THE FLORIDA BAR
INTERNATIONAL LAW SECTION
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IN THIS ISSUE:

SAVE THE DATE!

9th International Litigation and Arbitration Conference

February 11, 2011

Miami, FL

Watch for more details.

New French Case Removes Automatic Privacy Shield From Employee E-Mails, Making Them More Amenable to U.S. Discovery

By Trevor Jefferies, Houston, and Alvin F. Lindsay, Miami

A new decision released on January 8, 2010, from the French high labor court (the Cour de Cassation Chambre Sociale) may provide some grounds for arguing that a party in France can review a French employee's e-mails and electronically-stored information to determine whether the data is relevant to a U.S. litigation, without the employee's knowledge or presence. This is a significant development in the perennial tension between European Union (EU) privacy law and U.S. discovery principles.

European Union policies protecting personal privacy almost always conflict with U.S. policies that grant, for U.S. court actions, litigants full and complete discovery of relevant documents and electronically-stored information. The conflict is particularly acute in France, where a

See "Automatic Privacy Shield," page 31

Message From the Chair:

A Year of Years

By Francisco Corrales

The Section had a year to remember. We were immediately faced with several serious challenges but can report that the Section turned to its greatest strength, its membership, and you responded accordingly. Together, we addressed these challenges and made our Section better.

Section Finances

The Section began the year in financial trouble, with expenditures exceeding revenues. We immediately assessed the situation, slashed expenses and shut down all non-essential Section programs. This is why

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CHAIR'S MESSAGE

from page 1

appropriations were so tight this past year. As Chair, I ceded final authority over financial matters to my Treasurer, Richard Lorenzo, as a key check and balance. All Section leaders and Committees were put on notice that discretionary operational funding was suspended until further notice. It is not something we enjoyed doing, but it had to be done to serve the larger objective of preserving the Section's viability. Now that it is over, may we never have to do this again.

Section Sponsorships

On the revenue side, the Section reports very favorable reception to its new sponsorship program. The Section currently has a three-tiered Section sponsorship system with levels of $2500, $5000 and $7500 and over 35 sponsors. Demographically, Section sponsors range from solo practitioners and small firms to large state-wide and multi-national firms. Significantly, the Section was able to secure sponsorships from firms located in Brazil, British Virgin Islands, Colombia, Dominican Republic, Guatemala and Panama. Additionally, several non-law firm service providers sponsored the Section, from chambers of commerce to accounting, printing and mediation service companies. In all, the Section has raised over $125,000 in sponsorships this past year. Without our sponsors, we would not be a functioning Section. We need to remember that. Like it or not, it is a different way to do business that is here to stay.

Mindful of the major role that our sponsors have in our operations, the Section focused on creating value for our sponsors while maintaining the quality of our programs and events. The Section incorporated technology such as internet email blasts and website banner ads to publicize our sponsors in an efficient and economical manner. Additionally, we involved our sponsors in our conferences and events with exhibitor tables, sign boards and speaking opportunities. We are particularly proud of the fact that every Section law firm sponsor spoke at an ILS event this year. It has been a successful partnership, and we anticipate a significant retention of our existing sponsors and the addition of several others in the upcoming year. From a business perspective, the International Law Section is a very effective way for a firm or company to enter, develop and solidify its international market presence. Thank you all.

Financial Results

Our Section members stepped forward to assist the Section on the revenue side with increased sponsorships and on the expense side by shouldering many expenses both personally and through their firms. Together, we were able to turn the Section's financial condition around. See Table 1 below. **[Note:** The Section's CLE and event schedule is currently backloaded to the spring, reflecting the increase in expenses. The Section is exploring the rescheduling of events to the fall portion of the Bar calendar year to spread out Section expenses.]

To date, the Section's 2009-2010 year has been run at net surplus of $84,588.00. More importantly, the Section has implemented fiscal restraints and safeguards, such as greater oversight on Section expenditures by the Section's Executive Committee, the adoption of fiscal restraint and program viability as a pre-condition of the implementation of most Section projects, and greater awareness by the Section membership at large regarding the need to run the Section with an eye towards financial practicality. The Section appears to have corrected its financial course and is in position to operate in a financially viable manner for years to come, but it is going to take your help and vigilance for the Section to maintain fiscal discipline.

