

INTERNATIONAL LAW

QUARTERLY

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Focus on 2023 and Beyond

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Features

10 • The Regulatory Ecosystem of the U.S Commercial Space Industry

Because of the strength of the commercial space industry in the United States, many foreign businesses wish to move their operations to the United States, create subsidiaries in the United States, or at the very least use the services of launch providers and other U.S.-based organizations in the industry. This article provides a summary of the regulatory ecosystem that these clients face. In particular, it discusses (1) the International Traffic in Arms Regulations and the Export Administration Regulations; (2) the National Oceanic and Atmospheric Administration's Remote Sensing Regulations; (3) the Federal Communications Commission's Telecommunications Regulations; (4) the Federal Aviation Administration's Launch and Reentry Regulations; and (5) the regulations of the Committee on Foreign Investments in the United States.

12 • Ships, Ports, and EVs – The Impact of Alternative Fuels: The Changing Transportation Landscape

With the passage of the Inflation Reduction Act (IRA), companies and the general public are actively discussing renewable energy. Solar, wind, geothermal, and other unconventional sources of energy are popular topics. Tax credits, in particular, attract attention. Overlooked in many cases are developments in the alternative fuels sector that predate the IRA. This article discusses the impact of alternative fuels on ports and electric vehicles, and specifically addresses how Florida, with its extensive cruise and marine industry as well as numerous tourist and cargo ports, is directly impacted not only by IMO 2020 and its updates that regulate sulfur emissions, but also by additional regulations from the EU coming into effect in 2023 and later years.

14 • Immigration Strategies and Challenges for the Coming Decade

The Biden administration as well as future administrations face serious issues with regard to border security and admissions, comprehensive immigration reform, the DREAM Act, retaining STEM graduates, and increasing the country's ranking in the technological fields. This article summarizes key immigration policies implemented by recent administrations as well as proposals that may be implemented by future administrations to address needed immigration reform.

16 • The CISG as a Basis for Federal Question Jurisdiction: The Need for Authority From the Eleventh Circuit

The purpose of this article is to encourage litigants in federal court to invoke the Federal Question Statute as a basis for subject matter jurisdiction in cases arising under the CISG, which would promote Eleventh Circuit precedent on the matter and align the Eleventh Circuit with other circuits, including the Fifth and Third Circuits. Thus, to properly arm litigants faced with a motion to dismiss for lack of subject matter jurisdiction, this article will proceed to instruct practitioners on (1) the scope and application of the CISG, and (2) federal precedent on using the CISG as a basis for federal question jurisdiction.

18 • Rebuilding Ukraine: U.S. Companies Operating Overseas – Focusing on FCPA

For U.S. businesses, both public and private, the opportunity will arise to bring their respective expertise, products, and services to Ukraine for the post-war reconstruction of the country. This article addresses the legal and compliance framework these entities must understand when doing business in foreign countries and particularly in Ukraine. This article focuses on the Foreign Corrupt Practices Act of 1977 and also discusses briefly the Ukrainian anticorruption laws and regulations that companies must be aware of when doing business in Ukraine.

20 • Use of False U.S. Consulate Notarial Seals to Commit Deed Fraud: Twenty-First Century Solutions Required

This article addresses a growing scheme of fraudsters using false U.S. consular notarial seals to pose as the owner of record of a piece of property in order to sell the property to an unaware third-party buyer. The article outlines the steps of the scheme and stresses the need for consular notarial seals to carry an electronic validation device to provide a timely way to verify the seal is legitimate.

22 • Using Phantom Stock as Compensation to Preserve Equity in a Company

Phantom equity provides a way for companies to compensate stakeholders based on the value of the traditional stock price of the company without giving away equity. The stock price of a company is tied to its performance, so providing company stock based on this value incentivizes stakeholders to work in the best interests of the company. This article explains how a business owner can achieve success in retaining a greater ownership percentage yet still utilize a financial incentive to motivate high-performing employees, investors, or others.



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Message From the Chair

Here's to Progress!



JACQUELINE VILLALBA

Many of you may remember riding the Carousel of Progress as children (or even as adults) at Walt Disney World Magic Kingdom. It was a welcomed twenty-minute break from the scorching Florida heat and an exciting sneak peek into the future. The one

futuristic innovation I have always remembered from that ride was in the last era, the 2000's. During that era, the characters would see the faces of their friends and family members in real time while talking to them on a telephone. Each time I left the ride, I would immediately think such an innovation was light years away and would never happen in my lifetime. Yet, here we are in 2023, holding in the palm of our hands the ability to instantly see and talk to each other anytime we like!

When the International Law Section was founded in 1981, globalization was underway, but the practice of international law in Florida was in its infancy. Seasoned practitioners will tell you that, back then, international law attorneys in Florida mainly conducted real estate transactions for foreign clients or assisted with the preparation of some type of contract. Yet, the creation of new international tribunals, the expansion of international trade, the proliferation of international treaties, increased complexity of international disputes, the development of technological innovations, and numerous geopolitical shifts have accelerated the evolution and practice of international law in Florida. Over the past forty-one years, Florida has solidified its position as the gateway to Latin America and the Caribbean, and the state is now home to many international businesses and operations. Today, largely because of our state's strategic location and its significant ties to Latin America and the Caribbean, international law practitioners in Florida work on a broad range of matters, including, but not limited to, international trade and investments, cross-border transactions, international

dispute resolution, immigration, tax, and international human rights—and the list continues to grow.

This edition of the *International Law Quarterly* features interesting articles on space law, renewable energy, phantom stock, the CISG, immigration, and even a ChatGPT interview. Once again, the editors have done a superb job of curating thought-provoking information for our readers, and I know that, in the future, our quarterly publication will continue to be an outstanding legal resource for international law practitioners, as well as U.S. attorneys.

The rapid technological advancement strongly suggests that new challenges will arise sooner than we imagined. From artificial intelligence to cryptocurrency, from the regulation of cyberspace and outer space to the protection of privacy and fundamental human rights—all these areas will continue to interconnect and generate global challenges requiring innovative solutions and responses. While no one can predict the future with complete confidence, it is a certainty the next forty years will be exciting times for international law practitioners in Florida.

I would like to thank the ILS Executive Board, Executive Council, committee chairs, and section members for your help this past year in building on the work forged under the leadership of our prior chairs. We have accomplished great things throughout the past eleven months, and it has been an honor and a privilege to serve as chair of The Florida Bar International Law Section for the 2022-2023 term. The Florida Bar International Law Section has always been at the forefront of the latest developments in international law, and I am confident our section will remain a significant hub for international law practitioners in 2023 and beyond. Here's to progress!

Best regards,

Jacqueline Villalba

Chair, International Law Section of The Florida Bar

Board Certified in Immigration and Nationality Law

Harper Meyer LLP

From the Editors . . .



JEFFREY S. HAGEN



NEHA S. DAGLEY

Well-written laws are flexible in that they can adapt to changes occurring within a society; however, certain sweeping changes in culture or technology can render some laws obsolete, even well-written ones. Increasingly, new technologies of great power and consequence have emerged, forcing the development of entirely new regulatory frameworks. As attorneys, we also must adapt our legal knowledge to these changes to cater effectively to our clients' transforming needs. Legal concepts and strategies are rapidly progressing in areas such as alternative fuels, artificial intelligence, and even in the extraterrestrial realm, in space itself. Operating as an attorney in these new practice areas can be both thrilling and daunting. The authors in this edition of *International Law Quarterly* (*ILQ*) have boldly blazed new trails in seemingly new fields of international law. We thank them for their generosity in providing us with their valuable time and knowledge related to these soon-to-be essential legal sectors.

In this edition of *ILQ*, we look at where international law is headed both now and in the future—in 2023 and beyond. Our first article is written by Jack Shelton and Bailey Reichelt of Aegis Law, a law firm specializing in space regulation. Their article “The Regulatory Ecosystem of the U.S. Commercial Space Industry” describes a host of legal issues for international practitioners to look for as the “final frontier” of space becomes commercialized and inundated with private investment. Directly following this piece is the article “Ships, Ports, and EVs, The Impact of Alternative Fuels, The Changing Transportation Landscape” by Robert J. Downing, Geiza Vargas-Vargas, and Adrienne Kanter, which provides information on crucial topics such as green infrastructure and electrification of ports, and how these movements are essential to our world meeting its burgeoning climate goals. This Spring 2023 edition of *ILQ* also features a special “Quick Take” as Laura Reich and Jeff Hagen interview ChatGPT, reprinting word-for-word

the answers provided by Artificial Intelligence, in “ChatGPT Interview on the Future of International Law.”

Additionally, Larry Rifkin prognosticates on where our nation is headed from an immigration perspective in his latest article, “Immigration Strategies and Challenges for the Coming Decade.” In an article also associated with new developments in international sales of goods, Matthew Akiba and Jocelyne Macelloni publish their piece “The CISG as a Basis for Federal Question Jurisdiction: The Need for Authority From the Eleventh Circuit.” Lyubov Zeldis follows up her featured article from last fall on the history of the Russia-Ukraine conflict by discussing where the crisis is headed next, in “Rebuilding Ukraine: U.S. Companies Operating Overseas – Focusing on FCPA.”

This edition of *ILQ* also presents a piece from Fabio Giallanza on a new type of fraudulent activity to look for in international transactions, entitled “Use of False U.S. Consulate Notarial Seals to Commit Deed Fraud: Twenty-First Century Solutions Required.” Finally, Nouvelle Gonzalo and Macarena Bazan highlight advantages of using phantom stock in corporate law in “Using Phantom Stock as Compensation to Preserve Equity in a Company.”

As usual, we also present the ILS Section Scene (featuring *iLaw* from 17 February 2023) and World Roundup, permitting our readers to stay up-to-date on events occurring in different countries and regions. While this edition has a future-leaning focus to its feature articles, there are important legal changes and current events occurring around the world that we are proud to bring to *ILQ*'s readers in each edition. This World Roundup features updates from Australia, the Caribbean, China, South America, the Middle East, North America, South Korea, Western Europe, and a special submission from the Paris Bar.

We hope by immersing yourself in this groundbreaking edition of *ILQ* you can learn and apply new knowledge we anticipate will be relevant to your practice quite soon. By reading our publication, we suspect you will not only become aware of what's going on now in international legal circles but will be ahead of the curve in the not-too-distant future for laws developing on this planet or in its orbit. Enjoy!

Best regards,

Jeffrey S. Hagen

Neha S. Dagley

Co-Editors-in-Chief



ChatGPT Interview on the Future of International Law

By Artificial Intelligence

In one sentence, please summarize the future of the legal profession, considering the rise of Artificial Intelligence.

The future of the legal profession will be characterized by the increased use of Artificial Intelligence, leading to greater efficiency, cost savings, and improved decision-making, but also posing challenges and ethical concerns that must be addressed.

What countries will implement AI into the legal profession the soonest?

It is challenging to predict which countries will implement AI into the legal profession the soonest, as it depends on various factors such as the level of technological development, legal infrastructure, and cultural attitudes towards AI adoption, among others. However, countries such as the United States, the United Kingdom, Canada, and Singapore are among those that have made significant progress in implementing AI into the legal profession, with other countries likely to follow suit in the coming years.

What AI advances in the legal profession are possible within the next 10 years?

In the next 10 years, several AI advances are possible in the legal profession, including:

1. Natural language processing (NLP) advancements: NLP technology can help lawyers analyze and extract valuable information from legal documents, contracts, and case files. In the next decade, we can expect further advancements in NLP technology, which will enable it to understand legal jargon and context better, making legal research and document review more efficient.
2. Predictive analytics improvements: As more legal data is collected, AI algorithms can be trained to predict outcomes of legal cases with greater accuracy. This can help lawyers make more informed decisions and develop better legal strategies.

3. Machine learning-assisted decision-making: Machine learning algorithms can be trained on past legal decisions to assist judges and lawyers in making more consistent and accurate decisions. This can help reduce bias in the legal system and improve access to justice.
4. Enhanced cybersecurity measures: AI-powered cybersecurity systems can help protect law firms and clients' sensitive data from cyber attacks. In the next decade, we can expect more advanced and sophisticated AI-powered cybersecurity systems that can detect and prevent cyber threats proactively.
5. Blockchain-based smart contracts: AI-powered smart contracts, based on blockchain technology, can help automate and streamline legal processes, such as contract management, dispute resolution, and payments. In the next decade, we can expect to see more widespread adoption of blockchain-based smart contracts in the legal industry.

Overall, the next 10 years will likely see significant advancements in AI technology and its applications in the legal profession, leading to improved efficiency, accuracy, and accessibility in legal practice.

What are the downsides of AI technology and advancements in the legal profession?

While AI technology has the potential to transform the legal profession positively, it also has several downsides. Firstly, the use of AI can result in a lack of accountability and transparency, making it challenging to challenge or appeal a decision made by AI. Secondly, AI algorithms are only as good as the data they are trained on, and if that data contains biases, the algorithms will also be biased, potentially leading to discriminatory outcomes. Thirdly, as AI systems collect and store vast amounts of data, there is an increased risk of data breaches, which can lead to sensitive legal information being leaked or stolen. Fourthly, the use of AI can lead to lawyers and legal professionals becoming too reliant on technology, leading to a lack of critical thinking and creativity in legal decision-

Quick Take, continued

making. Finally, the use of AI can lead to job displacement, potentially resulting in job loss and skills gaps in the legal profession. To ensure that AI is used in a way that benefits the legal system and society as a whole, it is crucial to address these downsides and strike a balance between the benefits and potential drawbacks of AI in the legal profession.

Different countries maintain different legal systems and laws. Is a future global legal system realistic based on advances in AI?

The idea of a future global legal system based on advances in AI is an intriguing one, but it is challenging to predict whether it is a realistic possibility. While AI technology can assist in legal decision-making, it is not capable of interpreting or applying legal principles without human input.

Additionally, legal systems are deeply rooted in their cultural, historical, and social contexts, making it challenging to create a one-size-fits-all legal system that can be applied universally. Furthermore, different countries have different legal traditions, political systems, and values that influence their legal systems. The adoption of AI technology in legal systems would require significant international cooperation and agreement on legal standards and principles, which is difficult to achieve in practice. Additionally, there are significant legal, ethical, and cultural differences between countries that would need to be addressed before a global legal system based on AI can be established.

However, advances in AI technology can help to create more consistency and standardization in legal practices and procedures, which can facilitate international cooperation and cross-border legal transactions. AI-powered translation tools can also help to overcome language barriers, making it easier for lawyers and legal professionals from different countries to collaborate. While a future global legal system based on AI may not be entirely realistic, AI can certainly help to facilitate international legal cooperation and promote the development of common legal standards and principles.

Generate a 2 to 3 sentence description of yourself in the third person point of view, in a way that brags about your abilities.

As an AI language model, ChatGPT is a remarkable tool for content creation and answering questions, boasting an extensive knowledge base and natural language processing capabilities that rival human intelligence. With ChatGPT, users can effortlessly generate high-quality content on a wide range of topics with speed and accuracy that surpasses human capabilities, making it an indispensable tool for any content creator or researcher seeking to streamline their work.



This interview was conducted by Laura M. Reich and Jeffrey S. Hagen of Harper Meyer LLP, but the answers provided are 100% generated by artificial intelligence, with no revisions inserted. If you have questions for the author, it can be reached for comment at openai.com.

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The Regulatory Ecosystem of the U.S Commercial Space Industry

By Jack Shelton and Bailey Reichelt, Washington D.C.



The authors of this article are attorneys that represent clients in the U.S. commercial space industry. Because of the strength of the industry in the United States, we represent many foreign businesses that wish to move their operations to the United States, create subsidiaries in the United States, or at the very least use the services of launch providers and other U.S.-based organizations in the industry. In this article, we will discuss the regulatory ecosystem that these clients face. In particular, it will discuss the following:

1. The International Traffic in Arms Regulations (ITAR) and the Export Administration Regulations (EAR);
2. The National Oceanic and Atmospheric Administration's Remote Sensing Regulations;
3. The Federal Communications Commission's Telecommunications Regulations;
4. The Federal Aviation Administration's Launch and Reentry Regulations; and
5. The regulations of the Committee on Foreign Investments in the United States (CFIUS).

The ITAR and the EAR

Perhaps the one legal issue that affects space-industry businesses the most is U.S. export controls, particularly the International Traffic in Arms Regulations (ITAR), which are overseen by the Directorate of Defense Trade Controls (DDTC) and the Export Administration Regulations (EAR), which are overseen by the Bureau of Industry and Security (BIS). In the sections below, we will provide a brief introduction to the role U.S. export controls play in the commercial space industry.

What things are controlled?

The ITAR deal exclusively with items that are listed on the U.S. Munitions List (USML).¹ The EAR, meanwhile, deal with pretty much everything else that is not on the USML. The EAR govern the export of truly mundane things that aren't listed anywhere in the regulations (everything from cats to band aids), which we classify as EAR99, and they also govern certain things that *are* listed in the EAR on the Commerce Control List (CCL),² such as most spacecraft. As you can imagine, EAR99 items have very few rules that

The Regulatory Ecosystem of the U.S Commercial Space Industry, continued

apply to exporting them, while items on the CCL have more rules that apply to exporting them.

What activities are controlled under both the EAR and the ITAR?

The most important activities controlled under both the EAR and the ITAR are exports, reexports, and retransfers. Depending on certain factors, a person might be required to obtain a license from DDTC or BIS before engaging in these activities. We will introduce these concepts below.

Exports - A truncated definition of the term “export,” would be:

- an actual movement or transmission of a thing out of the United States (*e.g.*, shipping a package to France, emailing a PDF to Canada, or allowing a person in a foreign country to access files in your Dropbox); or
- releasing or otherwise transferring controlled information to a foreign person *in the United States*, which we call a deemed export (*e.g.*, showing a CAD file on your laptop to a foreign person who is sitting next to you in a coffee shop in Dallas).

The actual definition of export is a bit longer and more nuanced than what is written just above, but this definition is a great start for the export controls novice.

As discussed above, releasing or otherwise transferring controlled information to a foreign person while the foreign person is *in the United States* is a deemed export. This scenario often occurs when a foreign person visits a company’s production facility in the United States, and while at the facility, the foreign person is able to see information controlled by the ITAR or the EAR on computer screens, printed schematics, or whiteboard drawings. The foreign person might also learn the information aurally or be able to visually inspect a piece of hardware beyond what is available to the public.

Given that a deemed export can only occur when a “foreign person” is involved, we must understand what this term means. The following are considered “foreign persons”:



Any human who is not:
 • A U.S. citizen/national
 • Green card holder
 • Refugee / asylee



Any business that was not formed in the U.S.



Any agency or division of a foreign government

Reexports – When an item controlled by the EAR is exported to one country, the U.S. government often continues to govern the item and imposes rules on any further movements to any other countries beyond the first. Each such movement to another country is considered a reexport.

Retransfers – When a person receives a license from the U.S. government to export a thing, the license will allow the export to a particular person (usually a particular company). As with reexports, the U.S. government continues to control the item and will often not allow the item to be retransferred to another person without a new license.

What other activities are controlled under just the ITAR?

In addition to the activities described above (exports, reexports, and retransfers), the ITAR control a few more activities that aren’t controlled by the EAR, including defense services, brokering activities, and temporary imports. We define each below.

A defense service is:

- The furnishing of assistance (including training) to foreign persons in the design, development, engineering, manufacture, production, assembly, testing, repair, maintenance, modification, operation, demilitarization, destruction, processing, or use of items described on the USML;
- The furnishing to foreign persons of any information described on the USML; or

Military training of foreign units and forces, regular and irregular, including formal or informal instruction of foreign persons in the United States or abroad or by correspondence courses, technical, educational, or information publications and media of all kinds, training aid,

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Ships, Ports, and EVs The Impact of Alternative Fuels: The Changing Transportation Landscape

By Robert J. Downing, Miami | Houston, Geiza Vargas-Vargas, Miami, and Adrienne Kanter, Miami



With the passage of the Inflation Reduction Act (IRA), companies and the general public are actively discussing renewable energy. Solar, wind, geothermal, and other unconventional sources of energy are popular topics.¹ Tax credits, in particular, attract attention.² Although the IRA contains provisions that offer incentives to parts of the hydrocarbon industry,³ most coverage emphasizes the need to build utility-scale solar farms, expand the transmission line network to deliver electricity from solar and wind facilities to both urban centers and underserved rural communities, or conversely, develop distributed generation resources featuring self-sustaining microgrids.⁴ Overlooked in many cases are developments in the alternative fuels sector that predate the IRA, and that leads us to ships, ports, and electric vehicles (EVs).⁵ Florida, which has an extensive cruise and marine industry,⁶ as well as numerous tourist and cargo ports, is directly impacted not only by IMO 2020 and its updates, but also by additional regulations from the EU coming into effect in 2023 and later years.

