests for travelers based on providing vital support of critical infrastructure sectors: "Please be prepared to answer the following questions as accurately, and with as much detail, as possible . . .

1. "In which critical infrastructure industry is your work?
2. What are the exact specific activities you intend to perform?
3. How do these activities directly support the critical infrastructure?
4. Why do these activities require your physical presence in the United States?
5. Why will alternatives such as video conferencing, teleworking, or actions by proxy fail to directly support the critical infrastructure?"[26]

General NIE Requests

For practitioners representing clients (investors, entrepreneurs, and corporations) from any of the areas with COVID-19 travel restrictions, the focus will be on presenting the most compelling and convincing argument to the consular post that your client's physical presence in the United States is essential. Practitioners should be cognizant of the guidance presented herein and apply it to applications in other jurisdictions. The first step in an NIE request is to establish that the proposed activity must physically take place in the United States and cannot be postponed or conducted remotely. The last two questions posted on the website of the U.S. Embassy in Paris directly address this issue. Practitioners must argue that the applicant's business activities require his/her hands-on presence and/or expertise that cannot be performed remotely.

Second, practitioners must tie the traveler's business needs for entering the United States to at least one of the sixteen critical infrastructure sectors previously listed. Sectors such as financial services, communications, health care, and transportation can be interpreted broadly to try to fit a company's services within its parameters. If the business is tied to one of

the listed critical sectors, practitioners must stress in the NIE request the company's size (if applicable), financial assets, benefit to the U.S. economy and infrastructure, and its services and support assertions with the relevant financial/corporate documents.

Third, the specificity of the applicant's duties is essential to the success of the NIE request. As stated in the guidance from the U.S. Consulate General in Frankfurt, senior executives traveling to the United States to observe operations, attend regular meetings, or conduct other general duties no longer qualify for NIE consideration. Practitioners must be specific about the exact duties the applicants will perform and stress their significance to the successful financial operations of the business. The more specific and vital the duties listed are, the greater the likelihood of success of the NIE request.

Fourth, the NIE request must clearly establish how the applicant's duties specifically and directly tie to supporting the critical infrastructure of the business and that of the United States. The questions listed on the website of the U.S. Embassy in Paris specifically require applicants to demonstrate how their activities directly support the critical infrastructure. Practitioners must stress the unique nature of the applicant's qualifications and expertise and argue that no one else in the company can competently perform the applicant's duties in the United States. Practitioners should focus on the applicant's education, professional experience, awards, and other evidence to support the applicant's unique qualifications for his/her position in the company.

New H-1B Applications

For new H-1B applications, the guidance from the U.S. Consulate General in Frankfurt is paramount as the specific five criteria listed will assist practitioners submitting NIE requests in other jurisdictions. New H-1B applicants must meet at least two of the five criteria to qualify for consideration. Practitioners must tie the company to a critical infrastructure sector; stress the continuing need for the employee; establish that the employee's wage exceeds the prevailing wage by at least 15%; evidence how the applicant's education, training, and/or experience demonstrates unusual expertise in the specialty occupation; or argue that the company will suffer financial hardship if the applicant's H-1B visa is denied. As the company's attachment to a critical infrastructure sector is only one of the five criteria, for businesses that find it difficult to meet this prong, practitioners should focus on qualifying for two of the remaining four criteria for new H-1B applicants.

New L-1A Applications

For new L-1A applications, the guidance from the U.S. Consulate General in Frankfurt is also vital, as it specifically prohibits executives or managers coming to open a new office in the United States from qualifying for an NIE request. Applicants must establish two of the three criteria previously listed. For L-1A applicants coming to work in an existing business that is not tied to a critical infrastructure sector, practitioners must establish that the applicant is a senior-level executive or manager who has spent multiple years with the company overseas, indicating a substantial knowledge and expertise within the organization.[27] As in all NIE requests, practitioners must determine if their clients qualify for NIE consideration and focus on the criteria that provide the most compelling arguments for success.

Conclusion

COVID-19 travel restrictions are still in effect for immigrants and nonimmigrants from the Schengen Area, the UK, Ireland, Brazil, and South Africa. There are several exceptions for immediate family members of U.S. citizens and lawful permanent residents. For business travelers with no qualifying family members or visas, there is a national interest exception available. Though the standard for consideration has become more stringent, with knowledge of the different posts' guidance, key strategies, and proper preparation, successful NIE requests can be prepared on behalf of clients.

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Endnotes

1 *Suspension of Entry as Immigrants and Nonimmigrants of Persons Who Pose a Risk of Transmitting 2019 Novel Coronavirus and Other Appropriate Measures to Address This Risk*, 85 Fed. Reg. 6709 (Jan. 31, 2020).