Section Events

Due to the hard work and dedication of our Section committees and members and the support of our sponsors, the Section was able, despite the need for fiscal austerity, to put together a solid calendar of events:

- **International Income Tax and Estate Planning Conference** - October 2, 2009 – Our Tax Committee coordinated our bi-annual tax conference, once again showing the sophisticated level of Florida's international tax practitioners. The Program CDs can be purchased at: http://www.floridabar.org/TFB/

Table 1

Month	Beginning Balance	YTD Revenue	YTD Expenses	Ending Balance
Year End 2008-2009	$136,588.00	$54,730.00	$217,374.00	-$26,056.00
August 2009	$-26.056.00	$20,505.00	$1,522.00	-$7,068.00
September 2009	-$7,068.00	$38,692.00	$6,006.00	$6,635.00
October 2009	$6,635.00	$53,426.00	$11,228.00	$16,147.00
November 2009	$16,147.00	$69,543.00	$11,809.00	$31,683.00
December 2009	$31,683.00	$77,751.00	$12,630.00	$39,070.00
January 2010	$39,070.00	$98,475.00	$15,901.00	$56,523.00
February 2010	$56,523.00	$122,552.00	$32,597.00	$63,904.00
March 2010	$63,904.00	$120,506.00	$44,087.00	$50,368.00
April 2010	$50,368.00	$132,541.00	$47,953.00	$58,537.00
May 2010	$58,537.00	$127,299.00	$52,147.00	$49,101.00

TFBResources.nsf/Attachments/181FC0AEEB3AA6FA852576BA0071042D/$FILE/Audio%20CD%20&%20DVD%20List.pdf?OpenElement.

- **ILS Reception at The ABA Section of International Law Fall Meeting** – October 27, 2009 – The Section partnered with our friends at The American Bar Association Section of International Law for their Fall Meeting in Miami Beach. The ABA reported that the Section's reception welcoming everyone to Florida was one of the highest attended events of the entire Fall Meeting.
- **ILS Membership Drive and Cocktail Reception** – November 5, 2009 – Our Membership Committee successfully recruited additional members and bolstered Section morale with a series of cocktail receptions. This first reception in Miami was followed up with a second in Orlando on January 21, 2010, as part of the Mid-Year meeting, and a third reception on May 5, 2010, as a prelude to the IBTC Conference in Miami. Most notably, the Membership Committee was able to arrange all of these events at no cost to the Section. Well done!
- **Immigration Law for the International Practitioner** – January 22, 2010 – Our Immigration Committee presented an informative seminar to lead into the Section's Mid-Year meeting. We learned about business immigration, employment-based visa processing, family immigration and removal. The Program CDs can be purchased at: http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/181FC0AEEB3AA6FA852576BA0071042D/$FILE/Audio%20CD%20&%20DVD%20List.pdf?OpenElement.
- **The Haiti Earthquake Relief Project** –January 2010 – Working closely with The Florida Bar leadership, the Section took the point for Florida's lawyers in publicizing and fundraising for the victims of the Haiti earthquake. Tens of thousands of dollars were raised in humanitarian relief, many by Florida's lawyers who met the aspirational challenge of donating one billable hour. Thank you all for helping.
- **The 8th Annual International Litigation and Arbitration Conference** – February 12, 2010 – There is not much else to say here: Plenary sessions on Chinese Drywall Litigation and on meeting Florida judges; two tracks – one for international litigation and one for international arbitration. The ILAC Conference set a new registrations record, once again showing why it is the flagship event in the Section's CLE calendar. The Program CDs can be purchased at: http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/181FC0AEEB3AA6FA852576BA0071042D/$FILE/Audio%20CD%20&%20DVD%20List.pdf?OpenElement.
- **Vis Pre-Competition Moot Debate** – February 26-27, 2010 – Financial issues notwithstanding, the Section continued to give back to Florida's law schools with its sponsorship, financial support and time commitment to assist our students and international lawyers of tomorrow in their preparation for international competitions in Vienna and Hong Kong. Special thanks go to our friends at the University of Miami Law School for their hospitality and to our friends at Versailles Law School in France for becoming our first international school participant.
- **International Days** – April 13-14, 2010 – Thanks to our friends in the Florida Chamber of Commerce, the Section was once again able to participate in Florida's recognition of the importance of international trade and commerce and meet with Florida's lawmakers. Special thanks go to our former Section chairs who stepped forward to represent the Section at the last minute. We look forward to next year's event.
- **The 3rd Annual International Business Transactions Conference** – May 27, 2010 – The Section's transactionalists mobilized to present a day-long agenda of programs and reports from nearly every Section substantive law committee. Programs were presented included China, the Foreign Corrupt Practices Act, Customs and International Transport Law, International Tax Law, Intellectual Property Law, Foreign Country Lawyers, Securities, Public Private Partnerships and Corporate Counsel. It was a strong turnout.
- **The Florida-Quebec Forum** – June 3-4, 2010 – The Section is happy to be working again with our friends from the Barreau de Quebec and sent a blue-ribbon delegation to represent Florida in a two-day gathering of Quebec's legal professionals. We look forward to returning the favor and hosting our Quebecois friends in Florida in early 2011.
- **View from the End of the Table: Inside the Mind of the Mediator** – June 24, 2010 – The Section is proud to have its mediation program selected as part of the President's Showcase during the Florida Bar Annual Convention in Boca Raton. A solid program has been prepared to educate Florida's lawyers on mediation: what it is; how it works; and how to succeed.
- **Passage of UNCITRAL Legislation** - The Section is particularly proud of its hard work and dedication in successfully advocating Florida's passage and enactment into law of the international arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL). This three-year effort positions Florida as an even more attractive venue for international arbitrations and brings added benefit to Florida's economy. The Section recognizes and thanks its friends in the leg-