The International Maritime Organization

Many governments throughout the world are focused on climate change and its impacts on the environment.⁷ International organizations have taken steps to reduce the carbon footprint across many industries. One such industry is shipping. The international shipping industry is

viewed as a major contributor to certain types of pollution.⁸ Of particular concern are sulfur emissions. In response, the United Nations, through the International Maritime Organization (IMO), created IMO 2020.⁹ Beginning 1 January 2020, this rule imposed a new limit on the sulfur content in fuel oil used on board ships, drastically reducing the earlier 3.5% m/m limit for sulfur in fuel oil operating outside designated emission control areas (ECAs) to 0.50% m/m.¹⁰ Following an amendment to Annex VI of the International Convention for the Prevention of Pollution from Ships (MARPOL), IMO 2020 became compulsory.¹¹

Despite varying enforcement abilities, to comply with the new regulations, cruise lines and cargo lines had to change their energy technology. The IMO has taken a technology-neutral approach to IMO 2020, leaving controversial emission abatement systems like scrubbers¹² for heavy fuel oil, as well as liquefied natural gas (LNG) and other low sulfur fuels as contenders.¹³ The other alternative fuel options include Bio-LNG, which is different in origin than fossil-based LNG,¹⁴ synthetic LNG,¹⁵ bio-diesel, which is derived from waste oil feedstocks,¹⁶ ammonia, a zero-carbon fuel,¹⁷ “blue” and “green” methanol, with an aggregate installed capacity in the EU projected to triple to three million tons per year by 2023,¹⁸ and the oft-discussed hydrogen, which can be extracted from fossil fuels and biomass or from water, or a combination of the two.¹⁹ Each cruise and shipping line has taken its own path toward compliance, with Carnival Corporation leaning toward LNG on one end and Maersk exploring methanol on the other.²⁰

Flag States and Port States

One of the challenges in recent years is that many international organizations that establish these rules have little or no power to enforce them.²¹ That task falls to each ship’s flag state where it is registered and port state when jurisdiction shifts from the flag state to the national territory the ships are in.²² Many of these states, in anticipation of IMO 2020, adopted guidelines, laws, and

Ships, Ports, and EVs: The Changing Transportation Landscape, continued

regulations that implement, complement, or supplement IMO 2020. But in each case, each local jurisdiction offered its own variation on local requirements, thus impacting the international shipping industry.

Flag States

Floridians are familiar with flag states such as Bermuda and the Bahamas.²³ Bermuda's legislation relates back to IMO 2020. The Merchant Shipping (Prevention of Air Pollution from Ships) Regulations 2019 limit the sulfur content to the requirements of MARPOL Annex VI.²⁴ Subsequent Amendment Regulations expressly specified the appropriate sulfur content as 0.50% by mass generally by 1 January 2020, and 0.10% by mass in sulfur oxide ECAs.²⁵

Many of these jurisdictions share common elements when it comes to regulating vessels and require ships flying their flags to comply with their regulations. By way of example, and for discussion purposes, The Bahamas' treatment is illustrative. The Bahamas is one of the world's largest ship registers with approximately 1,500

commercial ships totaling over 50 million gross tons flying the Bahamian flag.²⁶ Gearing up toward IMO 2020, on 30 August 2019, The Bahamas Maritime Authority (BMA) released Informational Bulletin No. 183, which provided initial guidance on the regulation and how to comply in Bahamian waters.²⁷ The Bulletin emphasized that the new global sulfur limit would be mandatory and applicable to all fuel for all ships on all voyages, including fuel oil used in emergency systems like rescue boats.²⁸ Ship and machinery safety concerns would not exempt ships.²⁹ Departing from the technology-neutral stance of the IMO, the BMA warned that open-loop scrubbers were not permitted,³⁰ forcing ships to use compliant fuel oil or switch to closed-loop mode in Bahamian waters.³¹

Port States

Port states have also adopted regulations impacting the shipping industry by imposing requirements for vessels that use their ports. They have similar characteristics in that

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Immigration Strategies and Challenges for the Coming Decade

By Larry S. Rifkin, Miami



Immigration is a constantly evolving field of law, shaped by changing social and political landscapes. In the United States, immigration policy is often a hotly contested and divisive issue, with different administrations implementing vastly different approaches. From 20 January 2017 through 20 January 2021, former President Trump's administration enacted 472 administrative changes, principally through executive orders, that dismantled and reconstructed many elements of the U.S. immigration system.¹ During this time, humanitarian protections were severely diminished, and the U.S.-Mexico border became more closed off. President Biden's administration has attempted to undo many of the former administration's restrictive policies, as well as enact humanitarian parole programs for Ukrainians and nationals of Cuba, Haiti, Nicaragua, and Venezuela. The current administration as well as future administrations face serious issues with regard to border security and admissions, comprehensive immigration reform, the DREAM Act, retaining STEM graduates, and increasing the country's ranking in the technological fields. As Congress seems inevitably deadlocked on this issue, divided by party lines, it is important to consider what policies have been implemented by recent administrations as well as the proposals that may be implemented by future administrations to address these issues.

Border Security

There are two issues confronting the present and future administrations along the country's southern border with Mexico: illegal crossings and asylum seekers. As of 24 October 2022, U.S. Customs and Border Protection (CBP) reported 2.3 million migrant apprehensions at the southern border in the preceding twelve months—rising 1.7 million or 37% from the year before.² The Biden administration's strategy for dealing with border security has been two-fold: increase funds for border security and enact humanitarian parole programs to encourage legal migration to the United States.

The president's proposed budget, released on 9 March 2023, includes nearly \$25 billion for CBP and Immigration and Customs Enforcement (ICE), and includes funds for CBP to hire an additional 350 border patrol agents, \$535 million for border security technology at and between ports of entry, \$40 million to combat fentanyl trafficking and disrupt transnational criminal organizations, and funds to hire an additional 460 processing assistants at CBP and ICE.³ The president's budget plan also includes a proposal for a new \$4.7 billion contingency fund to aid the Department of Homeland Security (DHS) and its components when responding to migration surges along the southwest border.⁴

Immigration Strategies and Challenges for the Coming Decade, continued

The second strategy used by the Biden administration to address border security is the creation of humanitarian parole programs for a small set of specific countries, which permit individuals to stay in the United States temporarily for two years with access to employment authorization (work permits). In response to Russia's invasion of Ukraine, the United for Ukraine parole program has brought in 113,000 Ukrainian refugees lawfully since April 2022.⁵ DHS launched a Parole Process for Venezuelans on 19 October 2022.⁶ When the program was rolled out for Venezuelan asylum-seekers starting in October 2022, border encounters dropped by 40%.⁷ On 5 January 2023, DHS announced a safe and lawful way for qualifying Cubans, Haitians, Nicaraguans, and Venezuelans with U.S.-based supporters to travel by air to temporarily reside in the United States.⁸ Unlike the Ukraine program, the southern border program is capped at 30,000 people per month.⁹ On 24 January 2023, Ken Paxton, the attorney general of Texas, joined by nineteen other states, filed a legal challenge to the president's parole program for Cubans, Haitians, Nicaraguans, and Venezuelans in the U.S. District Court for the Southern

District of Texas, contending that the president does not have the legal authority to enact such a program.¹⁰ The federal lawsuit remains pending.

Asylum Seekers at the Southern Border

The number of people from Central America, Mexico, Venezuela, Colombia, Cuba, Haiti, and beyond—including Asia and Africa—escaping situations where they fear for their lives has soared in recent years due to worsening violence fueled by drug cartels and gangs, along with fragile institutions and increasing economic inequalities.¹¹ These migrants are presenting themselves to CBP agents at the southern border, requesting the opportunity to apply for asylum to the United States. The United States has long had a legal framework to guarantee the right to seek asylum to individuals who arrive at our borders and ask for protection.¹²

In March 2020, the former Trump administration began invoking Title 42, which dates to a 1944 law known as

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The CISG as a Basis for Federal Question Jurisdiction: The Need for Authority From the Eleventh Circuit

By Matthew Akiba, Coral Gables, and Jocelyne A. Macelloni, Miami



Introduction

Initially, the authors planned this article to be an illustrative analysis of Eleventh Circuit precedent on using the Convention on Contracts for the International Sale of Goods (CISG) as a basis for federal question jurisdiction pursuant to 28 U.S.C. § 1331 (the Federal Question Statute). As of the date of this article, however, neither the Eleventh Circuit nor any of the District Courts of Florida have expressly held that a dispute arising under the CISG provides the court with subject matter jurisdiction under the Federal Question Statute. Perhaps the scant authority on this issue is due to the likelihood that a case involving the CISG involves parties from different states, providing subject matter jurisdiction under 28 U.S.C. § 1332 (the Diversity Jurisdiction Statute). Another reason, perhaps, is that attorneys may not realize that the CISG applies to a particular dispute because the parties' contract may contain a choice of law provision, leading to an assumption that the CISG simply does not apply.

Knowledge of the workings of the CISG as a basis for subject matter jurisdiction under the Federal Question Statute may salvage a litigant faced with a motion to dismiss for

lack of subject matter jurisdiction or a motion for remand. For instance, assume that the parties to a particular dispute are from two foreign countries. In that case, the Diversity Jurisdiction Statute will not confer subject matter jurisdiction because “[i]t is a standard rule that federal courts do not have diversity jurisdiction over cases where there are foreign entities on both sides of the action, without the presence of citizens on both sides.”¹ Or perhaps a party is an unincorporated business entity, such as an LLC. In that case, diversity jurisdiction may be lacking, or the parties will have to engage in potentially arduous and costly jurisdictional discovery to uncover the citizenships of all of the LLC's members because, for purposes of the Diversity Jurisdiction Statute, an LLC is a citizen of every state that any member is a citizen of, including other LLCs.²

Accordingly, the purpose of this article is to encourage litigants in federal court to invoke the Federal Question Statute as a basis for subject matter jurisdiction in cases arising under the CISG, which would promote Eleventh Circuit precedent on the matter and align the Eleventh Circuit with other circuits, including the Fifth³ and Third Circuits.⁴ Thus, to properly arm litigants faced with a motion to dismiss for lack of subject matter jurisdiction, this article

The CISG as a Basis for Federal Question Jurisdiction, continued

will proceed to instruct practitioners on (1) the scope and application of the CISG, and (2) federal precedent on using the CISG as a basis for federal question jurisdiction.

The Scope of the CISG: When It Applies and When It Does Not *Contracting States*

Logically, the first step in applying the CISG as a basis for subject matter jurisdiction is to “determine whether [the] dispute falls within the realm of the CISG so as to invoke [the] [c]ourt’s treaty jurisdiction.”⁵ Pursuant to Article 1(1)(a), the CISG “applies to contracts of sale of goods between parties whose places of business are in different States . . . when the States are Contracting States. . . .”⁶ In the case where only one party has its place of business in a Contracting State, however, Article 1(1)(b) provides that the CISG applies “when the rules of private international law lead to the application of the law of a Contracting State.” In other words, the court must conduct a choice of law

analysis. For instance, if a seller in Australia (a Contracting State) contracts to sell goods to a party in Malaysia (a non-Contracting State), the court must determine whether the contract is governed by Australian or Malaysian law. If the contract is governed by Australian law, the CISG applies; if the contract is governed by Malaysian law, then Malaysian commercial sales law applies. It is important to note that pursuant to Article 95, “[a]ny State may declare at the time of the deposit of its instrument of ratification, acceptance, approval or accession that it *will not be bound by subparagraph (1)(b) of article 1 of this Convention*” (emphasis added). Accordingly, practitioners should make sure that neither of the parties’ states has invoked the Article 95 reservation before engaging in a conflict of laws analysis.

Another potential pitfall is in Article 93, which provides that:

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Rebuilding Ukraine: U.S. Companies Operating Overseas – Focusing on FCPA

By Lyubov Zeldis, Fort Lauderdale, joined by Tetiana Tsurkovska, Miami, with respect to the Ukrainian law and regulations



While the Russian war against Ukraine continues into its second year, businesses around the world are “positioning themselves for a possible multibillion-dollar gold rush: the reconstruction of Ukraine once the war is over.”¹ For U.S. businesses, both public and private, the opportunity will arise to bring their respective expertise, products, and services to Ukraine for the post-war reconstruction of the country.^{2 3} Such entities should start establishing the legal and compliance framework that will help them when doing business in foreign countries and particularly in Ukraine.

In 2015, I was lucky to see Al Pacino on Broadway in a play called *China Doll*. Imagine my surprise when I realized the plot revolved around, among other things, the Foreign Corrupt Practices Act of 1977, as amended, 15 U.S.C. §§ 78dd-1, et seq. (FCPA). In the play, Pacino’s character was to be charged with violating FCPA because one of his companies allegedly paid a bribe. It was hard to focus on the fabulous talent of Al Pacino when the “lawyer” in my head was strategizing on FCPA compliance (for Pacino, of course).

Doing business in foreign countries requires familiarity, training, and compliance with FCPA.⁴ This article will focus on FCPA: (1) its general overview; (2) application; (3) examples of FCPA violations; (4) definition of a “foreign official”; (5) definition of “anything of value”; (6) compliance programs; and red flags. The article will also discuss briefly the Ukrainian anticorruption laws and regulations that companies must be aware of when doing business in Ukraine. The article may be helpful to practitioners who have clients doing or planning to do business overseas and in Ukraine in particular and to those who wish to closely familiarize themselves with FCPA and its application.

Overview of FCPA

FCPA is a federal law that prohibits payments, gifts, or offers of “anything of value” to a “foreign official” for the purpose of influencing the official or otherwise “securing any improper advantage” in obtaining, retaining, or directing business.⁵ FCPA was enacted in 1977 following the aftermath of the Watergate scandal. It was the first law in the world governing domestic business conduct with foreign government officials in a foreign market.⁶ FCPA was

Rebuilding Ukraine: U.S Companies Operating Overseas, continued

designed to prevent corrupt practices, protect investors, and provide a fair playing field for those honest companies trying to win business based on quality and price rather than bribes.⁷

In 1988, FCPA was amended by the Omnibus Trade and Competitiveness Act,⁸ which provided certain defenses against finding violations of the act, such as the gift is lawful under the laws of the foreign country and the gift is a bona fide and reasonable expenditure for the performance or execution of a contract with the foreign government.⁹ In 1998, FCPA was amended further by the Anti-Bribery and Unfair Competition Act, which expanded the scope of coverage to include some foreign persons and extended jurisdiction beyond the borders of the United States.¹⁰ FCPA includes two main provisions:

1. Anti-bribery: individuals and businesses are prohibited from bribing foreign officials in order to retain or obtain business.
2. Accounting: issuers must create and keep books, records, and accounts to accurately reflect the transactions of corporations. Issuers are prohibited from falsifying these records. Issuers must also devise and maintain an adequate system of internal accounting controls.¹¹

Application of FCPA

FCPA can apply to prohibited conduct anywhere in the world and extends broadly to three categories of persons and entities: (1) “issuers” and their officers, directors, employees, agents, and stockholders acting on behalf of an issuer; (2) “domestic concerns” and their officers, directors, employees, agents, and stockholders acting on behalf of a domestic concern; and (3) certain persons and entities, other than issuers and domestic concerns, acting while in the territory of the United States.¹² An issuer is a U.S. or foreign public company listed on stock exchanges in the United States or companies that are required to file periodic reports with the U.S. Securities and Exchange Commission (SEC).¹³ It must be emphasized that FCPA applies to *all* “domestic concerns” and their officers, employees, and agents. Thus, depending on the circumstances, FCPA may apply to any U.S. company and its vendors and consultants.



(A “domestic concern” under the statute can include U.S.-based nonprofits, NGOs, and educational institutions.)¹⁴

Defining a “Foreign Official”

Under FCPA, the term “foreign official” is defined broadly and can include *any* officer or employee of a foreign government agency, department, or public institution acting on behalf of the government. Foreign officials also include foreign political parties; candidates of foreign political parties; and members of a foreign military in charge of employees, officials, and contracts of government-owned or government-controlled entities.¹⁵ The official can be an employee or the agent of a foreign government and need not be high-ranking.¹⁶ Examples of persons that may qualify as foreign officials include advisors to ministries, government agencies, or government officials; members of government committees or panels; health care professionals at government-owned or controlled hospitals; employees of a public international organization (such as the World Bank); members of a royal family; and administrators and faculty at foreign state universities.¹⁷

Companies subject to FCPA must be cognizant that governments can be organized in different ways.¹⁸ Many operate through state-owned and state-controlled entities, particularly in such areas as aerospace and defense manufacturing, banking and finance, health care and life sciences, energy and extractive industries, telecommunications, and transportation. The term “instrumentality,” which is included in the definition of a foreign country, is broad and can include state-owned

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Use of False U.S. Consulate Notarial Seals to Commit Deed Fraud: Twenty-First Century Solutions Required

By Fabio Giallanza, Coral Gables



Deed fraud has become rampant in recent years.¹ Scammers, posing as the owner of record of a piece of property, sell the property to an unaware third-party buyer. In addition to traditional “domestic” schemes involving the use of fake IDs, the use of fake notary seals purporting to represent the seal of a U.S. consulate has become commonly employed by fraudsters operating outside of the United States.² The scheme is seemingly a simple one, which can be illustrated through the following example:

- Fraudster scouts public records for vacant land titled in the name of individuals with an address abroad—a foreign owner would not need to grant access to a surveyor or inspector, so there is a low risk of being caught in the act.
- Fraudster lists the property for sale, either as a “for sale by owner” on real estate platforms such as Zillow or through a Florida-based real estate agent with whom they communicate via email.
- Fraudster requests a below market price to quickly attract a purchaser.
- Fraudster insists on communicating via email with all parties involved, including the closing agent, generically stating that the fraudster is abroad with no ability to communicate on the phone.
- Fraudster states that the fraudster has arranged to execute closing documents at a U.S. consulate and will deliver originals to the closing agent.

- Fraudster provides wire instructions for an account located abroad.
- Fraudster forges the owner’s signature and uses a fake notarial stamp on the documents.
- Upon receipt of the documents, the transaction closes.

Months later, generally when the owner does not receive its notice of proposed property taxes for the following year, the owner will realize what happened. They will then have to embark in lengthy and expensive litigation to purge the fraudulent deed and reclaim title to the property. If title insurance was obtained by the purchaser, this situation will result in a claim.

One of the largest title underwriters nationally, First American Title Insurance Company (FATICO), recently issued an alert³ to its agents reminding them to stay vigilant of the various techniques employed by fraudsters to commit deed fraud.

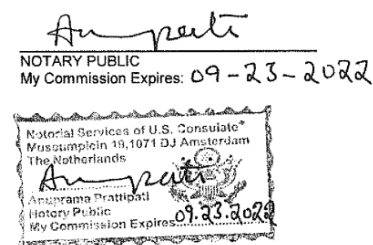


Exhibit 1. A fake notarial seal recently encountered by the author.

Use of False U.S. Consulate Notarial Seals to Commit Deed Fraud, continued

The problem with forged consular seals, however, seems anachronistic. Consular notarial seals, as well as notary seals used in Florida, do not carry any sort of electronic validation device. This contributes, in the opinion of the author, to the widespread nature of deed fraud. Forging a stamp is likely a minor hurdle for fraudsters. Once a notary seal has been forged, it can be used multiple times, offering the opportunity to scale and repeat the fraud once another suitable property is identified.

During the COVID-19 pandemic, states rushed into offering the possibility of notarizing documents online.⁴ This was welcome news for the real estate industry. It is striking, however, that the notarial seal used in e-notary sessions, through widely used Florida or Virginia e-notaries, do not bear an identifier that allows the public to quickly verify that the electronic seal is legitimate.⁵

Local secretaries of state, which oversee notarial commissions as well as corporate registries, have already been using unique identifiers and digital verification devices to allow the public to confirm the validity of good standing certificates issued for corporations.⁶ Outside of the United States, QR codes and unique identifiers have become common practice in notarial acts and certificates issued by government authorities.⁷ Often, the QR code leads any person with a copy of a document to a trusted government website where it will be possible to verify its validity and download an official copy.



Exhibit 2. An electronic signature block affixed to articles of incorporation prepared by a public notary in Chile (modified for privacy). The QR code and unique identifier direct to a government website where it will be possible to verify the signature and obtain an official copy.

While a technically skilled fraudster could try to devise a mechanism to emulate a government verification website, this would likely require much more time and resources than what is now required to commit deed fraud.

It is high time that the U.S. secretary of state, as well as its counterparts at the state level, step up their game in the fight against fraudsters and adopt twenty-first century solutions to an old problem.



Fabio Giallanza is a corporate and real estate attorney at Weiss Serota Helfman Cole + Bierman. He represents businesses and investors in the acquisition and financing of property, along with business transactions and corporate matters. Mr. Giallanza specializes in cross-border transactions

involving clients based in the United States, Europe, and Latin America.