2 *Suspension of Entry as Immigrants and Nonimmigrants of Certain Additional Persons Who Pose a Risk of Transmitting 2019 Novel Coronavirus*, 85 Fed. Reg. 12855 (Feb. 29, 2020).

3 *Suspension of Entry as Immigrants and Nonimmigrants of Certain Additional Persons Who Pose a Risk of Transmitting 2019 Novel Coronavirus*, 85 Fed. Reg. 15045 (Mar. 11, 2020).

4 *Suspension of Entry as Immigrants and Nonimmigrants of Certain Additional Persons Who Pose a Risk of Transmitting 2019 Novel Coronavirus*, 85 Fed. Reg. 15341 (Mar. 14, 2020).

5 *Suspension of Entry as Immigrants and Nonimmigrants of Certain Additional Persons Who Pose a Risk of Transmitting 2019 Novel Coronavirus*, 85 Fed. Reg. 31933 (May 24, 2020).

6 *Suspension of Entry as Immigrants and Nonimmigrants of Certain Additional Persons Who Pose a Risk of Transmitting Coronavirus Disease 2019*, 86 Fed. Reg. 7467 (Jan. 25, 2021).

7 *Id.*

8 *Id.*

9 *Id.* at 86 Fed. Reg. 7467 (Jan. 25, 2021).

10 https://it.usembassy.gov/wp-content/uploads/sites/67/nie-travel_15july20.pdf.

11 *Id.*

12 https://travel.state.gov/content/travel/en/News/visas-news/national-interest-exceptions-from-certain-travelers-from-the-schengen-area-uk-and-ireland.html.

13 *Id.*

14 *Id.*

15 https://www.cisa.gov/critical-infrastructure-sectors.

16 https://www.jdsupra.com/legalnews/president-proclamation-10052-times-out-1078601/.

17 https://www.aila.org/infonet/us-consulate-in-frankfurt-provides-guidance.

18 *Id.*

19 *Id.*

20 *Id.*

21 *Id.*

22 *Id.*

23 *Id.*

24 *Id.*

25 *Id.*

26 https://fr.usembassy.gov/visas/.

27 https://www.aila.org/infonet/us-consulate-in-frankfurt-provides-guidance.

The Pitfalls of Domesticating a Foreign Subpoena, from page 37

there must have been some court involvement, such as the issuance of a commission by a state court clerk or signature of the subpoena by a state court judge." On the one hand, dissecting the court's ruling suggests that if a subpoena is issued in connection with a pending litigation, there need not be any court involvement, thus permitting issuance by counsel alone. On the other hand, the Virgin Islands law empowers its commissioner to issue subpoenas for its investigations.[11] Therefore, the foreign subpoena should have qualified as an out-of-state subpoena because the commissioner "is authorized to issue a subpoena under the laws of that state." UIDDA Commentary. Thus, the First Department's ruling appears to contradict itself as well as disregard the UIDDA drafters' clear explanation. *Matter of Am. Express Co. v. United States V.I. Dep't of Justice*, 178 A.D.3d 426, 427 (App. Div. 2019).

But all is not lost. Recently, the Supreme Court of New York for New York County found that a plaintiff could not domesticate a subpoena issued by the plaintiff's counsel in a federal proceeding in the Virgin Islands because the parties have not yet participated in a Rule 26(f) conference, and thus, discovery was not yet permissible under the Federal Rules of Civil Procedure.[12] *Olson v. Glencore, Ltd.*, 70 Misc. 3d 1219(A) (Sup. Ct. 2021). This ruling accords with the UIDDA drafters' comment that "under authority of a court of record" includes "anyone who is authorized to issue a subpoena under the laws of that state." Here, "the laws of that state" refers to the Federal Rules of Civil Procedure, which generally empower attorneys to issue subpoenas.[13] Thus, because Rule 26 did not permit the plaintiff's attorney to issue discovery, the subpoena was not issued "under authority of a court of record."

Franklin County Court House, Kentucky
Photo: www.courthouses.co

The Pitfalls of Domesticating a Foreign Subpoena, continued

Until New York unifies its case law, the way to play it safe is to have a foreign subpoena stamped by a clerk of court of the issuing state and submit the original or a true copy of the foreign subpoena to a New York clerk of court together with the proposed domesticated subpoena.