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CHAIR'S MESSAGE
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islature and business community, without which this could not have been possible:

The Players

The Section is not run by one person. It is not run by the Chair. It is not run by the Executive Committee. It is not run by the Executive Council. It is run by the entire 1,000 plus members located in the several states, countries and continents. I have said it before: I am a very lucky man. Everyone who stepped forward this year, rolled up his or her sleeves and got to work, made us a better Section. What you all were able to do this year under the circumstances in which you had to operate shows what a truly strong Section we are and what we can do when we apply ourselves.

The Future of the Section

The Section is in good hands for the future. I sincerely believe that we have turned the corner. Having witnessed first-hand the challenges faced this past year, we have leaders committed to the interests of the Section, supported by a strong Executive Council. The Section has learned from its mistakes and made its adjustments. While the Section recognizes that there is (and always will be) room for improvement, we are a stronger and better section for what we accomplished this past year.

As you will see, the Section will continue to grow in size and scope and event participation. We have cultivated strong contacts and working relationships with organizations such as The American Bar Association, The International Bar Association, various state, county and city bar associations and professional organizations. Our Committees are progressing in their development and implementation of projects. And, we have many new faces and eager new attorneys who will work tirelessly to become the Section leaders of tomorrow.

As the Section turns to the direction and leadership of our new Chair, Edward Mullins, I sincerely hope that we remember the lessons learned from the past year and appreciate the level and quality of work we were all able to do this past year.

The Section is what you make it, and I was fortunate enough to be surrounded by many people who wanted to make it something special and were willing to work to achieve those ends. Likewise, I encourage all of you to get involved and help make the Section even better.

Section Scene

At the ILS Reception – 2009 Fall ABA Meeting

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Arbitration: The Second Circuit Invites a Reexamination of Attorneys' Fees Provisions in Arbitration Agreements

By Douglas J. Giuliano, Miami

In April 2009, the Second Circuit issued its decision in *ReliaStar Life Insurance Co. of New York v. EMC National Life Co.*,[1] holding that a generic (and ubiquitous) fees and costs provision in an arbitral agreement that called for each party to bear its own attorneys' fees did not prohibit the arbitral panel from ordering a party whom the panel felt had litigated in bad faith to pay the other side's attorneys' fees. This article will examine how the Second Circuit arrived at its ruling, as well as the practical effect that the *ReliaStar* decision is likely to have on the future drafting of fees and costs provisions in arbitral agreements.

The *ReliaStar* case stemmed from a dispute between two co-insurers, National Travelers Life Company (NTL) and ReliaStar Life Insurance Company (RLI), regarding the scope of NTL's obligations under a co-insurance arrangement between the two parties. The dispute ended up in arbitration, as was provided for in the parties' contracts, and the arbitral panel eventually issued an award in favor of RLI in the amount of $3,169,146.00.

In addition to this amount, however, the panel also awarded RLI $691,903.75 in fees and costs, based on the panel's finding that "the conduct of NTL was lacking good faith."2 When RLI subsequently moved to have the arbitral award confirmed in the Southern District of New York, NTL for the most part did not dispute the main component of the award but vociferously objected to the award of fees and costs. NTL argued that the fees and costs provisions in the arbitral clauses of the parties' contracts (which were identical) precluded that portion of the award. The fees and costs provision in question provided that "[e]ach party shall bear the expense of its own arbitrator ... and related outside attorneys' fees, and shall jointly and equally bear with the other party the expenses of the third arbitrator."[3]

At first glance, NTL's argument, that the panel had abused its authority in awarding fees and costs to RLI, has intuitive appeal. Indeed, the district court, in vacating the fees and costs portion of the award, found that the parties' arbitral agreement was "clear as a bell" and that it "unmistakably provide[d] that the parties are to bear the fees of their respective arbitrators (i.e., the party-appointed arbitrators) and outside counsel." The district court confirmed the arbitral award in the amount of $3,169,146.00 but vacated the $691,903.75 in fees and costs.

Predictably, RLI appealed the decision and argued that the district court had erred in concluding that the arbitral panel lacked authority to award fees and costs as a sanction for what it had deemed was bad faith conduct in the arbitral proceedings. In taking the appeal, the Second Circuit made it clear that the issue before it was limited to whether the fees and costs provision in the parties' arbitral agreements acted to circumscribe the arbitral panel's authority to award fees and costs as a means of sanction; it was not deciding whether the arbitral panel's finding of bad faith was correct, or whether the amount of fees and costs it awarded for the supposed bad faith was excessive.