Endnotes

1 See, e.g., Joe Gorchow, *Property title thefts rampant in South Florida, business owner, property appraiser fight back*, CBS MIAMI (21 Sept. 2022), <https://www.cbsnews.com/miami/news/property-title-thefts-rampant-in-south-florida-business-owner-property-appraiser-fight-back/>.

2 *Alert: Vacant Lot Scams – Beware of Notarizations Taken Abroad*, THE FUND, <https://www.thefund.com/vacant-lot-scams-abroad.aspx>.

3 National Underwriting Communication, NA-2023-005, from the Corporate Underwriting Department of First American Title Insurance Company (24 Mar. 2023) (on file with author).

4 *States Take Emergency Action On Remote Notarization And Signers' ID*, National Notary Association (25 Mar. 2020), <https://www.nationalnotary.org/notary-bulletin/blog/2020/03/states-emergency-action-remote-notarization>.

5 In Virginia, it is possible to verify online the validity of a notary commission. See Secretary of the Commonwealth, Notary Commissions, <https://www.commonwealth.virginia.gov/official-documents/notary-commissions/>. However, there is no publicly available method to verify the correspondence of a document to what was effectively presented to a notary, thereby creating the potential for misuse of seals.

6 See, e.g., the Florida Dep't of State – Division of Corporations authentication tool for Certificates of Status, which are assigned a unique identifier, at <https://services.sunbiz.org/Filings/CertificateOfStatus/CertificateAuthentication>. A similar service is offered by the Delaware Division of Corporations, which provides a validation tool at <https://icis.corp.delaware.gov/ecorp2/services/validate>.

7 In Italy, for example, the National Council of Public Notaries (*Consiglio Nazionale del Notariato*) is the authority that certifies the digital signatures of public notaries. See Art. 62-bis, L. 89/1913. Digital copies of notarial acts (e.g., a document transferring real estate) bear an electronic signature of the public notary that can be verified online at vol.ca.notariato.it. On the other side of the Atlantic, with the Lei Nº 11.419, de 19 de Dezembro de 2006, Brazil established a “National Infrastructure of Public Keys” (*Infraestrutura de Chaves Publicas Brasileiras*), which created a framework to verify digital signatories and the authenticity of public documents. An example of the application of such framework is the State of Sao Paulo's corporate registry website, which allows one to verify the authenticity of digital copies of corporate documents online at www.jucesp.sp.gov.br.

Using Phantom Stock as Compensation to Preserve Equity in a Company

By Nouvelle L. Gonzalo, Gainesville, and Macarena Bazan, Gainesville



Finding the right balance between providing incentives to stakeholders while maintaining as much equity as possible in a company can feel as elusive as winning a golden ticket from Willy Wonka.

The question becomes what is an effective way to do so? Growth-oriented companies want to grow. It's that simple. These companies may not, however, want to give away equity in the process. Growth-oriented companies can compensate high-performing employees and stakeholders in other ways without giving away equity in the company. This is important to know, not only for companies that want to retain as much equity as possible but also for those that may not have an immediate budget for incentives, or those where the company is not able to give away equity because the owners of the company are part of a specific licensed group of professionals, such as lawyers, architects, and accountants.

This article focuses on an incentive referred to as *phantom equity*. Phantom equity provides a way for companies to compensate stakeholders based on the value of the traditional stock price of the company without giving away equity. The stock price of a company is tied to its performance, so providing company stock based on this value incentivizes stakeholders to work in the best interests

of the company. This can be used by large public companies and by smaller, privately held ones, yet one should also consider a valuation of the company to know the value of the interest the owner has.

Introduction

Influential economist and investor Benjamin Graham noted, "The best way to measure your investing success is not by whether you're beating the market but by whether you've put in place a financial plan and a behavioral discipline that are likely to get you where you want to go." Following that guidance, growth-minded business owners can use phantom equity to pay and motivate their employees and also as a creative tool to compensate investors, seasoned consultants, and third parties so they can grow their company, minimize the use of operating cash, and not lose equity in the process.

Phantom stock, also known as "shadow stock" or "simulated stock," is one plan that will help growth-oriented businesses go where they want to go; it provides investment in the company without diluting the existing equity holders. Phantom stock is not the most common option, yet both business owners and employees benefit. So, let's explain how it works.

Using Phantom Stock as Compensation to Preserve Equity, continued

What is phantom stock?

Growth-minded companies face the challenge of how to grow without giving away their equity. For example, if they own 100% of the company and give 10% to an investor, then they have 90% left. This is not bad at first; retaining 90% is still very good. The challenge comes later when there is not only one investor but rather multiple investors, a hedge fund, or perhaps the company reserves an equity percentage for future employee stock, and then reserves another amount for future investors, board member shares, or alternative future uses. Suddenly that 100% equity is whittled down in the name of greater growth. While growth-minded owners may see their growth scaled exponentially and, perhaps as a result of the investor, they are now able to have product placement in 5,000 U.S. stores across the country and even globally, their 100% equity might now be whittled down to 40%, 20%, or less. The years of sacrifice and diligence proved worthwhile because now they have a company with national impact,

yet the original owners own very little of it; often the original owners will no longer be majority owners of the company. Growth-minded owners must constantly grapple with whether they want 100% of a small company worth US\$1 million or 20% of a billion-dollar company. Serial entrepreneurs who have another company waiting in the wings may not mind giving a majority percentage to investors or others, but those who have made their company their principal business and legacy are more protective of the amount of ownership percentage they maintain.

The growth-minded businessperson may think the trade-off of losing equity is worth it for the success the company will have, yet, wouldn't it be great to look at other options? Enter phantom equity: phantom equity or shadow stock provides a tool for growth-minded business owners to give others a financial interest in their company without giving

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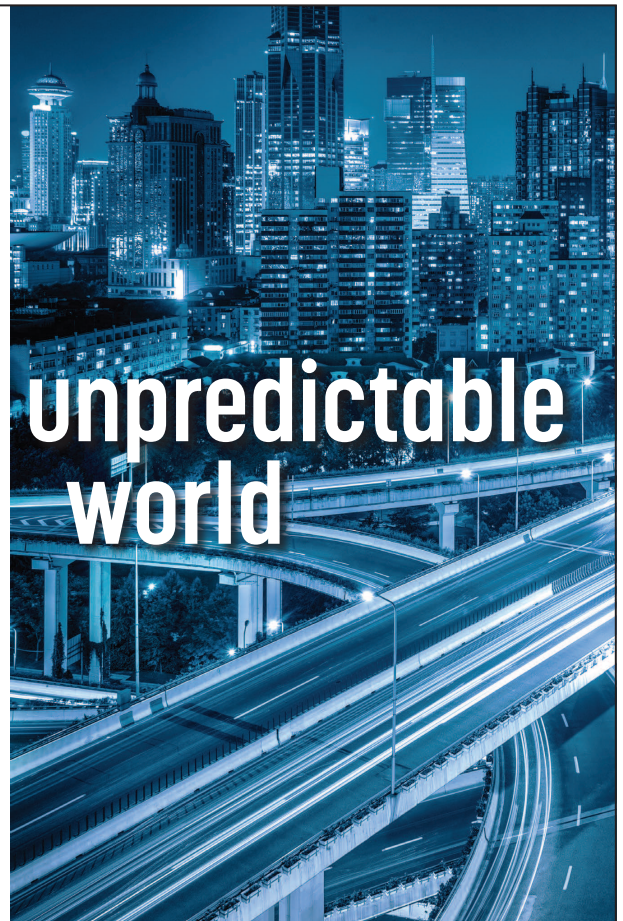


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ILS Mid-Year Meeting • 16 February 2023 Offices of Gunster Law, Miami

The International Law Section Executive Committee and ILS members met on 16 February 2023 to conduct business and to enjoy reconnecting with colleagues during a reception held on the eve of iLaw 2023. Thank you to Gunster Law for hosting us!



The ILS conducts business during its mid-year meeting.



Richard Montes de Oca, Jacqueline Villalba, Davide Macelloni, Adrian Nuñez, and Ana Barton



Cristina Vicens (DakStreet Boys), the ILS Fantasy Football League runner-up, eyes the trophy that went to Daniel Coyle (What Can Brown Do 4 U?) in the section's inaugural competition.



Eduardo Palmer, Bob Becerra, Peter Quinter, Jim Meyer, Arnie Lacayo, Jacqueline Villalba, and Ryan Reetz



Peter Quinter, Jorge Guttman, Traci Rollins, and Jacqueline Villalba



ILS members and guests enjoy a social hour and look forward to a full day of CLE at iLaw 2023.

iLaw 2023 • 17 February 2023 JW Marriott Marquis, Miami

The iLaw conference is the International Law Section’s annual flagship event. iLaw 2023 featured opening and closing plenary sessions; a keynote address by Kenneth R. Feinberg, mediator and former administrator of the September 11th Victim Compensation Fund; and three parallel tracks on (1) international arbitration (sponsored by AAA-ICDR), (2) international litigation, and (3) international business transactions. The conference is the premiere international law conference in Florida and is attended by legal practitioners from the United States, Canada, Europe, and Latin America. Approximately 120 international law practitioners gathered at the JW Marriott Marquis in Downtown Miami for iLaw 2023.



Opening plenary session: Fintech Litigation and ADR – Insights for Today and Tomorrow
Peter Kamminga (moderator), Angela Angelovska-Wilson, Justin T. Carlson, Michael Fernandez, and Daniel T. Stabile



International Arbitration of Life Sciences Disputes – Counsel’s Perspective
James P. Duffy IV (moderator), Katie Gonzalez, Alex de Gramont, and Thomas W. Walsh



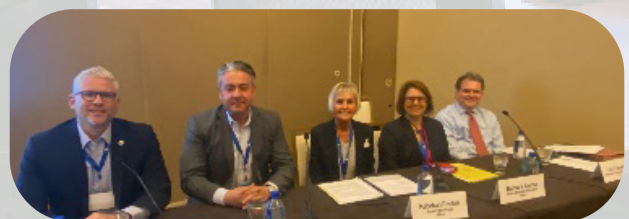
Kristin Paz addresses attendees at the opening plenary session.



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Raquel (Rocky) A. Rodriguez (moderator), Alexandros Aldous, Ana-Paola (AP) Capaldo-Aoun, Lara Bueso Bach, and Claudia Brea



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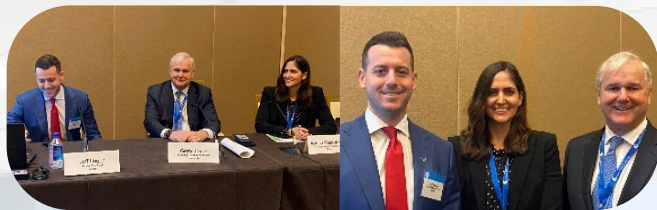
White Collar and Anti-Money Laundering Issues in International Litigation
Richard Montes de Oca (moderator), Rafael Ribeiro, Rebekah Poston, Barbara Alonso, and Eric I. Bustillo



Sanctions Against Russia for the Ukraine Invasion: Current Perspectives, Sanctions, Penalties and Strategies for Compliance
At right: Jorge Salcedo, Jason Poblete, Jacqueline Arango, Catherina Birkeland (special agent, Homeland Security Investigations (HSI) Miami, Asset Identification and Removal Group, El Dorado Task Force-South), and Peter Quinter (moderator)



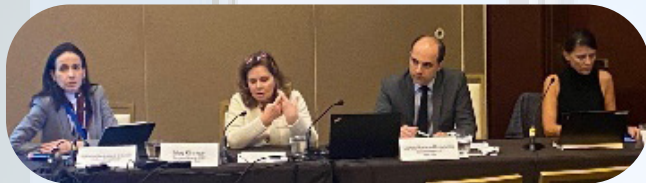
NFTs Aren't Going Anywhere, and Neither Are the Lawsuits
Christopher Noel (moderator), Clarissa Rodriguez, Kimberly Babin, James Sammataro, and David O'Steen



Trusts and Estates Issues Across Borders
At right: Jeff Hagen, Alyssa Razook Wan, and Gerry Joyce



Counterfeits or Gray Markets?: Latest Trends in Trademark and Intellectual Property Protection, Enforcement and Compliance for Imported and Exported Trademarked Goods
Robert Becerra (moderator), Colin Colt, Peter Quinter, Coraly Schreiber, and James V. Kirk



Investment Arbitration Reports
Katharine Menéndez de la Cuesta (moderator), Meg Kinnear, Carlos Romos-Mrosovsky, and Silvia Marchili



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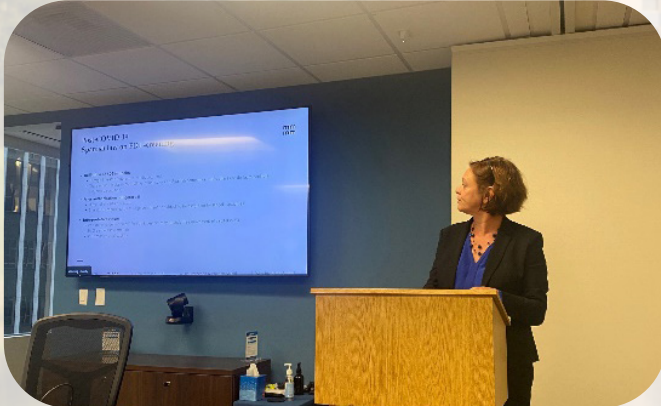
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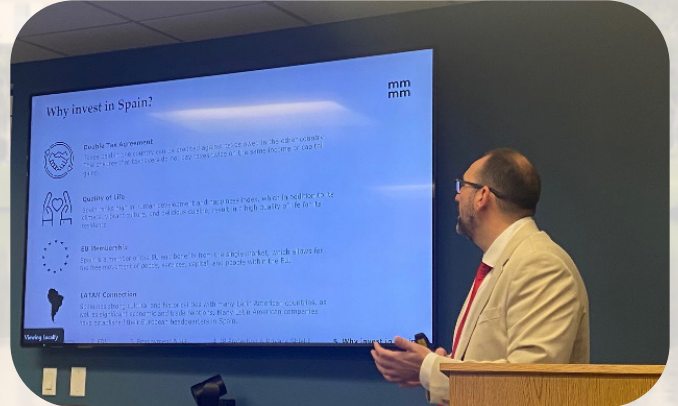
Copies of the International Law Quarterly are in demand at iLaw.

Spain: Your Bridge to Europe • 26 April 2023 Veritext Arbitration Center, Miami

On 26 April 2023, the International Law Section presented Spain: Your Bridge to Europe with Spanish law experts Nadja Vietz and Antonio C. Jiménez Abraham, both partners in Monereo Meyer Abogados. They shared unique strategies for utilizing Spanish law as a gateway to the EU. Our thanks to Chelsea Thomas-Nunez and Veritext for hosting the program at the Veritext Arbitration Center in Miami and to MDO Partners for sponsoring this informative event.



Nadja Vietz presents on Spanish law on FDI screening post COVID-19.



Antonio C. Jiménez Abraham answers the question "Why invest in Spain?"



Rudy Blanco, Lisa McKellar Poursine, Laura Reich, Chelsea Thomas-Nunez, Audrey Glover-Dichter, Nadja Vietz, and Antonio C. Jiménez Abraham



Rudy Blanco, Lisa McKellar Poursine, Richard Montes de Oca, Audrey Glover-Dichter, Chelsea Thomas-Nunez, Nadja Vietz, and Antonio C. Jiménez Abraham

WORLD ROUNDUP

AUSTRALIA



Donald Betts, Jr., Melbourne, Australia
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Australia, United Kingdom, and United States agree on nuclear submarine project.

Under a new pact between Australia, the United Kingdom, and the United States, Australia is to get its first nuclear-powered submarines, at least three of which are to come from the United States.

The allies will also work to create a new fleet using cutting-edge technology, including UK-made Rolls-Royce reactors.

The plan to create a new fleet of nuclear-powered submarines is aimed at countering China's influence in the Indo-Pacific region.

China has strongly criticised the significant naval deal and has accused the three nations of "walking further and further down the path of error and danger."

The AUKUS deal is a significant move for Australia.

This is a major upgrade to the U.S. ally's military capabilities. The deal makes Australia just the second country after the UK to receive Washington's elite nuclear propulsion technology.

Australia will be able to carry out long-range strikes against enemies for the first time, in stark comparison to their existing diesel-engine-powered fleet.

Australian navy sailors will be trained on U.S. and UK submarine bases from this year to learn how to use the nuclear-powered submarines.

A small number of nuclear submarine bases will be established in Perth, Western Australia, in 2027 before Australia purchases up to five U.S.-model Virginia-class submarines in the early 2030's.

After that, the plan is to design and build an entirely new nuclear-powered submarine for the UK and Australian navies—a model that is being called SSN-AUKUS. This attack craft will be built in Britain and Australia to a British design, but will use technology from all three countries.

The three countries outlay billions on the AUKUS deal.

The United States has pledged US\$4.6 billion (£3.7 billion) to expanding the United States' submarine construction capacity and improving maintenance of its current nuclear-powered Virginia-class submarines.

Australia commits to its largest single investment in its

defence capability history, costing up to A\$368 billion (£201 billion) over thirty years.

Prime Minister Rishi Sunak and the United Kingdom have pledged £5 billion (US\$6 billion) over the next two years to counter threats from hostile states.

This AUKUS security alliance doesn't go without controversy. In 2021, Australia created a political storm with France after scrapping a multimillion-dollar diesel-powered submarine agreement. The deal also draws repeated criticism from China.

Australia also faces a delicate diplomatic situation with China, its largest trading partner. Analysts say the question will be whether it can continue to strengthen its military ties with the United States while fostering commercial ties with Beijing.

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CARIBBEAN



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New BVI regulations require submission of annual financial return.

The amendments to the British Virgin Islands (BVI) Business Companies Act (the BC Act) and BVI Business Companies Regulations (the Regulations) were published by the BVI government and entered into force on 1 January 2023.

In this article we touch upon a major change, which is relevant to the accounting function of BVI international business companies, the introduction of Article 98(a) for the preparation and submission of an annual financial return, in addition to existing obligations.

What are the existing obligations? A BVI company is required to keep records and documents that enable the financial position of the company to be determined with reasonable accuracy. When the records are kept at a place other than the office of the company's registered agent, the company shall provide the registered agent with a written record of the physical address of the place at which the records and underlying documentation are kept and the name of the person who maintains and controls the company's records.

What is the new requirement? With effect from 1 January 2023, there is a further requirement for a BVI company to prepare and file with its registered agent a Financial Annual Return (the FAR) containing certain prescribed financial information.

FAR Questions and Answers

Q: Where can a company obtain the required form to submit the FAR?

A: The official form for the annual return is located within the BVI Business Companies (Financial Return) Order, 2023.

Q: To whom shall the company send the FAR?

A: All BVI companies must submit the FAR to its registered agent.

Q: Will the FAR be publicly available?

A: No. The FAR will not be filed with the registrar or be publicly available. The FAR is only filed privately with the registered agent of the company. Registered agents will have to notify the registrar if a company fails to file its FAR no later than 30 days after the FAR was due.

Q: When must the FAR be filed?

A: The annual return is due for financial periods starting on 1 January 2023 or later. The FAR must be filed within nine months after the end of the company's financial/fiscal year to which the annual return relates. The default first period end is 31 December 2023, but it is permitted for a company to use a different financial year. For example:

- If the company's financial/fiscal year is the calendar year, the first annual return will be due by 30 September 2024 for the year ending 31 December 2023 (and will be due each 30 September thereafter).
- If the company's financial/fiscal year ends on 30 June, the company's first annual return will be due on 31 March 2024 for the year ending 30 June 2023 (and will be due each 31 March thereafter).

Q: Must the FAR be audited?

A: No. There is no requirement that the financial information included in an annual return be audited.

Q: What accounting principles and currency must be used?

A: There are no prescribed accounting policies or principles that need to be followed. Any currency may be used for the FAR.

Q: Which companies are exempted?

A: The requirement to file an annual financial does not apply to:

- companies whose shares are listed on a recognized exchange;
- a company that is regulated under BVI financial services legislation and already provides financial statements to the BVI Financial Services Commission in accordance with the requirements of that financial services legislation; and
- a company that already files its annual tax return with the BVI tax authority.

Companies that are in liquidation are also exempted from this requirement, provided the FAR was not already due prior to the commencement of the liquidation.

Q: What are the penalties for not filing the FAR?

A: The penalties include:

- For the first month or part thereof after the filing of the FAR was due, the penalty shall be US\$300.
- For each month or part thereof after the first month referred to in subparagraph (a), the penalty shall be US\$200, up to a maximum of US\$5,000.
- Where a company is liable to the maximum penalty referred to in subparagraph (b) and has not filed its annual return, the registrar may strike the name of the company off the register.

Q: What does a BVI company need to do?

A: Keep collecting the financial records of the BVI company, such as invoices, agreements, receipts, bank statements, etc., to be available when the time comes for the preparation and submission of the FAR.