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Endnotes

1 CPLR 3119(a)(1).

2 Uniform Interstate Depositions And Discovery Act with Prefatory Note and Comments, drafted by the National Conference of Commissioners on Uniform State Laws and by it Approved and Recommended for Enactment in all the States at its Annual Conference Meeting in Pasadena, California, on 27 July-3 August 2007, available at https://my.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=f67a712b-0585-c0be-3e71-0523c8de4089&forceDialog=0 last visited on 27 Apr. 2021.

3 Fla. R. Civ. P. 1.410(a) ("Subpoenas for testimony before the court, subpoenas for production of tangible evidence, and subpoenas for taking depositions may be issued by the clerk of court or by any attorney of record in an action").

4 Fla. Const. Art. V, § 2 ("The supreme court shall adopt rules for the practice and procedure in all courts including the time for seeking appellate review, the administrative supervision of all courts, the transfer to the court having jurisdiction of any proceeding when the jurisdiction of another court has been improvidently invoked, and a requirement that no cause shall be dismissed because an improper remedy has been sought").

5 *In Brightmore Home Care of Ky. Llc v. Commonwealth*, No. 2019-CA-1409-MR, 2021 Ky. App. Unpub. LEXIS 44, at *14 (Ct. App. Jan. 22, 2021) ("As the Cabinet was permitted under KRS 216B.040(3)(b) to issue subpoenas, I believe it qualifies as a court of record and subpoenas it issued that were valid in Kentucky could certainly be the basis for obtaining subpoenas in Utah through the UIDDA").

6 The court encountered the issue when disposing of the plaintiff's attempt to invalidate an arbitration clause because the arbitration allegedly violated the effective-vindication rule by not providing the plaintiff the same scope of discovery as in federal courts. The court reminded the plaintiff that while discovery in arbitration "might not be as extensive as in the federal courts, by agreeing to arbitrate, a party 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.'" *In Butler v. ATS Inc.*, No. 20-CV-1631 (PJS/LIB), 2021 U.S. Dist. LEXIS 70707, at *24-25 (D. Minn. Apr. 13, 2021) (*quoting Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991)).

7 *Boyarsky v. Acadia Realty Tr.*, No. 53667/14, 2014 N.Y. Misc. LEXIS 6545, at *7 (Sup. Ct. May 9, 2014).

8 ALM R. Civ. P. Rule 45 ("Every subpoena shall be issued by the clerk of court, by a notary public, or by a justice of the peace, shall state the name of the court and the title of the action, and shall command each person to whom it is directed to do the following at a specified time and place: to attend and give testimony; to produce designated documents, electronically stored information, or tangible things in that person's possession, custody, or control; or to permit inspection of premises. The clerk, notary public, or justice of the peace shall issue a subpoena signed but otherwise in blank, to a party requesting it, who shall fill it in before service").

9 Based on the court records, the Florida counsel filed a Notice of Production from Non-Party on 2 August 2018, Filing # 75886361. The notice did not have the proposed subpoena attached to it, as required under Rule 1.351. Then, on 20 February 2019, the Florida counsel filed the subpoena in the Florida action, Filing # 85232943. Interestingly, the Florida attorney who issued the subpoena was barred both in Florida and New York.

10 *Matter of Matter of Enf't of Non-Party Subpoena Duces Tecum Issued by Kings Cty. Clerk. E. Coast Jewelry Distribs., Inc. v. Jomashop, Inc.*, 2020 NY Slip Op 32293(U), ¶ 3 (Sup. Ct.) ("[T]here is no evidence in the record that a subpoena similar to the one issued by the [New York] County Clerk was ever issued under authority of the Florida Court. The only subpoena that is part of the record is the subpoena prepared by petitioners' New York counsel which was presented to the Kings County Clerk for execution. The fact that the parties to the Florida action may have agreed to the scope of the subpoena is of no moment").

11 12A V.I.C. § 104 empowers the commissioner to impose administrative fines for unfair trade practices. The section explicitly states that "[t]he Commissioner may issue a subpoena requiring the appearance of an individual and the production of documentation of every kind and description reasonably necessary for his deliberations."

12 The court rejected the plaintiff's arguments that the subpoena fell within an exception to Rule 26(f) discovery because neither the court's order setting an evidentiary hearing nor the defendant's silence following the plaintiff's notice of intent to serve a subpoena on a third party permitted early discovery. The court reiterated that "Rules 26(f) requires parties to 'confer as soon as practicable' to establish a discovery plan. Under Rule 26(d)(1), a party 'may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order.'" *Olson v. Glencore, Ltd.*, 70 Misc. 3d 1219(A) (Sup. Ct. 2021).

13 Fed. R. Civ. P. 45(a)(3).

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