The Second Circuit started its analysis by observing that the arbitral agreement at issue was "broad," in that it vested within the arbitrators a wide scope of authority relating to disputes between the parties. The arbitral agreement in part provided:

> 10.1 *Appointment of Arbitrators.* In the event of **any disputes or differences** arising hereafter between the parties with reference to **any transaction** under or relating **in any way** to this Agreement as to which agreement between the parties hereto cannot be reached, the same shall be decided by arbitration. Three arbitrators **shall decide any dispute or difference**....[4]

The court then "clarified" that a broad arbitral clause like the one before it "confers inherent authority on arbitrators to sanction a party that participates in the arbitration in bad faith and that such a sanction may include an award of attorney's or arbitrator's fees." For this point, the court relied on *Synergy Gas Co. v. Sasso*,[5] where the Second Circuit upheld an arbitral panel's awarding of fees and costs to one party for the other party's bad faith in the arbitral proceedings. The court additionally cited to *Todd Shipyards Corp. v. Cunard Line, Ltd.*,[6] and *Marshall & Company v. Duke*,[7] from the Ninth and Eleventh Circuits, respectively, for the proposition that arbitrators normally can rely on the "bad faith" exception to the American Rule of attorneys' fees (under which parties normally bear their own fees and costs) to require a party to pay the other's fees and costs.

Then the Second Circuit turned to the real heart of the case -- whether the provision in the arbitral agreement stating that each party was to bear its own attorneys' fees and costs served to preclude the application of the "bad faith" exception here, such that the arbitrators were powerless to

enter an award for attorneys' fees and costs against a party it had judged to have acted in bad faith during the arbitral proceedings. Stated another way, whether the attorneys' fees provision found in section 10.3 of the parties' contracts trumped the general, broad authority vested within the arbitrations pursuant to section 10.1 of those same contracts, which authority the Second Circuit stated included the award of attorneys' fees and costs.

The court answered the question with a firm "no." Partly relying on the principle under New York law that implicit in every contract is an obligation to act in good faith, it concluded that the intent of section 10.3 had been to preclude attorneys' fees awards for "ordinary," or, as the court put it, "good faith," participation in the arbitral proceedings and not for conduct that constituted bad faith. It additionally noted that the drafters of the contracts were sophisticated commercial parties, and that they could easily have worded section 10.3 so as to leave no doubt as to its scope or application. In short, the Second Circuit refused to read section 10.3 as explicitly overcoming the broad authority vested in the arbitrators by section 10.1, or the bad faith exception to the American Rule. The Second Circuit remanded the case to the district court so it could enter a modified judgment awarding fees and costs to RLI.[8]

That the *ReliaStar* decision could have a significant impact on arbitration cannot be doubted. After all, provisions worded similarly to section 10.3 are present in many arbitral agreements, both within and without the Second Circuit's jurisdiction, so the decision could lead to a fair number of parties to arbitration finding themselves at the receiving end of an unexpected, and potentially large, adverse award of attorneys' fees and costs.

There also is no denying that the rationale in *ReliaStar* has a certain attractiveness to it, particularly for those practitioners who have found themselves opposite obstinate or unscrupulous attorneys in arbitration (as the author has). The appeal of this approach is heightened by the fact that many are concerned that the advantages typically associated with arbitration over court litigation -- such as faster, more streamlined and cheaper administration of justice and less onerous discovery obligations -- are being eroded due to what is perceived to be an increase in overly aggressive, unnecessary "litigation for litigation's sake" conduct among attorneys involved in arbitration.[9] Surely, the risk of having arbitrators punish such bad faith behavior by awarding fees and costs even when the arbitral agreement does not explicitly authorize, or arguably even prohibits, such awards cannot be viewed as a bad thing. Or can it?

Playing the role of devil's advocate, it is fair to question whether the Second Circuit's rationale in reaching its result was sound. For one thing, some may argue that *ReliaStar* was a "results-oriented" decision, where the court, perhaps aware of concerns associated with the state of arbitration, could not pass up an opportunity to strengthen arbitrators' power to curtail some of the problematic conduct giving rise to those concerns. In the same vein, there will certainly be some who view the *ReliaStar* decision as a defeat for parties' freedom of contract, arguing that the intent of the attorneys' fees provision at issue was clear enough.

And, putting aside any motivations the Second Circuit may have had in reaching the decision it did, one may wonder at the persuasiveness of the other cases the court cited as support. In fact, neither *Synergy Gas Co.*, nor the other two cases cited, *Todd Shipyards* and *Marshall*, contained provisions limiting the awarding of attorneys' fees, as section 10.3 did in *ReliaStar*.