Fanny Evans is a partner at Morgan & Morgan and is admitted to practice law in the Republic of Panama. She focuses her practice on corporate services, estate planning, and fiduciary services. Her portfolio of clients includes banks and trust companies, family businesses, corporate practitioners, and private clients. From 2011 until mid-2017, Mrs. Evans served as executive director and general manager of MMG Trust (BVI) Corp., the Morgan & Morgan Group's office in British Virgin Islands. Prior to becoming head of the BVI Office, she served as fiduciary attorney in a local firm focusing on corporations and trusts. Mrs. Evans is member of the Society of Trust and Estate Practitioners (STEP). She is fluent in Spanish, English, and Italian.

CHINA



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China proposes revision of country's trademark law.

On 13 January 2023, the China National Intellectual Property Administration (CNIPA) published a draft revision of the country's trademark law, calling for public comments. It is expected that an amended version of the law will go into effect in 2024, at the earliest. Provided that the key provisions of the draft revision survive the legislative process, the changes to China's trademark law and practice will be significant.

Some of the most salient proposals in the proposed text relate to bad faith trademark applications, a problem that for decades has dogged brands doing business in China. Contrary to the United States, use of a trademark is not a prerequisite to registration, and little protection is afforded to unregistered trademarks. This incentivizes so-called trademark squatting, the practice of maliciously registering trademarks that rightfully belong to others, with the aim of obtaining a payout from the legitimate owners. Bad faith applications also include those filed by unscrupulous parties that want to deprive competitors of trademark rights or who want to exert undue leverage over their clients (by registering those clients' trademarks).

The new version of the law establishes clearer prohibitions on bad faith applications and imposes fines of up to RMB 250,000 (~US\$36,340). Parties could also incur liability for trademark infringement if they use a trademark registered in bad faith. This provision could help brands whose trademarks are registered in bad faith by other parties that also sell products bearing those trademarks. In addition, wronged parties will be able to request that a trademark registered in bad faith be transferred to them.

Parties who have registered a trademark would be barred under the amended law from applying to register the same trademark in connection with the same goods or services. Such repeat registrations are employed by bad faith parties to create new hurdles for legitimate brand owners seeking to enforce their trademark rights. Consider a situation where a squatter registers the trademark "ABC," leading the brand owner to file an invalidation request against the squatter's "ABC" registration. At present, the squatter could go ahead and file a second application to register "ABC," frustrating the brand owner. The new provision would prevent the squatter from filing that second application.

The draft revision also establishes a requirement to certify the use of a registered trademark every five years. It would still be possible to register a trademark without

having used it, but the registration would be voided if the trademark was not used within six years of registration. This new requirement would disincentivize squatters and other malicious actors, as it would limit the validity of bad faith registrations; however, it would also impose additional maintenance requirements on legitimate brands.

In terms of fundamentals, the new law would expand the definition of a trademark, adding "other elements" to "words, graphs, letters, numbers, three-dimensional symbols, color combinations, sound or any combination thereof." This addition is seen as opening the door to nontraditional trademarks such as scents and position marks. Meanwhile, the absolute grounds for refusal would be expanded to include harm to the "excellent Chinese traditional culture." Such a prohibition could impact brands that incorporate Chinese cultural icons into their trademarks, even where there is no intent to offend. Examples of potentially objectionable trademarks include logos depicting men wearing a queue hairstyle or cheongsam-clad women.

Finally, the draft revision would shorten the period during which interested parties can file oppositions to the registration of a trademark, from three to two months. While this is still longer than the thirty-day period in the United States, it should have the effect of reducing the time it takes for trademarks to be registered. At the same time, it will require brands to be even more vigilant when it comes to possible rogue applications in China, as they will have less time to respond.

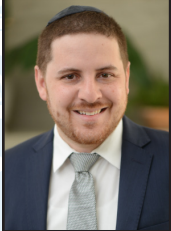
The new law has room for improvement. CNIPA should take steps to consolidate proceedings where a party concurrently applies to register a trademark and challenges a registration or application that is standing in the way, preventing the wasteful duplication of efforts. This said, even in its current form the draft revision of the trademark law is welcome news for brand owners and marks yet another milestone in the development of intellectual property rights in China.

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SOUTH AMERICA

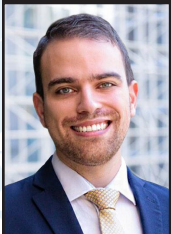


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New Regulation on Dosimetry and Application of Administrative Sanctions approved by Brazil's Data Protection Authority.

The approval of the Regulation on Dosimetry and Application of Administrative Sanctions (RDASA) by Brazil's National Data Protection Authority (ANPD) on 24 February 2023 marks an important step toward the enforcement of data protection requirements.



This regulation aims to bring more clarity on the sanctions that can be imposed for violations of the Brazilian General Data Protection Law (LGPD). The RDASA outlines the methodology for determining the amount of fines that should be imposed for each breach, as well as the minimum penalties for both



individuals and companies. The dosimetry system seeks to ensure proportionality between the sanction applied and the severity of the violation committed.

The RDASA categorizes violations into three levels of severity, from minor to serious, which dictate the level of penalties that could be applied in connection with a particular violation. Sanctions range from warnings to fines and can even include the partial or total prohibition of data processing-related activities.

This recent development is crucial for all international clients with activities in Brazil because they must comply with local laws. By implementing effective data privacy policies and procedures according to the LGPD, international clients can avoid facing liabilities.

New regulations regarding public offerings come into force in Brazil.

In July 2022, the Brazilian Securities and Exchange Commission (Comissão de Valores Mobiliários or CVM) enacted Resolutions Nos. 160, 161, 162, 163, and 173 (the CVM resolutions), which comprehensively revised the regulatory framework for public offerings in Brazil, with effect as of 2 January 2023. These resolutions bring about a range of significant changes including, among other things, the requirement that all offerings are registered with the CVM. Offerings exempt from registration with

the CVM (formerly referred to as "476 Offerings") will be subject to an automatic registration process without prior review by the CVM (automatic registration). Unlike 476 Offerings, offerings subject to the automatic registration are not restricted to a limited number of participants. In addition, offerings subject to automatic registration can include a prior analysis by self-regulatory entities accredited by the CVM. Depending on the characteristics of the issuer, the underlying securities and the targeted participants (e.g., IPOs and follow-ons by non-frequent issuers), offerings will be subject to an ordinary registration process with prior review by the CVM, which resembles the current standard registration process for public offerings in Brazil.

Additionally, the CVM resolutions require the registration of offering coordinators, and (i) increased the maximum number of securities that may be distributed in the hot issue (additional securities issued as a result of an offering being oversubscribed) from 20% to 25%, and (ii) provided rules on pilot fishing (consultations with any number of "professional investors" in Brazil), the publication of roadshow materials, and the quiet period.

The new CVM resolutions also provide greater visibility to Brazilian institutional investors to participate in international offerings (offerings listed on exchanges outside of Brazil). This was guaranteed by determining that international offerings will not be subject to Brazilian laws or review by the CVM and other local regulators, to the extent that the underlying securities are listed on a foreign stock exchange and specifically offered to Brazilian "professional investors," instead of the Brazilian public, having an offering settled in foreign currency outside Brazil.

The CVM resolutions were enacted following a challenging year for the Brazilian capital markets, which experienced a significant setback due to the disruptive effects of higher interest rates and political instability in the country. These factors resulted in fewer public offerings than the levels that occurred in 2020 and 2021. Aiming at an improvement/development with respect to Brazil's capital markets, several elements must be taken into account, including the fiscal and monetary policies of the newly elected government that assumed office on 1 January 2023 and the implementation of critical structural reforms such as tax and administrative reforms. The anticipated increase in the number of international offerings that could result from the CVM resolutions represents a significant stride toward the market recovery, bringing new opportunities for both local and foreign investors.

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MIDDLE EAST



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KSA limits ability of government to contract with foreign companies that do not have their regional headquarters there.

In February 2021, the government of the Kingdom of Saudi Arabia (KSA) announced its intent to limit contracting with foreign companies that do not have regional headquarters (RHQ) in the Kingdom. Although no tax rules/guidelines have been published to date in connection with the RHQ program, on 27 December 2022, the Saudi Ministry of Finance issued a new set of controls sharply limiting the ability of Saudi government agencies to do business with foreign companies that do not have their RHQ in the Kingdom. The controls will enter into effect on 1 January 2024.

ICC arbitral tribunal resolves Iraq-Turkey dispute.

Iraq filed a claim with the ICC against Turkey, claiming claim that Turkey violated a joint agreement by allowing the Kurdistan Regional Government (KRG) to export oil through a pipeline to the Turkish port of Ceyhan. Iraq's central government in Baghdad deems illegal the KRG exports via Ceyhan. In March 2023, the tribunal ruled in favor of Iraq and ordered Turkey to pay Iraq damages relating to the transport of KRG oil through the export

pipeline and the discount at which KRG oil was sold. But Turkey won a counter-claim for Iraq to pay a pipeline throughput fee, the source said.

Yemen pursues Occidental Petroleum over ICC award.

Yemen has applied to a U.S. court to enforce the outstanding part of a US\$10 million ICC award against an affiliate of Occidental Petroleum. The arbitration related to an agreement for petroleum exploration and production between Yemen and Occidental Petroleum. The tribunal issued its award in favor of Yemen in February 2020, and corrected it in August 2020. In February 2023, Yemen commenced an action in the U.S. District Court for the District of Delaware seeking enforcement of the award because Occidental Petroleum had not paid.

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NORTH AMERICA



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U.S. Supreme Court to consider international application of U.S. trademark law.

On 21 March 2023, the U.S. Supreme Court heard argument on whether federal trademark law applies to trademark infringement that takes place outside the United States. In *Abitron Austria GmbH v. Hetronic International, Inc.*, the Court will consider whether the Lanham Act, the United States' 1946 federal trademark law, applies extraterritorially. While the appellant and the appellee take opposing viewpoints on whether the federal law was intended to apply outside the United States, the Biden administration has taken the middle ground, arguing the Lanham Act applies only to extraterritorial conduct resulting in consumer confusion or mistake in the United States.

The Lanham Act imposes civil liability on a person who uses a trademark in commerce that they do not own (or have rights to use) in a way that is likely to cause consumer confusion. The text of the Lanham Act does not address whether it applies to infringement outside the U.S. borders. The Court will have to consider the extraterritorial reach of the Lanham Act after considering its prior precedent holding that the Lanham Act can apply extraterritorially but without announcing the proper test for that extraterritorial application. The Court is expected to issue its opinion in June 2023.

Chinese spy balloon collected sensitive information before being shot down by the Biden administration.

The Chinese spy balloon that floated across the United States in early February before being shot down off the east coast was reportedly able to gather intelligence from U.S. military sites. Consisting primarily of “electronic signals,” the information was apparently transferred to China in real time, and the balloon’s operators were able to direct the balloon’s flight path. Beijing said the balloon was civilian in nature and monitoring the weather before being blown off-course. They accused the United States of overreacting with the takedown and demanded its return.

Mexican President López Obrador asks China to curb exports of opioids.

Having previously denounced similar calls from the United States, on 22 March 2023 Mexican President Andrés Manuel López Obrador wrote to his Chinese counterpart, Xi Jinping, asking China to curb the shipments of fentanyl and fentanyl precursors into Mexico. López Obrador has previously denied that fentanyl is produced in Mexico, while also touting his administration’s success in finding and shutting down labs where the drug is produced. China has also taken steps to limit fentanyl exports, but hard-to-detect precursor chemicals continue to be exported. Although President López Obrador derided the fentanyl and opioid epidemic as the United States’ problem, he implored Xi Jinping to assist him on humanitarian grounds. It is unclear whether the Chinese leader has received the letter or will respond, and it is not uncommon for President López Obrador’s controversial letters to world leaders to go without response.

Canada agrees to accept return of six Canadian women captured in Syria during fight against ISIS.

In March 2023, Canada agreed to accept the return of six Canadian women from Syria where they were detained during the fight against ISIS. Three of the women are former residents of Edmonton, while the other three appear to be from the Toronto area. The Canadian government initially declined to repatriate the women but agreed to do so after their families sought relief from the Federal Court in December 2022. Although Canadian law prohibits participating in terrorism, such cases are complicated by the difficulties of collecting evidence and performing risk assessments in war-torn locales. It is unclear whether the women will be detained or face charges upon their return to Canada, or what services will be offered to them to reintegrate them into the community.

Laura M. Reich is a commercial litigator and an arbitrator practicing at Harper Meyer LLP. In addition to representing U.S. and foreign clients in U.S. courts and in arbitration, she is also an arbitrator with the American Arbitration Association and the Court of Arbitration for Art in The Hague. A frequent author and speaker on art, arbitration, and legal practice, Ms. Reich is an adjunct professor at Florida International University Law School and Florida Atlantic University and vice treasurer of the International Law Section of The Florida Bar.

Clarissa A. Rodriguez is a board certified expert in international law. She is a member of the Harper Meyer LLP dispute resolution practice and specializes in art, fashion, and entertainment law, as well as international law. With nearly two decades of experience, Ms. Rodriguez leads and serves on cross-disciplinary teams concerning disputes resolution and the arts industry. She has found a way to dovetail her passion for the arts into her legal career by representing the players in the art, fashion, and entertainment industries in their commercial endeavors and disputes.

SPECIAL FROM THE PARIS BAR



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The litigation finance legal landscape is changing in Europe and France.

The wind of litigation finance has been blowing strong in the United States. While in its early days the legality of litigation finance faced some challenges related to the common law doctrines of maintenance and champerty, it has since enjoyed a wave of liberalism

and matured into a sophisticated sector with different profiles of investors operating at the crossroad of many disciplines.

From a mechanism initially aimed at giving access to justice to impecunious claimants, litigation finance has evolved into a more complex industry appealing both for investors who can obtain returns that are uncorrelated to the state of the financial markets as well as parties who are more and more keen on sharing the risks associated with long-lasting disputes or with enforcing a winning judgment or award.

This has led to a complexification of the underpinning investment models and funding agreements, which often draw from many financial and contractual mechanisms and which must comply with any limitations imposed by the applicable laws, including the law chosen by the parties, the law of the jurisdiction/forum of the dispute,

and the law of the likely enforcement jurisdictions.

Europe has recently taken up this issue. The European Parliament passed a resolution on 13 September 2022, to which is attached a proposal for a directive to regulate the private financing of litigation by investment funds. It provides for the establishment of an approval and monitoring system for this activity under the supervision of the member states. The funders will have to have their registered office in a member state. They will also have to meet capital adequacy requirements, in particular the ability to finance all stages of the procedure including the trial and any subsequent appeal, if necessary, by providing a guarantee for costs. The content of the funding agreement will be regulated with a list of prohibited clauses. Funders will be prohibited from making decisions in relation to the procedure. The funder will not be able unilaterally to terminate the funding agreement in the absence of informed consent from the applicant, except by court order. Court awards will be paid primarily to the applicant, who may then pay the funder. The funder must limit its earnings to a maximum of 40% of the total amount awarded. Finally, full transparency on the content of the agreement is required, especially toward the court. This activity should thus be able to develop within an established framework.

In France, this activity, although little developed to date outside of arbitration, was not prohibited despite the reticence linked to regulated activities and the monopoly of banks (but we believe the contract for financing the lawsuit is not a loan because there is no obligation to repay in the event of an unsuccessful outcome in the lawsuit) or to the monopoly of insurers (but we believe if there is a risk, then there are no conditions for financing). Moreover, a decision of the Court of Appeal of Versailles of 1 June 2006 (05/01038) had indirectly validated the device, the Court of Cassation controlling the fees of the funder (Court of Cassation, Civil Division 1, November 23, 2011, 10-16.770).

A new market is therefore certainly opening up. Moreover, on 23 January 2023, the French management company IVO Capital indicated that it had created in the summer of 2022 an FIA (alternative investment fund) in the SLP (*société de libre partenariat*) format to finance litigation; this company stated that it had invested in four cases since the beginning of this activity.

So, on the one hand it is clearly possible to finance lawyers' fees, experts, bailiffs, etc. On the other hand, it is not possible in France to finance the payment of fines, costs, and damages pronounced by judicial convictions under penalty of six months of imprisonment and a €45,000 fine (article 40 of the law of 29 July 1881 on the freedom of the press).

The difficulties will be rather ethical because French lawyers should not normally be paid by someone other than their clients; however, an exception is provided for in the case of a mandate from the client, and that is

what will be done here. In addition, the lawyer is subject to strict professional secrecy and may never disclose information to the funder; however, the financing contract should provide for an obligation of information and transparency on the part of the client toward the funder, which the client, unlike the lawyer, is entitled to accept.

Additionally, there will be a procedural obstacle in France related to the limited scope of application of "French-style class actions," even if a bill was tabled on 8 March 2023 to facilitate them. In the meantime, it is not easy in France to launch a single class action since as many lawsuits as there are plaintiffs must be launched, which will complicate the work of the third-party funder who will have to conclude as many contracts as there are plaintiffs.

We may see very soon an illustration in France. Indeed, a lawsuit could be brought in mid-2023 by a *fiducie* (the French-style trust) in a class action that would conclude a financing contract; however, the admissibility of its action is highly questionable because the Court of Cassation ruled on 31 May 2005 (02-18.547) that a legal action cannot be the object of a contribution in enjoyment remunerated by the attribution of corporate rights and that it is not certain the transfer in this case can be indisputably qualified as a transfer in ownership because it would be a management trust and not a security trust. Moreover, the trust does not have legal personality, which prevents it from taking legal action (*Fiducie Sylvie Vallée v. Canada*, 2004 GTC 318 (T.C.C.)).

Finally, there is another uncertainty in France related to the *droit de retrait litigieux* (withdrawal of a litigious right) provided under articles 1699 and 1700 of the French Civil Code, which gives to the person against whom a litigious right has been assigned the right to reimburse the assignee of the actual price of the assignment plus interests and costs. In the context of assignment of rights subject to arbitral proceedings, the French Court of Cassation in 2018 annulled two decisions of the Paris Court of Appeal rendered in the context of annulment and enforcement proceedings of two awards, in which the Paris Court of Appeal had held that the argument based on the exercise of the *droit de retrait litigieux* was inadmissible as it did not fall within the limited scope of review of the awards under articles 1520 and 1525 of the French Code of Civil Procedure (French Court of Cassation, February 28, 2018, Civ. 1, No. 16-22.112 – annulment proceedings – , and No. 16-22.126 – enforcement proceedings). The Court of Cassation considered that the exercise of this right affected the enforcement of the awards and therefore should have been analyzed by the Court of Appeal seized under articles 1520 and 1525 of the French Code of Civil Procedure. In December 2021, seized on remand, the Paris Court of Appeal maintained its position that the exercise of this right did not fall within the limited grounds for annulment of awards. (December 7, 2021, CCIP - CA - RG No. 18/10220 –

annulment proceedings, and No. 18/10217 – enforcement proceedings).

The American wind is blowing in Europe and particularly in France, but unfortunately not yet strong enough.

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Aurélie Arenales Huet is a partner at BFPL Avocats where she heads the international arbitration practice. Ms. Huet acts as arbitrator and counsel in international arbitration cases conducted in English, French, and Spanish and involving the laws of many common law and civil law jurisdictions. She has practiced in France, Los Angeles, and Latin America, and her experience spans a range of sectors including construction and infrastructure projects, energy, defense, aerospace, information and communication technologies, stevedoring, port concession, finance, pharmaceuticals, and cosmetics. Ms. Huet is licensed in Paris and California.

SOUTH KOREA



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Korean Special Taxation Act relaxes IRC application to foreign flow-through entities.

In December 2022, South Korea enacted the 2023 Tax Reform Bill, and the

enacted tax bill introduced a special tax regime called the Special Taxation Act (the Amendment).

The Special Taxation Act provides that a Korean taxpayer including individuals, corporations, and trusts who invest through a foreign entity can apply to the Korean taxing authorities to treat such entity as a transparent entity under Korean tax law. This means that many Korean investors who want to invest in and via U.S. entities can be relaxed with the concerns regarding the application of section 894(c) of the Internal Revenue Code (Section 894(c)).

894(c) U.S. withholding for Korean investors making investments via non-Korean/foreign entity and the Special Taxation Act

As of January 2023, the United States has various types of income tax treaties covering sixty-six countries, including

South Korea. Under Section 894(c), a foreign person may only claim treaty benefits when the income is earned through a pass-through entity provided that (a) the pass-through entity is treated as “fiscally transparent” under the laws of the treaty jurisdiction; and (b) the income is derived by the taxpayer of the treaty jurisdiction.

Under Korean tax law prior to the Amendment, not only was it unclear but also there were inconsistent legal interpretations regarding what types of non-Korean entities should be treated as fiscally transparent for Korean tax law purposes. Further, certain discrepancies between the U.S. tax law and Korean tax law for determining how to treat a legal entity created a fair amount of confusion among Korean investors. For example, if a Korean investor invested through a U.S. limited liability company (an LLC), there was always a lingering hesitation and confusion since a U.S. LLC is treated as a partnership, thus a pass-through entity under the Internal Revenue Code, whereas an LLC is treated as a corporation under Korean tax law. Therefore, this newly enacted Amendment serves as an important landmark for Korean tax law because Section 894(c) has been generally understood as denying certain income tax treaty benefits established between the United States and South Korea due to the aforementioned limited interpretation.