Finally, there is the well-established principle of contractual interpretation that a specific clause normally trumps a general one. Regarding this principle, which applies to arbitral agreements just as well as other types of contracts, the Second Circuit paused to "note the importance of the dominance of specific over general arbitration provisions."[10] Nonetheless, in *ReliaStar* the Second Circuit read the general arbitral provision in section 10.1 as trumping the specific section 10.3, which dealt only with fees and costs.

One thing is clear: Whatever one thinks of the result in *ReliaStar,* in terms of having a positive or negative impact on arbitration, or whether the Second Circuit "got it right," arbitration practitioners would do well to keep *ReliaStar* in mind when drafting attorneys' fees and costs provisions in arbitral agreements. And, for those already engaged in arbitral proceedings or who may be getting involved in them pursuant to an already existing arbitral agreement with an attorneys' fees and costs provision similar to section 10.3 in *ReliaStar*, this decision should be a reminder of the risk that comes with engaging in tactics that could be deemed bad faith by the arbitrators.


GIULIANO

Douglas J. Giuliano *practices with the international and arbitration boutique Astigarraga Davis Mullins & Grossman, P.A., in Miami. Born in Rio de Janeiro, Brazil, he is a native speaker of Portuguese and is also proficient in Spanish. Mr. Giuliano graduated summa cum laude from Troy University in Troy, Alabama, with a Bachelor of Science in Business Management. He then attended the Florida International University College of Law, where he made Dean's List every semester and graduated cum laude as one of the top five students. During his last year of law school, he served as Managing Editor of the FIU Law Review. Mr. Giuliano works in the field of arbitration and has also handled a variety of matters, including financial fraud, employment discrimination, and franchise disputes, at the trial and appellate*

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ARBITRATION

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stages of both state and federal courts. Mr. Giuliano is the author of numerous published articles and is currently Assistant Editor of The International Litigation Quarterly.

Endnotes:

1 564 F.3d 81 (2d Cir. 2009).

2 *Reliastar Life Ins. Co. of N.Y. v. EMC Nat. Life Ins. Co.*, 473 F. Supp. 2d 607, 607-08 (S. D.N.Y. 2007) (brackets in original removed).

3 *Id.* at 608.

4 *ReliaStar*, 564 F.3d at 84 (emphasis added).

5 853 F.2d 59 (2d Cir. 1988).

6 943 F.2d 1056 (9th Cir. 1991).

7 114 F.3d 188 (11th Cir. 1997).

8 There was a dissent. Judge Rosemary Pooler's basic problem with the majority decision was that, in her view, the attorneys' fees and costs provision in section 10.3 was clear and unambiguous, as was the parties' intent in incorporating that provision, and thus she did not agree with the majority's reading of section 10.3 as applying only to "good faith" conduct.

9 For instance, speaking about securities arbitration, David Ruder, the former chairman of the SEC and former member of the NASD Arbitration Policy Task Force, has commented that "the increasingly litigious nature of securities arbitration has gradually eroded the advantages of [securities] arbitration." Bridget B. Zoltowski, *Restoring Investor Confidence: Providing Uniformity in Securities Administration by Offering Guidelines for Arbitrators in Deciding Motions to Dismiss Before a Hearing on the Merits*, 58 Syracuse L. Rev. 375, 387 (2008). And, the seemingly ever-increasing number of disputes concerning discovery, particularly over the permissible scope of discovery, in arbitration proceedings is frustrating attorneys and arbitrators alike and is troubling because, as one court observed, "arbitration's principal advantages may be destroyed if the parties succumb to fighting over burdensome discovery requests far from the place of arbitration." *Republic of Kazakhstan v. Biedermann Intern.*, 168 F.3d 880, 883 (5th Cir. 1999).

10 *Katz v. Feinberg*, 290 F.3d 95, 96 (2d Cir. 2002).

THE FLORIDA BAR ANNUAL CONVENTION
Boca Raton Resort & Club, Boca Raton, FL

International Law Section Convention Schedule

THURSDAY, JUNE 24, 2010

View from the End of the Table – A Discussion on Mediation (President's Showcase Seminar)

10:30 a.m. – 10:35 a.m.
Introductory Remarks
Moderator: Edward M. Mullins, ILS Chair-Elect, Astigarraga Davis Mullins & Grossman, P.A., Miami

10:35 a.m. – 10:50 p.m.
Overview of Mediation Methodologies
John Upchurch, Upchurch Watson White & Max, Daytona Beach

10:50 a.m. – 11:00 a.m.
Mediation in the Context of International Disputes
Lynn H. Cole, Law Offices Lynn Cole, Tampa

11:00 a.m. – 11:10 a.m.
Issues Unique to Mediating Commercial Disputes
Carol Cope, Mediation, Inc., Miami

11:10 a.m. – 11:20 a.m.
Plaintiff's Perspective
Ervin A. Gonzalez, Colson Hicks Eidson, Miami

11:20 a.m. – 11:30 a.m.
Defense Perspective
Kelly Overstreet Johnson, Broad & Cassel, Tallahassee

11:30 a.m. – 12:00 noon
Panel Discussion, Hypotheticals and Q&A
Moderator: Edward M. Mullins, ILS Chair-Elect, Astigarraga Davis Mullins & Grossman, P.A., Miami
Panelists: Lynn H. Cole, Law Offices Lynn Cole, Tampa
Kelly Overstreet Johnson, Broad & Cassel, Tallahassee
Ervin A. Gonzalez, Colson Hicks Eidson, Miami
Carol Cope, Mediation, Inc., Miami
John Upchurch, Upchurch Watson White & Max, Daytona Beach

FRIDAY, JUNE 25, 2010

Section Events

12:30 p.m. - 2:00 p.m.
Luncheon
Keynote Speaker: Raoul Cantero, Former Florida Supreme Court Justice; Partner, White and Case, Miami, and incoming chair of the Appellate Practice Section

2:00 p.m. - 3:00 p.m.
2010 - 2011 ILS Committee Meetings

3:15 p.m. - 6:00 p.m.
ILS Executive Council Meeting

6:30 p.m. - 8:30 p.m.
ILS Section Reception/Mentor-Mentee Mixer/Ed Mullins Inaugural Ball
The Wishing Well Irish Pub, Boca Raton — 2 Hour Open Bar + Light Hors D'oeuvres

Register at the Annual Convention at the Boca Raton Resort & Club, Boca Raton, FL.

Travel to Forbidden Places

By Laurence D. Gore, Ft. Lauderdale, and Mary J. Hoftiezer, Orlando

As lawyers with a concentration of practice in the travel and international law fields, we often are asked for assistance from a client regarding travel to a country on the list of prohibited of travel maintained by the Office of Foreign Assets Control (OFAC). OFAC, under the United States Treasury Department, administers and enforces economic and trade sanctions against targeted foreign countries, terrorism-sponsoring organizations and international narcotics traffickers. The OFAC publishes an "alert" list of blocked countries, providing businesses, organizations, and individuals with information as to what activities are permitted and not permitted in those countries.

Attorneys practicing in the fields of Customs and Trade are well-aware of the constant need to familiarize themselves with the seemingly ever-changing and voluminous regulations for clients wishing to conduct trade activities in a blocked country, while attorneys in many other fields of law may have seemingly rare need to review the complex requirements of OFAC. Lawyers engaged in the representation of clients in the tourism field are most recently finding themselves responding to inquiries regarding the why, where, when, and who of travel to what is apparently a forbidden place. The concept of adventure travel has produced an almost entirely new form of traveler. Whether it be movies like *Indiana Jones* and its ilk or simply the desire and resources to go where few people (at least their neighbors) have gone before, the demand for new experiences in travel runs counter to regulations prohibiting what many believe is their constitutional right to travel wherever they may fancy. Often, good sense does not prevail, and travelers are willing to risk life, limb and jail time simply for the spirit of the adventure. However, good sense is what we, as attorneys, are generally required to possess when we counsel our clients concerning the activities in which they wish to engage. Fortunately, most of our clients are not the would-be travelers themselves but the companies that arrange for their transportation and accommodations in these forbidden places.

Numerous sanctions and prohibitions exist for trade and travel to certain countries under the OFAC regulations, but the Florida practitioner will most often find himself or herself engaged with the OFAC sanctions for travel to our closest neighbor, Cuba. The sanction program was recently revised when the Treasury Department amended the Cuba Assets Control Regulations to implement the President's Initiative on Family Visits, Remittances, and Telecommunications. While the regulations are far too lengthy to list, these amendments basically permit unrestricted travel for persons of Cuban descent involved in family visits and provide that family clothing and supplies may be brought to Cuba. This in turn has promoted a growing demand for transportation services by OFAC-licensed suppliers and the request for licensing as an OFAC-authorized Travel Service Provider. Additionally, the ports of Tampa and Port Everglades have requested authorization as Ferry Service provider ports. Cuba, on the other hand, maintains somewhat limited cruise service, as foreign-flagged vessels visiting Cuba cannot stop in a U.S. port during their cruise circuit. Much of this Initiative and the corresponding activities give impetus to what seems to be the constant anticipation of travel to Cuba being entirely without restrictions.