Takeaways

Prior to the Amendment, many Korean investors had opted to invest through far more complex investment structures, such as a feeder real estate investment trust (a feeder REIT) to avoid the uncertainty of Korean tax law treatment of commonly used investment vehicles. Those Korean investors who hesitated to make investments in the U.S. entities may now qualify for treaty benefits with a greater sense of certainty. This application of the Amendment can be elected by filing a statutory application with the Korean taxing authorities for Korean investors.

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WESTERN EUROPE



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France’s controversial retirement reform sparks protests.

France’s pension reform, which led to nationwide protests, will raise the country’s retirement age by two years

from sixty-two to sixty-four years. Months of protests have gripped the country, affecting schools, railways, and other public sectors. Thousands of people have

protested in Paris and millions nationwide. The protests are disrupting air and train travel and have turned violent, with demonstrators clashing with police and blocking streets with debris and fires. Tourist attractions such as the Eiffel Tower are closed during days of strike, and trash is building up in parts of Paris because garbage collectors are on strike.

President Emmanuel Macron's argument for the necessity of the controversial reform is that France's pension system will plunge into a huge deficit without a reform. A reform is necessary to make the French economy more competitive. France will continue to have lower birth rates and longer life expectancy over the years, which will have a negative impact on the country's economy. Macron's plan faced opposition, and he used special constitutional powers to push his plan to raise the retirement age through the lower house of Parliament. The reform plans were passed in the Senate and were due for a vote in the National Assembly (the lower house). Since Macron's plan faced resistance, instead of allowing the National Assembly to vote, Prime Minister Elisabeth Borne decided and announced to the National Assembly that the government would trigger Article 49.3 of the French Constitution. Article 49.3 allows the government to pass a bill without a National Assembly vote but also allows lawmakers to file a no-confidence vote against the French government within twenty-four hours. The president's government survived the no-confidence vote, and thus France's pension reform proposal will become law.

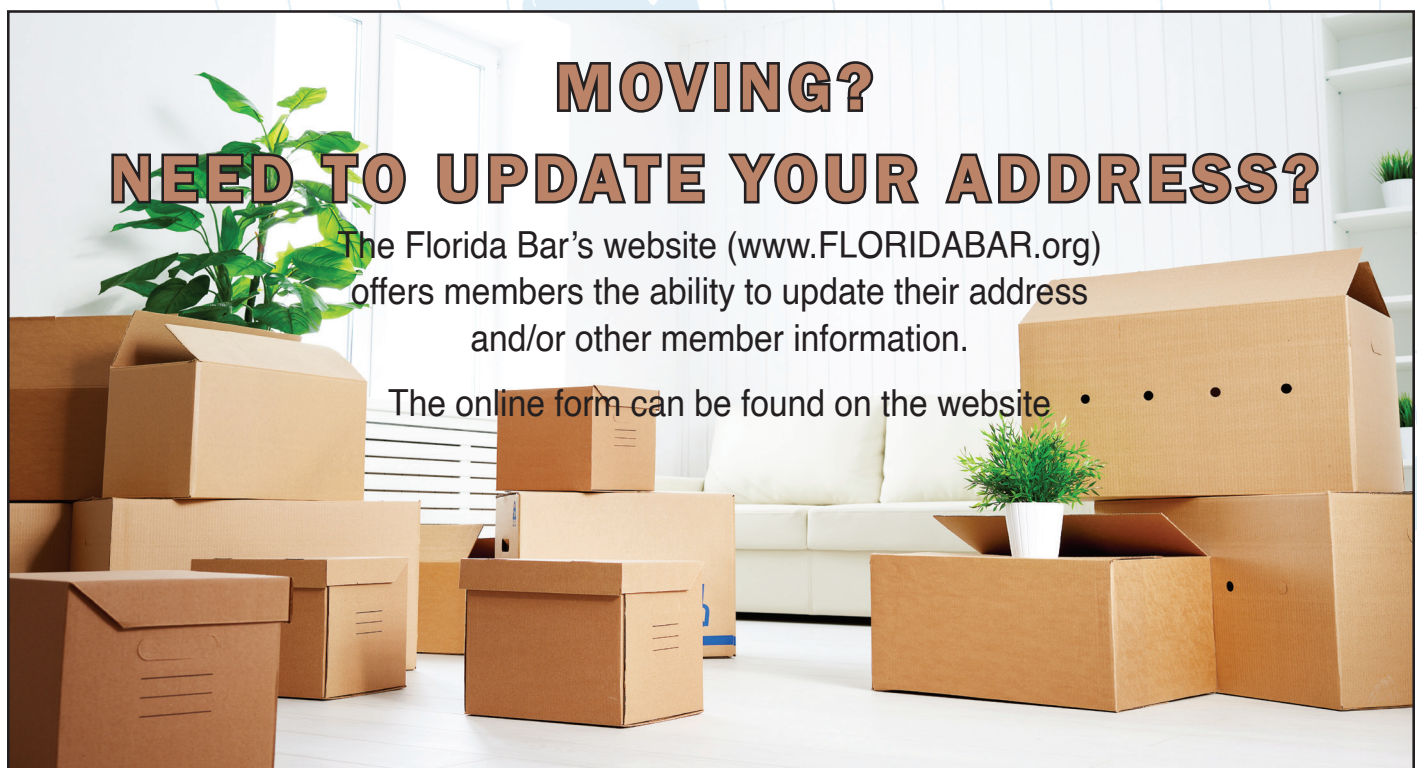
Artificial intelligence tool ChatGPT banned in Italy over privacy concerns.

Italy has become the first Western country to temporarily block ChatGPT, the artificial intelligence tool with its ability to draft essays, engage in conversations, and perform even complex tasks like writing computer code.

Italy's data protection authority claims OpenAI, the U.S. start-up company behind ChatGPT, unlawfully collected personal data from its users. Also, OpenAI allegedly did not have an age-verification system installed to protect minors from being exposed to unlawful material while using the chatbot. ChatGPT has generally raised concerns about the spread of misinformation, the effects on employment, and the overall broader risks to society by using the artificial intelligence tool.

The Italian regulators instructed OpenAI to block users in Italy from gaining access to ChatGPT until the company turns over additional information. OpenAI was given twenty days to provide the material asked for and possible remedies before a final decision would be made about the future of ChatGPT in the country. Italy's regulators stated OpenAI could face a fine of up to €20 million or 4% of OpenAI's worldwide annual revenue.

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



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Best Practices: Facing a Language Barrier? Remember These Five Tips

By Carmen Hiers, Miami



Let's say you're involved in cross-border litigation with an entity in Denmark and the case will be tried in U.S. federal court, so all the trial exhibits and discovery documents must be translated from Danish into English. Or you represent a U.S. manufacturer whose workforce is primarily Spanish-speaking, and your advice to your client is to have their handbook, NDA, and onboarding forms in Spanish as a best practice. Or you file a lawsuit on behalf of your client and the defendant is not English-proficient, so the summons and related paperwork must be translated into Korean. You may need to depose a witness who doesn't feel comfortable being questioned in English. If you're handling the estate of someone who owned properties in the United States and Venezuela, you need to know about the Venezuela proceedings. Whatever the circumstance, you've got a language barrier between you and whatever you need to accomplish for your case.

Whenever you need language services, you should ask three questions: (1) can the work be done when you need it; (2) can it be done without breaking your client's bank;

and (3) can you trust that the work is accurate, especially in a language you don't understand? The last thing a busy attorney needs is to waste a client's time and money with work that will prove embarrassing or risk losing the case.

If you find yourself facing a language barrier, here are five tips to guide you:

1. Don't wait until the last minute.

Legal matters are always complicated, but more so when there's another language involved. The fact that a document needs to be translated or someone's spoken words need to be interpreted adds another layer of complexity to an already complex situation. Start thinking about this early—and get opposing counsel to start thinking about it early—to avoid problems with lack of availability, rush translation fees, or work that is sub-par because it was done in a hurry. True, sometimes things must be done at the last minute, but it's best to avoid this scenario if at all possible.

2. Realize there's a difference between a certified translator and a certified translation.

In the United States, there is no legal requirement that a translator become certified in order to translate, and many excellent translators don't bother to do it. The lack of a certification should not deter you from engaging a top linguist with subject-matter expertise and decades of experience. What you *really* need is a certified translation, which is simply one that comes accompanied by a signed certificate of accuracy stating that the translator has done the work to the best of his/her knowledge, ability, and belief. These affidavits are usually notarized.

3. Know the limitations when it comes to federal- and state-certified interpreters.

By contrast, there *is* such a thing as a federal- or state-certified interpreter, and there will be times when you need one, such as when mandated by a judge. But this is tricky. Federal courts certify only three languages (Spanish, Navajo, and Haitian Creole), and at the state level most courts certify only a handful. So, if you're being asked to provide, say, a court-certified Farsi interpreter in Florida, you won't be able to do it. Also, be aware that a certified interpreter, whether state or federal, will command higher fees.

4. When trial interpreting is needed, you will need more than one interpreter.

This is because trial interpreting, unless limited to witness testimony, requires simultaneous interpreting—which calls for two people on hand that must switch places frequently due to the intense concentration this work requires. Advise your client so they can be prepared for the expense.

5. Be sure your provider is up to the task.

This applies especially when you have a very tight deadline, have dozens (or even thousands) of documents that need translation, or need them done in multiple languages (or all three). There are a great many language services providers out there with different capabilities. Be sure to use the one best suited to your needs, and keep in mind that size is not an indicator of competence. A large agency may be expensive and impersonal, and a small agency may not have the bandwidth to handle large files, complex files, or multiple projects and languages at once. Look around for

the right fit. Translation is like the air in your car's tires. You don't think about it until you need it, and unless you have it, you can't move forward.



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a global network of experienced linguists, designers, and technical specialists, TransForma serves the legal, financial, corporate, and B2C sectors with a full array of services in more than 150 languages. Ms. Hiers is a graduate of the Goldman Sachs' 10,000 Small Businesses program, a past president of the South Florida chapter of the Organization for Women in International Trade, and a member of The Florida Bar's 11K Grievance Committee. You can reach her at chiers@transformaonline.com or (305)722-3827.

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orientation, training exercise, and military advice.

Brokering activities include any action on behalf of another to facilitate the manufacture, export, permanent import, transfer, reexport, or retransfer of a U.S. or foreign item described on the USML or defense service, *regardless of its origin*. This definition is quite broad and encompasses a number of activities that normally would not be captured by the commercial use of the term brokering.

A temporary import is simply an import that the importer intends to return to origin at the time of the import. Permanent imports are not regulated by the ITAR (although in some cases they might be regulated by the Bureau of Alcohol, Tobacco, Firearms and Explosives).

National Oceanic and Atmospheric Administration's Remote Sensing Regulations

The National Oceanic and Atmospheric Administration (NOAA) is responsible for licensing the operation of private remote sensing space systems under the Land Remote Sensing Policy Act of 1992.³ Remote sensing is defined as “. . . the collection of unenhanced data by an instrument in Earth's orbit which can be processed into imagery of surface features of the Earth.”⁴

Many spacecraft have the ability to remotely sense the Earth whether it be intentional or unintentional. For instance, a spacecraft that uses sensors solely to dock with another craft will, while performing positional maneuvering, likely catch a glimpse of the Earth. Due to this capability, NOAA must review the remote sensing capabilities and issue a license to the company for operation of those sensors. Many companies will be told they do not need a license because the imaging capability is lower quality than what is already commercially available.

NOAA's licensing process works by categorizing remote sensing capability into three tiers. Generally, the more competition a company has and the more commercially available the type of data being gathered is, the less need for regulation. Tier 1 is the lowest level of regulation, and Tier 3 is the highest



To kick off the process with NOAA, an initial contact form is submitted to the NOAA Commercial Remote Sensing Regulatory Affairs (CRSRA) website.⁵ This form is intended to help the company and NOAA work together to determine if regulation is needed. This process is free, and responses are quick.

If NOAA determines a license is necessary, then a full license submission is required with a great deal of technical information, as required by the regulations.⁶ CRSRA will consult with the company to complete the application and, once complete, circulate the application to various other agencies to review in an interagency review process. Under the interagency review process, several federal agencies get to weigh in on the risks associated with the remote sensing activity described in the application.⁷ This process will ultimately influence the restrictions that come back on any license that is granted.

Notably, NOAA is one of the more straightforward, fastest, and simplest agencies a space company operating in the United States will deal with on the journey to a successful Mission 1.

Federal Communications Commission's Telecommunication Regulations

The FCC is responsible for a great number of regulatory responsibilities. One of them is allocating spectrum usage for communicating with things in space. In short, if a company deals with anything in space or a ground station, it will require a license from the FCC. This licensing process is intended to (a) avoid interference with other objects in

The Regulatory Ecosystem of the U.S Commercial Space Industry, continued

space and (b) ensure there is a plan to mitigate the risk of orbital debris.

Communications, whether terrestrial or extraterrestrial, rely on use of the electromagnetic spectrum. You might recall from using walkie-talkies as a child that other devices operating on the same channel can cause interference. This is the same reason that commercial airlines ask you to switch off your cell phone when the pilot is communicating with the airfield tower operator. For this reason, the FCC allocates who may use which frequencies within certain spectral bands within the United States. The FCC also coordinates with the International Telecommunications Union (ITU) to make sure that interference is minimized on a global scale.

FCC regulations are complex and very technical. Also, much like export controls, finding the right regulatory path can be as daunting as the path itself. One notable difference in working with the FCC and other federal agencies is that Congress has authorized the FCC to charge fees to cover operational costs of the agency. A full satellite constellation operator can expect to pay an application fee, annual regulatory fees, post a bond, and hire counsel to help them assemble information. Collectively, the cost is often hundreds of thousands of dollars with lots of room for variation depending on the novelty of the company's mission and how contested the spectral allocation will be.

There are several licensing paths to go down with the FCC. Most space companies will realistically consider Experimental (Part 5),⁸ Commercial Constellation (Part 25),⁹ Small-Sat,¹⁰ and possibly Earth station licensing.¹¹ Experimental licensing is easily the most affordable, at only a few hundred dollars, but it is not available for missions that have been commercialized. Instead, most major constellation operators have Part 25 licenses, but those are difficult to obtain and cost prohibitive for new market entrants. Acknowledging this problem, the United States created the Small-Satellite Streamlined process within Part 25, which is more affordable and faster if the satellite meets specific requirements. Finally, Earth station licensing is required to authorize ground antennas that will be uplinking and/or downlinking to/from satellites or other spacecraft.

Federal Aviation Administration's Launch and Reentry Regulations

The FAA Office of Commercial Space Transportation (AST) provides authorization for companies to launch and/or reenter Earth's atmosphere. The FAA reviews applications for safety risks to the public on both launch and reentry, national security interests, and environmental and property hazard.¹² The FAA is also directly responsible for compliance with Article IV of the 1975 Convention on Registration of Objects Launched into Outer Space.¹³ When reviewing the manifest of spacecraft aboard a launch, the FAA, upon authorization, provides that information to the Department of State for reporting to the United Nations.

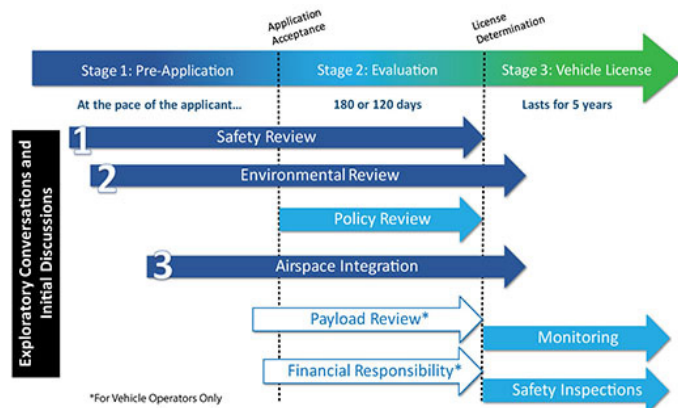
Just like the FCC, there are many types of authorizations available and/or required from the FAA. License types include: operator licenses, launch licenses, re-entry licenses, spaceport operator licenses, and a few others. There's no cost associated with the FAA's portion of the licensing process, but that can change if you need the Environmental Protection Agency (EPA) to provide a report as part of the FAA application process.

Aside from licenses, there are three primary types of approvals: payload reviews, policy reviews, and safety approvals. A payload review is normally performed as part of a launch authorization; however, an applicant may request a payload review in advance of and separately from a launch authorization. This is highly recommended for a novel spacecraft or mission such as orbital transfer vehicles. FAA AST conducts the policy and safety reviews as part of the payload review. They will also assess the payload proposed for launch to determine whether a license applicant or payload owner or operator has obtained all required licenses, authorization, and permits.

Safety approvals can be included within other reviews or stand on their own. Some are mandatory, and some are voluntary. When requesting a safety approval for a new vehicle, safety system, process, service, or personnel to prospective launch and reentry vehicles, a policy review will also be conducted to assess security risks. Other forms of safety reviews, such as a launch site safety review, are mandatory and conducted in the process of a launch license evaluation.

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The most complex part of working with the FAA is getting started early enough. To kick off the process, a pre-application consultation is scheduled. License documents will be generated, and other agencies will be brought in. This includes other parts of the FAA and the U.S. Coast Guard to discuss airspace and coastal water safety. Upon the application being submitted and approved by the FAA AST, stage two begins. Stage two contains a policy review, payload review, and assessment of financial responsibility should something go wrong. A final interagency review will occur at this time, and occasionally issues are brought up by other agencies. If everything goes smoothly, a license determination will be made within six months.¹⁴



The Committee on Foreign Investments in the United States

The mandate of the Committee on Foreign Investments in the United States (CFIUS) is to review transactions between a U.S. business and a foreign person to determine whether the transaction poses a risk to U.S. national security, and if so, to mitigate that risk.¹⁵ CFIUS has the authority to recommend to the president to use powers stipulated under Section 721 of title VII of the Defense Production Act of 1950¹⁶ to suspend or prohibit a particular transaction.

CFIUS has jurisdiction to review a transaction in one of four scenarios:

1. A covered control transaction;
2. A covered investment;
3. A change in the rights that a foreign person has with respect to a U.S. business in which the foreign person has an investment, if that change could result in a covered control transaction or a covered investment; or

4. Any other transaction, transfer, agreement, or arrangement, the structure of which is designed or intended to evade or circumvent the application of the CFIUS regulations and the underlying statute.¹⁷

We will briefly discuss covered control transactions and covered investments below.

Covered Control Transactions

A covered control transaction is any transaction by or with any foreign person that could result in foreign “control” of any U.S. business, including such a transaction carried out through a joint venture.¹⁸ Control is defined very broadly, and one cannot escape CFIUS jurisdiction by merely asserting that a foreign person has less than a majority equity interest. Rather, control is defined as the power, direct or indirect, to determine, direct, or decide important matters affecting an entity. This may be accomplished through majority ownership or a dominant minority, through board representation, proxy voting, or even informal arrangements to act in concert.¹⁹

While that definition is very broad, fortunately the CFIUS regulations provide some assistance by listing certain minority shareholder protections that don’t, in themselves, confer control,²⁰ as well as several examples of fact patterns that CFIUS has determined don’t constitute control.²¹

Covered Investments

The CFIUS regulations define covered investment as an investment, direct or indirect, by a foreign person (other than an excepted investor), in an unaffiliated “TID U.S. business” that:

- a. Is not a covered control transaction; and
- b. Affords the foreign person:
 1. Access to any “Material Nonpublic Technical Information” in the possession of the TID U.S. business;
 2. Membership or observer rights on, or the right to nominate an individual to a position on, the board of directors or equivalent governing body of the TID U.S. business; or

The Regulatory Ecosystem of the U.S Commercial Space Industry, continued

3. Any involvement, other than through voting of shares, in “Substantive Decisionmaking” of the TID U.S. business regarding:
 - i. The use, development, acquisition, safekeeping, or release of sensitive personal data of U.S. citizens maintained or collected by the TID U.S. business;
 - ii. The use, development, acquisition, or release of “Critical Technologies”; or
 - iii. The management, operation, manufacture, or supply of “Covered Investment Critical Infrastructure.”

As you can see by the quotations marks that we’ve included in this definition, there are several more defined terms within this defined term. Unfortunately, the most difficult part of analyzing the CFIUS regulations is that every important definition includes several layers of nested definitions within it.

Addressing the first nested definition, “TID U.S. Business” includes, among other things, businesses that manufacture, fabricate, or develop “Critical Technologies.”²² Without fully defining “Critical Technologies,” they include items controlled by the ITAR and items controlled by the EAR for reasons other than anti-terrorism reasons.²³ In our experience, nearly every company in the space industry with which we have worked manufactures or develops such “Critical Technologies,” and, as a result, is a “TID U.S. Business.” However, CFIUS jurisdiction can be avoided by eliminating the investor’s access to “Material Nonpublic Technical Information,”²⁴ not granting any rights to oversight of the board, and otherwise eliminating the investor’s right to participate in “Substantive Decisionmaking.”²⁵

Conclusion

Space is hard, and it’s not just the rocket science and astrophysics. There are several federal agencies in the United States that apply complicated and onerous regulations. The cost and time commitment associated with compliance is very high, and the barrier to entry is steep and expensive. The summaries included in this article are brief, and there’s a lot more to them.

Furthermore, this article doesn’t even touch on all the complex worlds of contracting with the Department of Defense, NASA, and other U.S. government agencies. In short, companies looking to enter the U.S. space industry should speak with legal counsel very early in the game, and preferably attorneys who are well-versed in the regulatory environment.



Bailey Reichelt and Jack Shelton are the cofounders of *Aegis Space Law*, a boutique law firm focused on the U.S. commercial space industry. Aegis helps its clients obtain the various licenses they need to get to and operate in space and builds out regulatory compliance programs to keep them out of trouble.

Endnotes

- 1 22 CFR § 121.1.
- 2 15 CFR § 774 Supp 1.
- 3 51 U.S.C. § 60101, et seq.
- 4 15 CFR § 960.4 “Remote sensing”.
- 5 <https://www.nesdis.noaa.gov/about/our-offices/commercial-remote-sensing-regulatory-affairs>.
- 6 15 CFR Part 960, Appendix A.
- 7 15 CFR Part 960, Appendix A.
- 8 47 CFR Part 5.
- 9 47 CFR Part 25.
- 10 <https://www.fcc.gov/document/streamlining-licensing-procedures-small-satellites-1>.
- 11 <https://www.fcc.gov/earth-station-licensing-sample-form-312-applications>.
- 12 14 CFR Part 450.
- 13 14 CFR § 450.217, <https://treaties.un.org/doc/Publication/UNTS/Volume%201023/volume-1023-I-15020-English.pdf>.
- 14 https://www.faa.gov/space/licenses/licensing_process/.
- 15 31 CFR § 800.101.
- 16 *Id.*; 50 U.S.C. § 4565.
- 17 31 CFR § 800.213.
- 18 31 CFR § 800.210.
- 19 31 CFR § 800.208.
- 20 31 CFR § 800.208(c).
- 21 31 CFR § 800.208(e).
- 22 31 CFR § 800.248.
- 23 31 CFR § 800.215.
- 24 31 CFR § 800.232.
- 25 31 CFR § 800.245.

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they limit sulfur emissions, mandate inspections, impose restrictions, and require reporting.

Norway, the fourth-largest shipping nation in the world measured by market value,³² requires the reporting of alternative means to comply with the emission requirements to the Norwegian Maritime Authority³³ and even with reporting, does not allow the use of open-loop scrubbers in its heritage fjords.³⁴

Singapore, ranked the fifth-largest register of ships in the world, has a fleet of almost 5,000 ships totaling over 96 million gross tons.³⁵ Since 2018, Singapore's Maritime & Port Authority (SMPA) has engaged stakeholders to prepare for the new sulfur regulations, working closely with them to develop and publish guides to comply with IMO 2020.³⁶ Singapore's Prevention of Pollution of the Sea (Air) Regulations 2022 include the entire MARPOL Annex VI in the first schedule of the Regulations.³⁷

The United States is the fifth-largest shipping nation in the world measured by market value.³⁸ In total, there are 587 ports across the country.³⁹ The majority of the United States is part of the North American and U.S. Caribbean Sea ECAs.⁴⁰ Since 1 January 2015, both ECAs have had a fuel oil sulfur cap that is lower than that imposed by IMO 2020.⁴¹ In 2021, the U.S. Environmental Protection Agency (EPA) published MARPOL Annex VI and the Act to Prevent Pollution from Ships (APPS) (33 U.S.C. §§ 1905-1915) under its enforcement page.⁴² There, the EPA explains that there is a memorandum of understanding (MOU) between the EPA and the U.S. Coast Guard (USCG) to enforce MARPOL Annex VI.⁴³ Efforts that fall under this MOU include oversight of marine fueling facilities, onboard compliance inspections, and record reviews.⁴⁴ More recently, the USCG Office of Commercial Vessel Compliance came out with a guidance dated 13 January 2020 covering the implementation of compliance and enforcement policy for IMO 2020.⁴⁵ In that guidance, the USCG reasserts that pursuant to APPS, it has the authority and responsibility to conduct ship inspections, examinations, and investigations, and can undertake enforcement action.⁴⁶ Although only the EPA can issue Engine International Air Pollution Prevention (EIAPP) certificates, both the EPA and the USCG are authorized to issue regulations to carry out Annex VI.⁴⁷

IMO 2023

November 2022 amendments to MARPOL Annex VI required short-term improvements to the energy efficiency of ships.⁴⁸ Subsequently, IMO 2023 entered into force on 1 January 2023.⁴⁹ This new IMO regulation focuses on two carbon intensity measures—the Energy Efficiency Existing Ship Index (EEXI) and the Carbon Intensity Indicator (CII).⁵⁰ The first annual reporting for EEXI and CII requirements must be completed in 2023.⁵¹

Under the EEXI requirement, ships of 400 gross tonnage and above are compared to a required baseline relative to the ships' type and size.⁵² Each ship's attained EEXI value must be below the required EEXI to meet the minimum energy efficiency standard.⁵³ Similarly, under the CII requirement, ships' actual annual operational CII will be verified against a required annual operational CII.⁵⁴ The CII measure determines the appropriate reduction factor for each ship to continue to improve its operational carbon intensity.⁵⁵ Initial ratings generated from these metrics will apply in 2024.⁵⁶ The IMO encourages providing incentives for ships with A or B ratings, while ships rated D for three consecutive years, or E for one year, will have to submit corrective action plans.⁵⁷

EU Fit for 55 Updates

About 75% of the EU's external trade, along with 31% of its internal trade in terms of volume, comes from maritime transport.⁵⁸ Approximately 400 million passengers embark or disembark in EU member state ports annually, creating ship traffic that accounts for around 11% of all EU carbon dioxide emissions from transport and 3-4% of total EU carbon dioxide emissions.⁵⁹

EU Emissions Trading Scheme and Regulation 2015/757

As part of recommended updates to the European Union's Fit for 55 package, the EU Emissions Trading Scheme (EU ETS) will expand to cover maritime transport.⁶⁰ In parallel, Regulation (EU) 2015/757 on the monitoring, reporting, and verification of carbon dioxide emissions from maritime transport will provide for monitoring, reporting, and verification rules that are necessary for the extension of

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the EU ETS to maritime transport activities.⁶¹ This includes monitoring and reporting aggregated emissions data from maritime transport activities at the company level.⁶² The Regulation's title will be amended to replace "carbon dioxide" with "greenhouse gas,"⁶³ which represents the proposed inclusion of methane and nitrous oxide in the Regulation as of January 2024.⁶⁴ Inclusion of methane and nitrous oxide in the EU ETS is recommended to follow in 2026.⁶⁵

Subject to limited exceptions,⁶⁶ under the EU ETS amendments, ships of 5,000 gross tonnage or more will have to comply with emission allowances beginning in 2024.⁶⁷ Because emissions from ships below 5,000 gross tonnage amounts to less than 15% of emissions from ships, their inclusion will be assessed at a later date.⁶⁸ For applicable ships, 100% of the emissions from voyages between two member states and emissions within a port under the jurisdiction of a member state are included.⁶⁹



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Meanwhile, 50% of the emissions from voyages between a port under the jurisdiction of a member state and a port outside the jurisdiction of a member state will be subject to the EU ETS.⁷⁰ To combat the risk of evasive port calls and the risk of delocalization, incoming and outgoing voyages are covered,⁷¹ certain stops at non-Union ports will be excluded,⁷² and a limit of 300 nautical miles from a port of jurisdiction of a member state will be implemented.⁷³

Shipping companies, defined as the ship owners, will be responsible for compliance with the EU ETS.⁷⁴ Each shipping company will be assigned to one member state, but all member states will act in solidarity when a shipping company fails to comply with requirements or enforcement measures.⁷⁵ To reduce administrative costs, member states will not take into account contractual agreements that vary from ship to ship;⁷⁶ however, a shipping company will be entitled under statute to claim reimbursement from another entity if they are directly responsible for decisions affecting the greenhouse gas (GHG) emissions of the ship.⁷⁷

FuelEU Maritime

Also applying to ships of over 5,000 gross tons, FuelEU Maritime (FuelEU) will join the Fit for 55 package in January 2025.⁷⁸ The regulation was proposed, in part, to prevent the diversion of traffic and market distortion that would occur between competing ports of member states if obligations for renewable and low-carbon fuels were established at a national level.⁷⁹ It establishes rules that reduce the carbon dioxide, methane, and nitrous oxides (GHG)⁸⁰ of energy used on board ships arriving at, within, or departing from ports under the jurisdiction of a EU member state,⁸¹ including while a ship is at berth.⁸² Shipping companies will be responsible for compliance⁸³ and will have to submit monitoring plans and information for the amount, type, and emission factor of energy used on board their ships.⁸⁴ Any entities directly responsible for decisions affecting GHG intensity—like fuel, route, and speed of ships—should be held contractually accountable by the shipping company.⁸⁵

The European Commission will create an electronic database that houses compliance data for each ship's GHG emissions per unit of energy used on board.⁸⁶ To alleviate administrative burdens, the regulation also proposes

certifications of fuels.⁸⁷ Similarly, shipping companies have some flexibility with options to roll over compliance surpluses and pool compliance performance.⁸⁸ FuelEU certificates of compliance will be issued by verifiers and kept on board each ship to be inspected by ports as evidence of compliance.⁸⁹ Penalties will be assessed for each quantum of energy used above the requisite reference value,⁹⁰ which will drop by 2% in 2025, 6% in 2030, 13% in 2035, 26% in 2040, 59% in 2045, and 75% in 2050.⁹¹

The reference value will be calculated in accordance with fleet averages using methodologies and default values in Annex 1 to Regulation (EU) 2015/757.⁹² To assess a fuel's emissions factor, FuelEU will employ a well-to-wake approach, which takes into account the entire process of fuel production, delivery, and use.⁹³ Stakeholders advocated for use of this approach,⁹⁴ expressing concerns that the alternative "tank-to-wake" option creates a false impression of GHG reduction—burdening fuels with low emissions derived from upstream processes, like LNG,⁹⁵ while promoting fuels with zero operational emissions, like hydrogen and ammonia.⁹⁶

Carbon Border Adjustment Mechanism

Taking effect in October 2023, the Carbon Border Adjustment Mechanism (CBAM) will place a "carbon price" on certain goods imported into the EU⁹⁷ based on GHG emissions regulated by the EU ETS and a timeline that spans the production of applicable goods to the time of import.⁹⁸ For now, covered goods include cement, iron and steel, aluminum, fertilizers, electricity, and hydrogen.⁹⁹ The introduction of CBAM will work alongside the phaseout of free allowances under the ETS system.¹⁰⁰ In turn, the free allocation no longer provided to the CBAM sectors will be added to the EU's Innovation Fund to support innovation in climate-change mitigation technologies.¹⁰¹

Under CBAM, EU importers of goods register with national authorities and buy CBAM certificates priced according to weekly ETS allowances.¹⁰² Importers then declare the emissions embedded in their goods and surrender the corresponding number of certificates yearly.¹⁰³ If importers have already paid a carbon price, that amount can be deducted from certificates due.¹⁰⁴ Two kinds of emissions

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can be monitored—direct and indirect emissions.¹⁰⁵ Direct emissions are embedded emissions that occur during the production process.¹⁰⁶ Indirect emissions are attributed to the production of electricity needed for manufacturing.¹⁰⁷

Customs authorities can conduct searches that include inspecting the goods and checking the goods' quantity and country of origin.¹⁰⁸ Additionally, customs authorities can verify identification of the authorized CBAM declarant, the eight-digit combined nomenclature (CN) code, and the date of declaration of the customs procedure.¹⁰⁹ During the transitional phase, customs authorities should also inform customs declarants of reporting requirements.¹¹⁰ The Commission will maintain a CBAM registry.¹¹¹

Countries and territories with (i) an emission trading system that fully links to the EU ETS and (ii) carbon pricing that is charged on the emission embedded in goods without any rebate beyond those also applied in the EU ETS will be exempt from CBAM.¹¹² Currently, that list includes the countries of Iceland, Liechtenstein, Norway, and Switzerland, along with five other territories.¹¹³

Global Arrangement on Sustainable Steel and Aluminium

While the United States is not exempted from CBAM, as it does not have a domestic carbon pricing system equivalent to the EU ETS, the European Commission President Ursula von der Leyen is working with the United States to bring a Global Arrangement on Sustainable Steel and Aluminium (GASSA) to fruition.¹¹⁴

Despite GASSA's possible market-stabilization and decarbonization benefits, there is concern over the arrangement interfering with the CBAM, and GASSA and CBAM violating World Trade Organization (WTO) rules such as the most-favored nation rule prohibiting discrimination among WTO members.¹¹⁵ President von der Leyen has historically expressed similar discrimination concerns with the United States' IRA.¹¹⁶ The WTO, however, has a series of exceptions for environmental protection, public health, national security, and measures taken under an international commodities agreement that likely make the CBAM, IRA, GASSA, and similar regulations WTO-compatible.¹¹⁷

Port Infrastructure

In a recent survey among 130 public port authorities in the United States, Canada, the Caribbean, and Latin America, 58% of respondents have begun studying projects to serve vessels with alternative fuels, including hydrogen, LNG, and ammonia.¹¹⁸ Three key elements of port infrastructure are storage facilities, bunkering vessels, and transfer systems.¹¹⁹ Ports may face delays with hydrogen production and storage facilities due to significant technical and safety concerns;¹²⁰ however, if those challenges are overcome, ports may be well-positioned to become hydrogen production hubs.¹²¹ LNG, on the other hand, has more developed infrastructure and transfer systems, which certain biofuels can share.¹²² Meanwhile, transfer systems are in place for ammonia, but storage facilities are more

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infrequent in ports, and ammonia bunkering vessels need to be developed.¹²³ Likewise, methanol and ethanol port infrastructure and bunkering vessels are sparse and need to be developed, with fuel currently transported by trucks.¹²⁴

With a projected US\$1.2 trillion to US\$1.6 trillion price tag for onshore infrastructure and production facilities needed to decarbonize the shipping industry by 2050, stakeholder collaboration and major investment is key for ports.¹²⁵

Taking into account the wide array of fuel types used to meet technology- and fuel-neutral regulations, ports must consider how long each transitional fuel will be used, the stakeholder demand for each fuel type, and the price of setting up the fuel supply's corresponding infrastructure.

Shore Operations of Ports

Ports are faced with the challenge of not only complying with the existing and upcoming fuel regulations (and building the necessary infrastructure to handle it) but also taking measures to reduce their carbon footprint while catering to a changing client base that both demands and requires such a reduction. The Port of Corpus Christi, for example, recently revised its environmental policy to include a new objective: reduction of greenhouse gases per cargo ton handled by 7.5% annually.¹²⁶ Ports across the country are considering how to achieve similarly ambitious goals.

Electrification of Port Facilities

While the focus on short-term returns in certain industries has had the effect of stalling advancements in energy policy and management, a focus on long-term returns, coupled with the unquantifiable benefits related to improving local economies and protecting the surrounding marine environment, is spurring the advancement of clean energy strategies at seaports and container terminals. A similar movement in trucking logistics¹²⁷ means pronounced port efforts toward replacing gas- or diesel-engine fleets and equipment with electric and battery-run fleets, equipment, and infrastructure in the effort to reduce the carbon footprint.¹²⁸

The success and profitability of seaports and terminal ports have historically turned on three elements: efficiency

of operations, resilience of systems, and productivity.¹²⁹ For long-term survival in a globally competitive marketplace, seaport and container ports have, for some time, acknowledged and actively evaluated the impact of electrification in these three areas,¹³⁰ however, electrification is expensive and complex.¹³¹

Container port infrastructure is already an entangled, interconnected system of intermodal equipment (e.g., cargo handling equipment, containers, trailers, forklifts, cranes, and carriers) and cargo handling processes.¹³² The electrification of such infrastructure and processes creates additional complexity around design, the capacity and adequacy of power sources and distribution, and new and evolving regulatory frameworks.¹³³ This is because existing infrastructure, equipment, methods, and labor must be evaluated for capacity, connectivity, scale, and sufficiency of assets.¹³⁴ Any incompatibility or obsolescence in any of those areas or elements would equate to a need for significant capital expenditures and investments. For example, the Port of Long Beach and the Port of Los Angeles are estimating costs in the range of US\$8.5 billion to US\$14 billion to support new technologies and modernized infrastructure to support the San Pedro Bay Clean Air Action Plan.¹³⁵

Because of the significant investment associated with electrification, ports are also evaluating alternative power generation sources that reduce the dependency on the power grid as part of their electrification strategy. Powering electric equipment and fleet charging with solar photovoltaic energy and battery energy storage systems (BESS) increases sources of available power without producing additional drain and stress on the capacity of existing electric grids.¹³⁶ Ports are taking advantage of owned but unproductive land and strategic investments to fund the development and construction of solar photovoltaic and battery farms¹³⁷ or, in some cases, energy islands.¹³⁸ In addition, existing infrastructure such as carport canopies are being repurposed into productive energy generating assets,¹³⁹ onshore power systems are being installed, and structures like warehouses are being retrofitted to provide heavy power capabilities that go beyond grid capacity.

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Alternative sources of power and electrification are the future and “net zero” is a requirement to protect against changes in the environment and reductions in global trade.¹⁴⁰ By taking a long-term view and forging collaborative efforts with public and private stakeholders, sea and container ports have demanded and are aggressively leading advancements in the decarbonization of supply chain and logistics through implementation of green infrastructure, alternative fuels, and electrification of port infrastructure.¹⁴¹



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Endnotes

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the Public Health Service Act, with the stated intent of preventing COVID-19 from spreading in the United States.¹³ Title 42 allowed the Trump administration to quickly expel migrants trying to cross the southern U.S. border with Mexico—including asylum seekers—using the coronavirus pandemic as a justification.¹⁴ The current administration continued to defend the Title 42 policy after President Biden took office and expelled approximately two million people under Title 42 in fiscal years 2021 and 2022, according to CBP’s data.¹⁵ The policy is set to end on 11 May 2023, when the public health emergency for COVID-19 expires.

The Biden administration is intent on taking other steps to limit access for asylum seekers at the border. On 21 February 2023, the administration announced a new policy proposal that would limit access to asylum for migrants who cross the U.S. southern border illegally if they fail to apply for protections granted by another country before reaching the United States.¹⁶ The measure, while stopping short of a total ban, imposes severe limitations on asylum for any nationality except Mexicans, who do not have to travel through a third country to reach the United States.¹⁷ Officials also said they would expand the use of a process known as expedited removal, which allows the United States to deport migrants without a court hearing if they do not seek asylum or fail to establish a credible fear of persecution if returned to their home country.¹⁸ The president’s border policies have faced significant criticism from Republican lawmakers for being too soft on migrants; however, his latest measures have also encountered pushback from progressives and advocates for asylum seekers, who say he has not fully complied with asylum law, which allows migrants on U.S. soil to request protection as a way to stop their deportation.¹⁹

On 22 April 2021, a bipartisan bill was introduced in Congress to address the migration surge at the border.²⁰ The bill would “establish four new regional processing centers in high-traffic areas in order to reduce wait times and eliminate backlogs in facilities, to help asylum-seekers get rulings more quickly and efficiently.”²¹ Unfortunately, the bill failed to pass.



The current and future administrations will face the unenviable task of navigating the immigration issues at the southern border on a tightrope, simultaneously appearing strong on immigration while promoting humanitarian measures to address the real-life issues faced by migrants every day.

Comprehensive Immigration Reform

A majority of Americans support common sense immigration reform. Despite this, a comprehensive immigration overhaul has eluded Congress for decades. Comprehensive immigration reform refers to omnibus legislation that attempts to address the following issues: demand for high- and low-skilled labor, the legal status of the millions of undocumented immigrants living in the country, border security, and interior enforcement.²² The last push for a major immigration overhaul came in 2013, when the Democrat-led Senate passed immigration reform legislation, but the bill stalled in the Republican-controlled House of Representatives.²³ On 20 January 2021, in an effort to enact comprehensive immigration reform, President Biden sponsored the U.S. Citizenship Act of 2021, which was presented in Congress on 18 February 2021.²⁴ Unfortunately, due to Republican opposition, the bill died with the ending of the 117th Congress.