In the meantime, while we await the anticipated abolition of travel restrictions to Cuba, we must be aware of the numerous guidelines for those wishing to visit Cuba who do not fall under the President's Initiative. In general, these regulations divide travelers into two categories: those who require a General License and those who require a Specific License. No applications are necessary for a General License, while an application is required for a Specific License. Those who wish to travel to Cuba must provide information and documentation that their travel to Cuba falls into one of the two categories, and they must meet the Application Guidelines. General licenses are for: individuals whose travel to Cuba is for official government business by an official for the U.S., a foreign government or an international organization to which the U.S. is a member; journalists and their supporting broadcast or technical personnel; and full-time professional researchers conducting business in their professional area or attending professional meetings or conferences. Specific licenses require an application, which can take up to six months and may be obtained for the following: educational activities;[1] religious activities;[2] public performances, athletic and other competitions and exhibitions;[3] support for Cuban people;[4] humanitarian projects;[5] activities of private foundations or research or educational institutes;[6] and the exportation, importation, or transmission of information or informational materials.[7] Pre-paid tourist packages remain prohibited, as well as the concept of the "visitor for pleasure." Regulations also exist for travel agencies wishing to sell travel to Cuba, and these must also seek a license.

There remain travelers who simply travel to Canada and Mexico, among other countries, and through sellers of travel in those countries, book their transportation and accommodations for their Cuba visits. Others, such as boat owners, have long been visiting

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Cuba without regard to OFAC regulations. Despite the fact that these individuals are assisted by the Cuban authorities who do not stamp their passports, such visits, likely unbeknownst to the travelers, are illegal and the traveler is subject to severe fines and jail sentences.

When advising the would-be traveler to Cuba, discuss the existence and extent of the regulations related to such travel. In addition, inform the providers of travel of the requirements necessary to secure the license to furnish such travel legally. And, of course, as lawyers we must be the bearers of bad news and warn of the potential for fines and incarceration should they choose to ignore the regulations and refuse to abide by the restrictions. Travel to the forbidden place of Cuba is not forbidden; it is merely restricted. It appears, by the new government initiative, that the trend is to remove or relax these restrictions until one day we may travel to Cuba as a permitted place.

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Endnotes:

1 31 C.F.R. §§ 515.560(a)(5) and 515.565.
2 31 C.F.R. §§515.560(a)(6) and 515.566.
3 31 C.F.R.§§515.560(a)(7) and 515.567.
4 31 C.F.R. §§515.560(a)(8) and 515.574.
5 31 C.F.R.§§515.560(a)(9) and 515.575.
6 31 C.F.R. §§515.560(a)(10) and 515.576.
7 31 C.F.R.§§515.560(a)(11) and 515.545.

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Articles between 7 and 10 pages, double-spaced, involving the various disciplines affecting international law may be submitted on computer disk with accompanying hard copy, or via electronic format in Word **(with the use of endnotes, rather than footnotes.)** Please contact Rima Mullins at *rimamullins@bellsouth.net or aflindsay@hhlaw.com* for submissions and for any questions you may have concerning the *Quarterly*.

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Litigation Risks in the SEC's IFRS Plan: What Attorneys Need to Know

By Barry Jay Epstein, Ph.D., CPA, Chicago

Background

Following a unanimous vote, the Securities and Exchange Commission (SEC) released a final rule in November, 2007, allowing foreign private issuers (FPIs) in the U.S. to file financial statements without reconciliation to U.S. Generally Accepted Accounting Principles (GAAP), provided that those financial statements are prepared fully in compliance with International Financial Reporting Standards (IFRS) as issued by the International Accounting Standards Board (IASB).[1] The SEC thus acknowledged that IFRS has the potential to become the global set of high-quality financial reporting standards, and that investors, issuers and markets would benefit from the improved comparability of financial reporting across national borders.

On August 27, 2008, the SEC took the next logical step, proposing a "roadmap" that could lead to mandatory IFRS adoption by all U.S. issuers beginning by 2014, which was an ambitious date that has now slipped slightly.[2] In addition to a timeline, the roadmap sets forth several "milestones" for U.S. issuers that, if achieved, could lead to all U.S. public companies using IFRS in their SEC filings, superseding U.S. GAAP. Notwithstanding the "fresh look" engaged in by the new leadership at the SEC, it is highly likely that U.S. GAAP will, for publicly-held companies, be superseded by IFRS. A decision is due within the next two years; if in the affirmative, all U.S. public companies could convert to IFRS, beginning with the largest issuers in 2015.