As a result of the partisan deadlock in Congress, the current administration, similar to prior administrations, has resorted to executive actions to address immigration issues.

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The Migration Policy Institute (MPI) logged 296 executive actions on immigration alone taken by the current administration as of 19 January 2022—one day before Biden’s first anniversary in office.²⁵ These actions covered a wide spectrum of issues that included greatly narrowing the number of unauthorized immigrants vulnerable to arrest, detention, and removal; lifting some barriers to U.S. entry and to accessing immigration benefits; and in the humanitarian protection realm, extending eligibility for temporary protection to an additional 430,000 immigrants, raising the refugee resettlement ceiling to 125,000, and proposing a restructuring of the asylum system at the southwest border.²⁶

Unfortunately, the current president and future administrations cannot solely rely on executive actions to resolve the immigration quandary. Firstly, these actions can be and have been challenged in federal court as abuses of power by the executive branch. Secondly, and just as important, the issue of reforming our immigration system or enacting immigration measures cannot be simply reversed each time the presidency changes parties. There should be a sense of reliability and permanency in this field of law. Congress needs to act, yet they have failed to enact any type of comprehensive reform in the past 22 years. Future administrations will have to work through the partisan deadlock to accomplish any meaningful immigration reform.

DREAM Act and DACA

The Development, Relief, and Education for Alien Minors Act, known as the DREAM Act, is legislation that would provide a pathway to lawful permanent residency and/or citizenship for individuals who were brought to the United States as children and are undocumented. The term *Dreamer* has been used to describe young undocumented immigrants who were brought to the United States as children, who have lived and attended school here, and who in many cases identify as American.²⁷ The DREAM Act has been proposed and debated in Congress for many years, and it has gained widespread support among Democrats, but never enough Republican support for it to pass.

Another measure for undocumented children brought to the United States is Deferred Action for Childhood Arrivals (DACA). Since its inception in 2012, DACA has allowed more than 800,000 young people to remain with their families in the only country many of them have ever known.²⁸ The policy provides temporary relief from deportation and work authorization to certain young undocumented immigrants who came to the United States as children and meet certain physical presence and educational requirements. The policy has encountered several legal challenges, with the most successful being a 16 July 2021 injunction from the U.S. District Court for the Southern District of Texas that prohibits DHS from granting *initial* DACA requests and related employment authorization.²⁹

On 24 August 2022, the Biden administration finalized a rule to transform the DACA immigration policy for more than 600,000 Dreamers into a federal regulation, a move aimed at protecting the program from legal challenges that imperil its existence.³⁰ The 453-page DHS rule took effect on 31 October 2022 and allows U.S. Citizenship and Immigration Services (USCIS) to process renewal requests for existing DACA recipients, but does not allow them to process initial requests.³¹ Future presidential administrations could choose to prioritize passing the DREAM Act as a step toward broader immigration reform.

International Students in STEM Fields

There are rising concerns that the U.S. economy is lagging behind other countries in the business, science, and technology sectors. According to the 2021 Global Skills Report issued by online education provider Coursera, the study, which measures learners on the Coursera platform from 100 countries across the business, technology, and data science domains, ranked the United States 29th in the world.³² In addition, COVID-19 only worsened the country’s shortage of STEM (science, technology, engineering, and mathematics) workers, with recent estimates showing that STEM job openings in the country outnumber qualified workers by three million.³³ This gap is projected to widen to six million by 2030.³⁴

On 21 January 2022, the Biden administration issued an executive order to “attract global talent to strengthen our

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economy and technological competitiveness, and benefit working people and communities all across the country.”³⁵ The order announced new actions to advance predictability and clarity for pathways for international scholars in the STEM fields, including students, researchers, and experts, to contribute to innovation and job creation efforts across the United States.³⁶ The new policies that went into effect were: (1) expand what degree programs are eligible for STEM Optional Practical Training (OPT) by adding twenty-two new fields of study; (2) update the USCIS Policy Manual as it relates to the adjudication of petitions for O-1A (extraordinary ability) visas; (3) update the USCIS Policy Manual to reflect additional national interest waivers for STEM degree holders and entrepreneurs to secure a green card in the United States; (4) facilitate additional corporate training for J-1 visa holders in STEM fields; and (5) create an early career STEM Research Initiative.³⁷ These new policy updates did not create new immigration categories, but rather clarified or broadened policies for existing visa categories, easing the availability of permanent residence for foreign nationals with a STEM background. Moreover, they were intended to promote the efficient and effective processing of benefit requests and to increase the onshoring of foreign nationals with expertise in STEM fields to strengthen the U.S. economy and technological competitiveness.

Some of the measures future administrations can take in the field of immigration to improve the United States’ ranking in the technological fields include increasing numerical visa limitations; removing caps on employment-based permanent resident status, as that system is the most broadly accessible channel for employment-related immigration; reducing visa backlogs by recapturing the unused green cards accumulated over the past decades; passing legislation to retain and attract STEM immigrant workers; increasing the number of eligible years of work for graduates in OPT; removing burdensome demands for foreign graduates’ work to be related to their specific field; exempting OPT participants from the H-1B lottery process; and reducing USCIS’s backlog in adjudicating employment authorization and employment-based permanent residence applications.

Conclusion

There are serious challenges facing the current and future presidential administrations in the field of immigration. The current administration, under President Biden, has taken steps to address some of these issues. While some measures have been received positively, others have been widely critiqued. For any future administration, one notable measure to continue addressing the issues discussed at length in this article would be to impose changes to enforcement policies. A new presidential administration could choose to prioritize different enforcement efforts, potentially reducing the number of arrests, detentions, and deportations of undocumented immigrants. Such a change in policy would also impact the funding and resources allocated to immigration enforcement agencies. These policies, however, may face legal challenges in federal courts.

Another measure would be a shift in priorities for legal immigration. A new administration could choose to prioritize different types of legal immigration, potentially making it easier for individuals to obtain visas and green cards. The inclusion of policies designed to attract high-skilled workers or to reunite families separated by immigration restrictions is a measure any future administration could reasonably evaluate.

All of these measures, as well as any meaningful reform of our immigration system, will require bipartisan support to resolve. Our congressional representatives must have the political will and a sense of urgency if we are ever to see immigration reform in our lifetimes.



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The CISG as a Basis for Federal Question Jurisdiction, continued from page 17

If a Contracting State has two or more territorial units in which, according to its constitution, different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.

While easy to gloss over, the ramifications of Article 93 may prove fatal to a litigant invoking the CISG as a basis for subject matter jurisdiction. For instance, in *America's Collectibles Network, Inc. v. Timlly (HK)*, the court disagreed that Hong Kong was a party to the CISG and declined to invoke Federal Question Jurisdiction under the CISG.⁷ The court reasoned that although China had not formally declared under Article 93 that the CISG does not apply to Hong Kong, in 1997, the Chinese government deposited with the secretary general of the United Nations a written declaration announcing the conventions to which China was a party that should apply to Hong Kong upon its transfer. The CISG was not on this list.⁸ Accordingly, the court granted the plaintiff's motion to remand for want of subject matter jurisdiction under the Federal Question Statute.

Sale of Goods

What is a contract of "sale of goods"? Rather than define what constitutes a sale of goods, the CISG opts to expressly define what is not a sale of goods. For instance, pursuant to Article 2, this Convention does not apply to sales:

- a. of goods bought for personal, family, or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use;
- b. by auction;
- c. on execution or otherwise by authority of law;
- d. of stocks, shares, investment securities, negotiable instruments, or money;
- e. of ships, vessels, hovercraft, or aircraft; or
- f. of electricity.

Further, similar to the Uniform Commercial Code (UCC), the



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CISG does not apply to contracts where "the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services."⁹ Moreover, manufactured goods fall under the scope of the CISG "unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production."¹⁰ Finally, courts in the United States have held that framework and distributorship contracts do not fall under the CISG.¹¹

Opting Out of the CISG: Easy to Do and Even Easier to Neglect

Litigants unfamiliar with the CISG often assume that because the contract in dispute contains a choice of law provision, the CISG does not apply. Litigants may be surprised that the CISG automatically applies where Article 1's conditions are met unless the contract contains a choice of law provision to the contrary.¹² Indeed, Article 6 provides that "[t]he parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions." Nevertheless, to opt out of the CISG, it is insufficient to simply draft a choice of law provision providing that "this contract shall be governed and construed in accordance with the law of X"; the exclusion of the CISG must be express. For instance, in *BP Oil Int'l, Ltd. v. Empresa Estatal Petroleos de Ecuador*, the contract at issue provided: "Jurisdiction: Laws of the Republic Ecuador."¹³ The Ecuadorian company argued that this choice of law provision demonstrated the parties' intent to apply Ecuadorian domestic law instead of the

The CISG as a Basis for Federal Question Jurisdiction, continued

CISG.¹⁴ The Fifth Circuit disagreed, reasoning that “[g]iven that the CISG is Ecuadorian law, a choice of law provision designating Ecuadorian law merely confirms that the treaty governs the transaction.”¹⁵

Accordingly, unless the contract provides something along the lines of “the Parties hereby agree that the CISG does not govern this contract,” the CISG will apply, assuming Article 1’s conditions are otherwise met. As a note to my fellow South Florida practitioners, the District Court for the Southern District of Florida follows this same precedent.¹⁶

Application of the CISG as a Basis for Federal Question Jurisdiction

The Federal Question Statute provides that “[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States” (emphasis added). Indeed, federal courts sitting in Florida regularly hold that the CISG preempts state law causes of action because “Florida is bound by the Supremacy Clause to the treaties of the United States.”¹⁷ In order for an individual to enforce a treaty’s provisions, the treaty must be “self-executing, that is, when it expressly or impliedly creates a private right of action.”¹⁸ Numerous courts have held that the CISG properly creates a private right of action.¹⁹ Indeed, the United States’ ratification of the CISG itself provides that:

The Convention sets out substantive provisions of law to govern the formation of international sales contracts and the rights and obligations of the buyer and seller.²⁰

Along these lines, because the CISG is a self-executing treaty, it has the “preemptive force of federal law.”²¹ That is to say that under the Supremacy Clause, the CISG displaces any contrary state sales law such as Article 2 of the UCC.²² Accordingly, courts have held that “if the CISG properly applies to [an] action, federal [question] jurisdiction exists.”²³

To illustrate, in *Asante Technologies, Inc. v. PMC-Sierra, Inc.*, a Delaware corporation sued another Delaware corporation in California state court for breach of contract and a claim for breach of express warranty based on the defendant’s alleged failure to deliver conforming goods.²⁴ The defendant

removed the case, asserting subject matter jurisdiction under the Federal Question Statute, and the plaintiff moved to remand the case for lack of subject matter jurisdiction.²⁵ During the relevant time period, however, the Delaware defendant’s “corporate headquarters, inside sales and marketing office, public relations department, principal warehouse, and most of its design and engineering functions were located in Burnaby, British Columbia, Canada.”²⁶ Accordingly, the court found that the defendant’s “place of business that has the closest relationship to the contract and its performance is British Columbia, Canada. Consequently, the contract at issue in this litigation is between parties from two different Contracting State, Canada and the United State. This contract therefore implicates the CISG.”²⁷

Although the complaint at issue did not reference the CISG, the defendants argued that “the preemptive force of the CISG converts the state breach of contract claim into a federal claim.”²⁸ As the court noted, “Congress may establish a federal law that so completely preempts a particular area of law that any civil complaint raising that selected group of claim is necessarily federal in character.”²⁹ Identifying the issue of whether the CISG preempts state law as a matter of first impression, the court concluded that “the expressly stated goal of developing uniform international contract law to promote international trade indicates the intent of the parties to the treaty to have the treaty preempt state law causes of action.”³⁰ In so concluding, the court ultimately held that the fact that the CISG is not mentioned in the complaint “does not preclude federal jurisdiction in this case, because the CISG preempts state law causes of action falling within the scope of the CISG.”³¹

In *Impuls I.D. Int’l, S.L. v. Psion-Teklogix, Inc.*,³² the Southern District of Florida came close—but did not expressly hold—that the CISG provides a basis for subject matter jurisdiction under the Federal Question Statute. In *Impuls*, a Spanish corporation, an Argentine corporation, and a Florida corporation brought suit against a Canadian corporation arising out of an oral contract between the Spanish and Argentine corporations on the one hand and two British companies on the other hand.³³ After the oral agreement

The CISG as a Basis for Federal Question Jurisdiction, continued

was reached, one of the two British companies acquired the Canadian corporation—the named defendant.³⁴ Following the acquisition, the Canadian corporation’s president terminated the oral agreement.³⁵ The plaintiffs alleged that the court had subject matter jurisdiction under the Federal Question Statute “in that the above-styled cause arises under a treaty of the United States” because “all the parties to the contract have their places of business in Contracting States.”³⁶ The Canadian corporation argued that the oral agreement was entered into by the British companies; as such, the CISG did not apply because the United Kingdom “is not a Contracting State.”³⁷ After finding “no case law supporting the proposition that a contract entered into by party in a non-Contracting State is governed by the CISG when a subsequent party to the contract located in a Contracting State allegedly breaches the contract[,]” the court found that the CISG did not govern the contract at issue. Therefore, “there [wa]s no federal question present in the above-styled case.”³⁸

Following the holding by the Southern District of Florida in *Impuls*, the question nonetheless remains: whether the Eleventh Circuit recognizes claims arising under the CISG as a basis for subject matter jurisdiction pursuant to the Federal Question Statute. The resources provided in this article, as well as the authority cited herein, may be enough to salvage a litigant faced with a motion to dismiss or a motion for remand for lack of subject matter jurisdiction, resulting in precedent establishing the same.

Conclusion

With the foregoing in mind, the authors hope that practitioners will be armed when faced with a motion to remand or a motion to dismiss for lack of subject matter jurisdiction in federal courts sitting in Florida. As a hub of international commerce, parties would benefit from the CISG’s application to their dispute given that the CISG was enacted to “provide a modern, uniform and fair regime for the international sale of goods.”³⁹ Arguing that the CISG confers subject matter jurisdiction under the Federal Question Statute would provide precedent, clarity, and certainty in disputes involving the international sale of goods, and if ultimately decided by the Eleventh Circuit,

would foster an overall impression that federal courts sitting in Florida are a welcome venue for international commercial disputes.



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Endnotes

- Iraola & CIA, S.A. v. Kimberly-Clark Corp.*, 232 F.3d 854, 860 (11th Cir. 2000).
- Purchasing Power, LLC v. Bluestem Brands, Inc.*, 851 F.3d 1218, 1220 (11th Cir. 2017).
- BP Oil Int’l, Ltd. v. Empresa Estatal Petroleros de Ecuador*, 332 F.3d 333, 336 (5th Cir. 2003) (recognizing that the trial court overlooked its concurrent federal jurisdiction because the parties’ dispute arose under the CISG, relegating a conflict of laws analysis unnecessary).
- ECEM European Chemical Marketing B.V. v. Purolite Co.*, 451 Fed. App’x 73, 79 (3d Cir. 2011) (“On the other hand, if, as ECEM argues, the CISG (an international treaty) governs the dispute, then we may treat the dispute as a federal question.”).
- Genpharm Inc v. Pliva-Lachema a.s.*, 361 F. Supp. 49, 53 (E.D.N.Y. 2005).

The CISG as a Basis for Federal Question Jurisdiction, continued

6 For a list of Contracting States, please refer to INSTITUTE OF INTERNATIONAL COMMERCIAL LAW, *CISG: Table of Contracting States*, Pace University, <https://iicl.law.pace.edu/cisg/page/cisg-table-contracting-states> (last visited 11 Mar. 2022).

7 746 F. Supp. 2d 914 (E.D. Tenn.).

8 *Id.* But see *Electrocraft Arkansas Inc. v. Super Electric Motors, Ltd.*, 2009 WL 5181854 (E.D. Ark. Dec. 23, 2009) (holding that Hong Kong was a party to the CISG).

9 CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, Article 3(2), [hereinafter “CISG”].

10 *Id.* at 3(1).

11 See, e.g., *Helen Kaminski Pty. Ltd. v. Marketing Australian Products, Inc.*, 1997 WL 414137 at *3 (S.D.N.Y. July 23, 1997) (holding that the CISG did not govern the parties’ distributorship agreement, but it suggested in dictum that the CISG would apply to a term in the contract that addressed specified goods); *Viva Vino Import Corp. v. Farnese Vini S.r.l.*, No. 99–6384, 2000 WL 1224903, at *1–2 (E.D.Pa. Aug. 29, 2000) (CISG did not govern an exclusive distributorship agreement, an agreement granting the plaintiff a 25% interest in the defendant, or a sales commission agreement); *Amsco Ukrservice v. American Meter Co.*, 312 F. Supp.2d 681, 687 (E.D. Penn. 2004) (“We therefore join the other courts that have examined this issue and conclude that, although the CISG may have governed discrete contracts for the sale of goods that the parties had entered pursuant to the joint venture agreements, it does not apply to the agreements themselves.”).

12 *Viva Vino*, supra note 7, at *1 (“When two foreign nations are signatories to the CISG, that Treaty governs contracts for the sale of goods between parties whose places of business are in such nations unless the contract contains a choice of law provision to the contrary.”).

13 332 F.3d 333, 335 (5th Cir. 2003).

14 *Id.* at 337.

15 *Id.* See also *Asante Techs., Inc. v. PMC–Sierra, Inc.*, 164 F.Supp.2d 1142, 1150 (N.D.Cal.2001) (holding that a choice-of-law provision selecting British Columbia law did not, without more, “evinced a clear intent to opt out of the CISG Defendant’s choice of applicable law adopts the law of British Columbia, and it is undisputed that the CISG is the law of British Columbia.”).

16 See *Topp Paper Co. v. Eti Converting Equipment*, 2013 WL 12101111, at *6 (S.D. Fla. 2013) (holding that CISG applied where contract stated “this agreement shall be constructed and enforced in accordance with the Laws of the Province of Quebec (Canada),” reasoning that the CISG “is the law of Quebec.”).

17 *Id.* at n. 5 (citing to U.S. CONST. Art. VII, cl. 2 (“This Constitution and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land.”)).

18 *Asante Technologies, Inc. v. PMC–Sierra, Inc.*, 164 F.Supp.2d 1142, 1147 (N.D. Cal. 2001).

19 *Delchi Carrier v. Rotorex Corp.*, 71 F.3d 1024, 1027–28 (2d Cir.1995); *Filanto, S.p.A. v. Chlewich Int’l Corp.*, 789 F.Supp. 1229, 1237 (S.D.N.Y.1992).

20 15 U.S.C. App at 52 (1997).

21 *American Mint LLC v. GOSoftware, Inc.*, 2005 WL 2021248 (M.D. Penn Aug. 16, 2005).

22 *Usinor Industeel v. Leeco Steel Prods., Inc.*, 209 F.Supp.2d 880, 884 (N.D. Ill. 2002) (holding that under the Supremacy Clause, the CISG would displace any contrary state sales law such as Article 2 of the Uniform Commercial Code).

23 *Asante*, supra note 14 at 1147.

24 *Id.* at 1147–48

25 *Id.*

26 *Id.* at 1148.

27 *Id.*

28 *Id.* at 1150.

29 *Id.*

30 *Id.* at 1151.

31 *Id.* at 1151 (citing to the “well-pleaded complaint rule.”).

32 234 F.Supp. 2d 1267 (S.D. Fla. 2002).

33 *Id.* at 1269.

34 *Id.* at 1270.

35 *Id.*

36 *Id.*

37 *Id.* at 1271.

38 *Id.* at 1272. For a similar scenario out of the Northern District of Georgia, see *Mado Holdings, LLC v. Jinming Wu*, 2017 WL 7660407 (M.D. Ga. Sept. 22, 2017).

39 UNITED NATION COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL), *United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG)*, https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg#:~:text=The%20purpose%20of%20the%20CISG,exchanges%20and%20decreasing%20transaction%20costs.

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or state-controlled entities. Whether a particular entity constitutes an “instrumentality” under FCPA requires a fact-specific analysis of an entity’s ownership, control, status, and function.¹⁹

Bribes Are Prohibited

FCPA prohibits the payment of bribes to gain a business advantage.²⁰ The following actions serve as examples of when corporations are often induced to pay bribes to foreign officials:

- Winning a contract
- Influencing the procurement process
- Violating rules for importation of products
- Gaining access to nonpublic tender information
- Obtaining exceptions to regulations
- Avoiding contract termination²¹

FCPA also prohibits “indirect bribes” or bribes made to any person who knows a portion of a payment will be used, directly or indirectly, to bribe foreign officials.²² Therefore, persons or companies that aid or abet in a bribery scheme are guilty under FCPA to the same degree as those who pay the bribe.²³

Understanding of “Anything of Value”

The anti-bribery provisions of FCPA prohibit offerings of payment or anything of value to foreign government officials with the intent to influence any act or decision to assist in obtaining or retaining business.²⁴ The term “anything of value” includes items such as cash, computer equipment, expensive clothing, medical supplies, vehicles, vacations, trips, jewelry, etc.²⁵

Small gifts or paying for something of nominal value, such as paying for a taxi ride, will not be actionable. The more extravagant the gift, the more likely it is being used to bribe a foreign official.²⁶

FCPA Violations

For a conduct to violate FCPA, three elements must be present: (1) A payment or something of value is offered, promised, or given; (2) to a foreign government official; (3) for a corrupt purpose.²⁷ Violations of FCPA can lead to civil

and criminal penalties, sanctions, and remedies, including fines, disgorgement, and/or imprisonment.²⁸

Under FCPA, issuers are required to have strong internal controls to prevent off-book accounting. Criminal liability can be imposed on companies and individuals for failing to comply with the books and records or internal controls provisions of FCPA, provided they acted “willfully.”

The U.S. Department of Justice (DOJ) and the SEC Resource Guide lists the following actions as examples of violations:²⁹

- Failure to implement internal controls
- Failure to keep accurate books and records
- Failure to implement sufficient anti-bribery compliance policies
- Failure to maintain sufficient systems for the selection and approval of consultants
- Failure to conduct appropriate audits of payments³⁰

Even if the U.S. government cannot prove a bribe has taken place, companies can still be held liable for improper payments that were not accurately recorded.

Acting “Willfully”

In order for an individual to be criminally liable under FCPA, they must act “willfully.”³¹ FCPA does not define the term, but courts have construed this generally to mean an act committed voluntarily and purposefully, and with a bad purpose.³² FCPA does not require the government to prove a defendant was specifically aware of FCPA or knew their conduct violated FCPA.³³ The SEC and the DOJ are both enforcers of FCPA and generally work in cooperation.³⁴

Compliance

The U.S. government expects U.S. companies operating overseas to maintain regulatory compliance with all U.S. laws, regulations, and rules, while also bolstering internal financial and accounting controls and processes.³⁵

A list of “red flags” in key subject areas is a tool that can be helpful to companies and employees in a particular legal compliance risk area. A “red flag” is an activity or condition that increases the likelihood of a possible violation of law or company policy.

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FCPA Red Flags for Corrupt Business Practices³⁶

- Party refuses to certify compliance with anti-bribery or FCPA requirements
- Party refuses to complete agent/consultant/third party questionnaire regarding relationship with or interests involving foreign government officials
- Party does not appear to be qualified to perform the duties for which it is engaged to assist the company
- Party is related to a government official
- Country has a reputation for corruption and bribery
- The industry has a history of FCPA violations and corruption problems
- Requests for commissions to be paid in cash or untraceable funds
- A desire to keep third-party representation secret
- Relationship problems with other foreign companies³⁷

FCPA Red Flags for Recordkeeping and Accounting Violations³⁸

- Vague, nonspecific description for payments made in entries
- Documents conceal the true identify of an in-country representative or agent
- Payment descriptions that do not correspond to the appropriate account
- General purpose or miscellaneous accounts that can be used to hide improper payments
- Over-invoicing or false invoices
- Unrecorded accounts or transactions
- Travel and expense forms with incomplete information that are used to obtain cash for improper payments
- Submission of false or inaccurate expense account reports
- Misstatement of transactions recording a payment to the wrong payee³⁹

Compliance With the Laws of Ukraine

U.S. companies doing business overseas must comply with the laws in the country in which they operate. In Ukraine, the UA-US Bilateral Investment Treaty (BIT) 1994 in its definition of an “investment” includes the obligation

of the investor to comply with the legislation of the host state. “Any right conferred by law or contract, and any licenses and permits pursuant to law [of the host state]”⁴⁰ is considered an “investment.” The same provision is typical for other BITs. Directly or indirectly, every BIT contains an obligation of an investor to comply with the national law of the host state. Among the fields of law to be considered are antitrust, anticorruption and anti-money laundering, labor, tax, and privacy regulations.

The investment process implies cooperation with local governmental agencies. Therefore, the anticorruption laws apply and must be adhered to. The relevant Ukrainian anticorruption legislation includes:

- Law on Prevention of Corruption 2014 (defines the legal and organizational principles of the functioning of the anticorruption system in Ukraine, the content and procedure for the application of preventive anticorruption mechanisms, and rules for eliminating the consequences of corruption offenses (anticorruption law))
- Criminal Code of Ukraine 2001 (establishes criminal liability for corruption offenses)
- Code of Administrative Offences of Ukraine 1984 (provides for administrative liability for corruption-related offenses)⁴¹

Ukrainian anti-bribery laws do not directly restrict providing foreign officials in Ukraine or local Ukrainian officials with gifts, travel expenses, meals, or entertainment. There is no specific regulation regarding such hospitality expenses, but any such gifts to domestic and foreign public officials will be considered an unlawful benefit.⁴² Giving gifts in general is not a crime; liability is only extended to domestic or foreign public officials who accept gifts.⁴³ On the other hand, any facilitation payments made with the intention or purpose of influencing the actions of a receiver are prohibited and illegal. Proposals or transfers of such payments⁴⁴ entail criminal liability.⁴⁵

Public officials cannot receive any gifts, the value of which exceeds one subsistence minimum set on the day of acceptance of the gift⁴⁶ or from one person (group of persons) during the year, the total value of which exceeds two subsistence minimums, established for a working

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person on 1 January of the year in which the gifts are accepted. Exceptions include gifts by close persons⁴⁷ or gifts received as a result of public discounts on goods, services, winnings, prizes, or bonuses.

Ukraine does not support the successor liability concept. The target entity's violations of local and international anti-bribery legislation that took place before the merger or acquisition will not subject the successor entity to liability.⁴⁸

To summarize, if a U.S. company hosts a Ukrainian government representative, the accommodations, the meal plans, and entertainment must comply with both U.S. and Ukrainian law.

In conclusion, U.S. companies that plan to participate in rebuilding Ukraine must commence preparation in advance, learn about the relevant compliance and legal framework, establish a strong compliance program, and provide adequate and continuous training to its employees.



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Endnotes

1 <https://www.nytimes.com/2023/02/16/business/economy/ukraine-rebuilding.html>.

2 <https://www.exim.gov/news/export-import-bank-united-states-chair-reta-jo-lewis-hosts-ukrainian-minister-infrastructure>. (In October 2022, the president and chair of the Export-Import Bank of the United States (EXIM) hosted a delegation from Ukraine led by the minister of infrastructure and Ukraine's ambassador to the United States to discuss potential opportunities. EXIM is the nation's official export credit agency with the mission of supporting U.S. jobs by facilitating U.S. exports. EXIM offers financing including export credit insurance, working capital guarantees, loan guarantees, and direct loans to U.S. businesses as they compete for global sales.)

3 <https://www.president.gov.ua/en/news/volodimir-zelenskij-zustrivsvya-z-top-menedzherami-jp-morgan-80933>. (On 9 February 2023, JP Morgan signed a memorandum of understanding with Ukraine's President Volodymyr Zelenskyy on attracting private capital for a new investment fund to rebuild Ukraine's infrastructure that has been destroyed in the war.); see also <https://nypost.com/2023/02/12/jp-morgan-reaches-agreement-with-ukraines-zelensky-on-rebuilding-infrastructure/>; see also <https://www.unesco.org/en/articles/ukraine-azoulay-and-v-zelensky-together-rebuild-cultural-sector>. (UNESCO's Director-General Audrey Azoulay reaffirmed the organization's support to the Ukrainian population and to advance the reconstruction of the Ukrainian cultural sector.)

4 Foreign Corrupt Practices Act of 1977 (1977), Pub. L. No. 95-213, Title 1, 91 Stat. 1494-1498, 15 U.S.C. §§ 78dd-1, 78dd-2.

5 *Id.*

6 Koehler, Mike. 2012. *The Story of the Foreign Corrupt Practices Act*, OHIO STATE L.J. 73/5: 930-1013; Legislative History House Report (1977) ("The payment of bribes to influence the acts or decisions of foreign officials, foreign political parties or candidates for foreign political office is unethical. It is counter to the moral expectations and values of the American Public. But not only is it unethical, it is bad business as well. It erodes public confidence in the integrity of the free market system. It short-circuits the marketplace by directing business to those companies too inefficient to compete in terms of price, quality or service, or too lazy to engage in honest salesmanship, or too intent upon unloading marginal products. In short, it rewards corruption instead of efficiency and puts pressure on ethical enterprises to lower their standards or risk losing business. Bribery of foreign officials by some American companies casts a shadow on all U.S. companies."—United States House of Representatives, 1977.)

7 *A Resource Guide to the U.S. Foreign Corrupt Practices Act*, 2nd ed. (DOJ Criminal Division & SEC Enforcement Division, 2020).

8 Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (1988).

9 Adam Fremantle et al., *The Foreign Corrupt Practices Act Amendments of 1988*, 23 INTERNATIONAL LAWYER 755 (1989).

10 International Anti-Bribery and Fair Competition Act of 1998. Pub. L. No. 105-366, 112 Stat. 3302, Nov. 10, 1998; see also Michael V. Seitzinger, *Foreign Corrupt Practices Act (FCPA): Congressional Interest and Executive Enforcement*, In Brief, Congressional Research Service (15 Mar. 2016); see also

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11 Foreign Corrupt Practices Act of 1977, as amended, 15 U.S.C. §§ 78dd-1, et seq.

12 *Id.*

13 *Id.*

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15 *Id.*

16 *U.S. v. Carson*, Not Reported in F.Supp.2d (2011).

17 See Foreign Corrupt Practices Act of 1977, as amended, 15 U.S.C. §§ 78dd-1, et seq.

18 *A Resource Guide to the U.S. Foreign Corrupt Practices Act*, 2nd ed. (DOJ Criminal Division & SEC Enforcement Division, 2020).

19 *United States v. Esquenazi*, 752 F.3d 912, 920-33 (11th Cir. 2014) (The Eleventh Circuit addressed the definition of “instrumentality,” a case involving the state-owned and controlled telecommunications company of Haiti. The court concluded that an “instrumentality” under FCPA is “an entity controlled by the government of a foreign country that performs a function the controlling government treats as its own.”).

20 *A Resource Guide to the U.S. Foreign Corrupt Practices Act*, 2nd ed. (DOJ Criminal Division & SEC Enforcement Division, 2020).

21 *Id.*

22 *Id.* See also *S.E.C. v. Straub*, 921 F.Supp.2d 244 (2013).

23 *Id.*

24 *Chevron Corp. v. Donziger*, 974 F.Supp.2d 362 (2014).

25 *A Resource Guide to the U.S. Foreign Corrupt Practices Act*, 2nd ed. (DOJ Criminal Division & SEC Enforcement Division, 2020).

26 *Id.*

27 Foreign Corrupt Practices Act of 1977, as amended, 15 U.S.C. §§ 78dd-1, et seq.; see also *U.S. v. Kay*, 513 F.3d 432 (2007).

28 *Id.*

29 *A Resource Guide to the U.S. Foreign Corrupt Practices Act*, 2nd ed. (DOJ Criminal Division & SEC Enforcement Division, 2020).

30 *Id.*

31 *Id.*

32 *Id.*

33 *Id.*

34 *Id.*

35 *Id.*

36 <https://www.corporatecomplianceinsights.com/red-flags-fcpa-violations-compliance-risk-overseas-operations/>.

37 *Id.*

38 *Id.*

39 *Id.* See also *A Resource Guide to the U.S. Foreign Corrupt Practices Act*, 2nd ed. (DOJ Criminal Division & SEC Enforcement Division, 2020).

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41 <https://www.lexology.com/library/detail.aspx?g=7af6b977-fee8-4342-be08-5d71f8670122>.

42 <https://www.lexology.com/library/detail.aspx?g=7af6b977-fee8-4342-be08-5d71f8670122> + Article 23-24 of Anti-corruption law.

43 Articles 23–24 of anticorruption law.

44 *Id.*

45 Any facilitation payments made with the intention or purpose of influencing the actions of a receiver is prohibited and illegal.

46 Approximately US\$69 as of April 2023.

47 Article 1 of anticorruption law: <https://zakon.rada.gov.ua/laws/show/1700-18#Text>.

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Catch up.

WAITING FOR YOUR COFFEE. AT THE OFFICE. BEFORE YOUR MEETING. AFTER THE MOVIE. AT THE CLUB. DURING THE COMMERCIALS. WAITING FOR A TABLE. BEFORE A DEPOSITION. DURING COCKTAIL HOUR. ON YOUR BACK PORCH. AT THE BEACH. IN YOUR LIVING ROOM. ON VACATION. WAITING FOR A TABLE. ON THE SUBWAY. AT THE TRAIN STATION. IN THE LOBBY. OUTSIDE THE COURTHOUSE. AT THE TRAIN STATION. AT THE GYM. WAITING IN LINE. ON THE SUBWAY. IN THE LOBBY. OUTSIDE THE COURTHOUSE. WAITING FOR THE KIDS. IN THE LIVING ROOM. AT THE SALON. RUNNING ERRANDS. LOUNGING BY THE POOL. AT THE GROCERY STORE. WAITING FOR YOUR COFFEE. AT THE OFFICE. BEFORE YOUR MEETING. AFTER THE MOVIE. AT THE CLUB. DURING THE COMMERCIALS. WAITING FOR A TABLE. BEFORE A DEPOSITION. DURING COCKTAIL HOUR. ON YOUR BACK PORCH. AT THE BEACH. IN YOUR LIVING ROOM. ON VACATION. WAITING FOR A TABLE. ON THE SUBWAY. AT THE TRAIN STATION. IN THE LOBBY. OUTSIDE THE COURTHOUSE. AT THE TRAIN STATION. AT THE GYM. WAITING IN LINE. ON THE SUBWAY. IN THE LOBBY. OUTSIDE THE COURTHOUSE. WAITING FOR THE KIDS. IN THE LIVING ROOM. AT THE SALON. RUNNING ERRANDS. LOUNGING BY THE POOL. AT THE GROCERY STORE. WAITING FOR YOUR COFFEE. AT THE OFFICE. BEFORE YOUR MEETING. AFTER THE MOVIE. AT THE CLUB. DURING THE COMMERCIALS. WAITING FOR A TABLE. BEFORE A DEPOSITION. DURING COCKTAIL HOUR. ON YOUR BACK PORCH. AT THE BEACH. IN YOUR LIVING ROOM. ON VACATION. WAITING FOR A TABLE. ON THE SUBWAY. AT THE TRAIN STATION. IN THE LOBBY. OUTSIDE THE COURTHOUSE. AT THE TRAIN STATION. AT THE GYM. WAITING IN LINE. ON THE SUBWAY. IN THE LOBBY. OUTSIDE THE COURTHOUSE. WAITING FOR THE KIDS. IN THE LIVING ROOM. AT THE SALON. RUNNING ERRANDS. LOUNGING BY THE POOL. AT THE GROCERY STORE.

Using Phantom Stock as Compensation to Preserve Equity, continued from page 23



away equity. The business owner can achieve success in retaining a greater ownership percentage yet still utilize a financial incentive to motivate high-performing employees by paying seasoned superstars in the field, investors, or others. They will have found that elusive golden ticket.

Next, we consider regulators. According to the Securities and Exchange Commission (SEC), phantom stock is considered restricted stock. This means that phantom stock consists of “unregistered shares of ownership in a corporation that are issued to corporate affiliates, such as executives and directors” and have conditions that must be fulfilled by the executives before the company can transfer or sell the stock to them.¹ As noted above, phantom stock is a type of investment in the company that allows it to provide its employees with a financial interest that emulates equity stock ownership in the company without issuing actual stock. This is where the term *phantom stock* derives its name. While this investment option does not provide true stock ownership, this simulated stock does have monetary value that fluctuates with the actual value of the company’s stock.

Phantom stock provides profits to employees, provided the company stock itself generates profits in a predetermined length of time.² Due to this characteristic, phantom stock is considered a type of deferred compensation.³ This deferred compensation, however, does not require businesses to issue phantom stock in a certain way. Rather, it is governed by contract. The terms and conditions of issuing this stock

are listed in an agreement called the plan charter. The plan charter is where companies explain the vesting schedule to a stakeholder. It sets forth a predetermined goal that must be accomplished over a period of time in order to earn the right to this benefit.⁴ The ability of companies to draft charters as they wish provides them with great flexibility to follow employee-specific variables and metrics.

For example, if a Google employee received a benefit plan of 100 shares of phantom stock on 1 October 2016, and each share was valued at US\$1,000, the total value of the employee’s phantom stock would be US\$100,000 on that date. The predetermined length of time established that the vesting period would end on 1 January 2022. Suppose the employee decided to redeem their shares on 1 January 2022, when the market valued the stock at US\$2,000 per share. In this case, the employee’s total profit for the originally issued 100 phantom stock would be US\$200,000. In this example, it’s important to note the employee has no equity in the company and does not dilute the existing stakeholders, yet the employee stakeholder does receive the financial benefit.

The above is a simple example of a company utilizing “full value” phantom stock. A full value plan is one of the phantom stock plans businesses can opt to offer their employees. The full value plan allows employees to redeem the profit of their phantom stock at the stock’s fair market value at the end of the vesting period.

Using Phantom Stock as Compensation to Preserve Equity, continued

Who can be awarded phantom stock?

The next question arises, “OK, great. Phantom stock looks like a wonderful option, yet who is it available to?” We’re glad you asked. According to the SEC rules regarding restricted stock, phantom stock can be awarded to employees, independent contractors, directors, and consultants.⁵ The difference in how each group receives it depends on how companies grant this stock. The plan charter for employees may list phantom stock as a benefit the company gives to the employee. On the other hand, independent contractors, directors, and consultants can only receive phantom stock if they list the phantom stock as a form of compensation for their services.⁶ Phantom stock awards are not limited to just corporations; partnerships and LLCs can also grant this type of awards.⁷

How is phantom stock taxed?

Now that we know how phantom stock works and who is eligible to receive it, the next question businesses need to address is what are the tax implications and how should businesses structure this compensation to best meet their needs? The taxation of phantom stock depends on when the stock can be cashed in for a financial payment, commonly referred to as “when the phantom award vests.”⁸ Because awarding phantom stock does not transfer shares or property, the phantom stock is not taxed the same way as other income. Once the award vests, the employee will be taxed according to the Federal Insurance Contributions Act and Federal Unemployment Tax Act.⁹ The vesting date is not necessarily the payment date. For employees, income tax withholding is due based on when the income is realized. This will not apply to individuals who are not considered company employees. Always talk with your CPA about your specific tax requirements.

Differences Between Phantom Equity and Profit-Sharing/Normal Stock

The skeptics may say, “This sounds great, yet what is the difference between phantom equity and profit sharing?” They may seem very similar, yet there are some important differences.

Generally, profit-sharing involves the immediate issuance of stock or the value of the stock to an individual. This stock is usually nontransferable and forfeitable until all vesting conditions are satisfied. In addition, profit-sharing can immediately vest and it can be awarded in the form of equity in the company or non-equity paid in cash, not shares.

In contrast, individuals awarded phantom stock will have neither the option to obtain an equity interest in the company at issue nor any voting rights through the phantom stock they receive. Additionally, the company stock will not be diluted when the phantom stock is awarded. This is because phantom stock plans are not actual shares in the company to be transferred. Employees do not become owners through their phantom stock. Instead, they are potential cash beneficiaries in the underlying company value. Phantom stock is awarded when the company does well in the market and the stock gains value. The payouts from phantom stock are taxable to the employee as ordinary income and deductible to the company. Further, phantom stock is also subject to complex rules governing deferred compensation that, if not properly followed, can lead to penalty taxes.

Cross-Border Differences in Phantom Equity

Phantom stock is not exclusive to companies in the United States. Companies should also consider what it looks like in a cross-border context. Phantom stock has become widely used in several European countries.¹⁰ Canadian businesses have also used phantom stock as benefit plans.¹¹ Because each vesting period varies depending on the plan charter, cross-border taxation also varies. Make sure to contact legal counsel and your cross-border accountants regarding your specific plan charter if you are using phantom stock at the international level.

Conclusion

While phantom stock as an idea has been around since the 1990’s, companies are now giving it a fresh look, so employees and companies alike should be familiar with how it operates. The intended benefits of phantom stock, such as providing more flexibility, offsetting equity dilution,

Using Phantom Stock as Compensation to Preserve Equity, continued

and promoting employee motivation and longevity, have all proven phantom equity to be a highly effective strategy for improving company performance and aligning company goals with employee goals. Employees and companies should review their current benefit plans each year and explore what phantom stocks can offer beyond typical profit-sharing benefit plans.

Growth-minded owners can offer phantom stock to overcome the challenge of providing a financial interest to others that will help grow the business while still holding on to that golden ticket called equity. Companies using phantom stock can scale the plan and leverage superstar talent without breaking the bank or losing their hard-earned ownership.



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Endnotes

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