Among the several proposed milestones that would need to be achieved before universal IFRS adoption becomes mandatory in the U.S. are: improvements to accounting standards; enhanced accountability by, and funding of, the International Accounting Standards Committee Foundation; improved ability to use interactive data for IFRS reporting; IFRS education and training in the U.S. for investors, auditors and others; favorable experience from limited early use of IFRS; the timing of future rulemaking by the Commission; and considerations relating to whether the mandatory use of IFRS should be staged or sequenced among groups of companies based on market capitalization.[3]

The new SEC Chairman, Mary Schapiro, has expressed some hesitation over the roadmap as currently prescribed, having recently stated, "I will not be bound by the existing roadmap that's out for public comment."[4] On the other hand, another key member of the new administration's economic team, Paul Volcker – former Chairman of the Federal Reserve Board and now Chairman of the President's Economic Recovery Advisory Board – has expressed enthusiasm about the push for a single set of global accounting standards to be administered by the IASB.[5]

The anointing of IFRS as the global standards for accounting and financial reporting, for publicly held and private companies alike, seems to be only a matter of time. The inevitability of this outcome was foretold when FPIs were given the right to file in the U.S. using IFRS, making it politically problematic (if not actually impossible) to deny this same right to U.S.-based registrants. Separately, since 2002 the primary U.S. accounting standard-setter, FASB, had already been engaged in a "convergence" effort with IASB, a result of which a number of older standards were revised, and several new standards were promulgated, mostly to conform to IFRS (although a few older IFRS have been modified to embrace U.S. GAAP).[6] In other words, whether IFRS are formally imposed or not, U.S. GAAP is in the process of becoming indistinguishable from IFRS.

It is often claimed (including by the IASB) that adoption of IFRS-based reporting would reduce preparers' costs of capital. Widely-cited theoretical arguments based on well-accepted economic and finance postulates credit the anticipated effects of reduced estimation risk of future returns on investments, decreased transaction costs, and mitigated information asymmetries between management and external investors, while logical arguments focus on greater transparency in financial reporting.[7] Despite academicians' actual research yielding mixed findings regarding these claimed benefits, neither theoretical arguments nor research results have cited any downside risk to adopting IFRS, other than the short-term cost of complying with the new requirements.

In any event, the trend appears irreversible, with over 100 countries now requiring or permitting the use of IFRS (some for all companies, others only for publicly traded ones), and with major nations such as Canada, Japan, China and Russia all committed to implementing IFRS within a few years.[8] This is particularly relevant in Florida, where for most of the last 15 years, South Florida's trade surplus has been the nation's largest, meaning that the internationalization of business is of greater relevance to Florida-based commercial and industrial concerns than it is to those in most other states.[9]

Florida's international accessibility, trade infrastructure, and multilingual workforce position market participants to interact with the global business community. Currently there

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are more than 1,000 multinational corporations in Miami-Dade County alone, including 50 Japanese companies, leading Korean multinationals and an increasingly strong Chinese presence.[10] An understanding of IFRS, and the risks that may be involved in the transition, is required by business leaders, their accounting advisors, and their attorneys, to help mitigate problems and improve communication in various business transactions.

Major reasons cited for the U.S. to adopt IFRS is to open up U.S. capital markets, remove barriers to raising capital anywhere in the world, lower transaction costs, and facilitate business on a global scale. The fear of losing listings to the London or other exchanges (which would exacerbate the already occurring loss of some listings, putatively due to the cost of Sarbanes-Oxley compliance) has encouraged the financial services sector to line up solidly behind IFRS adoption. As with any major change, unexpected impediments are sure to arise, beyond the already well-anticipated costs of modifying accounting systems, training staff, and increasing audit time and cost during at least the first few reporting years.

While the expected permission to transition to IFRS-based financial reporting is great news for U.S.-listed companies seeking reporting parity with foreign peers and competitors, this shift may have other negative ramifications, including increased litigation and greater challenges in structuring terms of business transactions. For those U.S.-based attorneys who are conversant with IFRS – currently only a relative handful – those challenges could indeed lead to opportunities. In the following paragraphs, certain of these matters are addressed.

Attorney IFRS Readiness

Given what has unfolded to date, and what seems likely to follow, attorneys clearly have a need to be trained in this new accounting "language," in order to assist their clients in making the transition. As accounting standards impact all aspects of a client's business, attorneys need to be aware of the changes IFRS will bring and how those changes may affect their clients. For instance, while U.S. GAAP has traditionally been the accounting standard to invoke in many contractual arrangements, with the wide respect that IFRS has gained over the past 10 years it is no longer a foregone conclusion that U.S. GAAP will be the only – or even the primary – standard to follow. With IFRS now mandated or permitted by over 100 nations, including the 27 members of the European Union, and even the U.S. GAAP-look-alike Canadian GAAP scheduled for replacement by IFRS in 2011, it is clear that in the immediate future international business arrangements will need to be largely or exclusively measured and reported under IFRS. It is therefore highly likely that future contractual and other legal instruments will

stipulate IFRS as the accounting standard to which the parties will adhere.

Implications for Transactional Attorneys

Transactional lawyers, who play a key advisory role in structuring contractual relationships with foreign-based entities on behalf of their clients, will benefit from increased knowledge about international legal and financial reporting issues. This is necessary when advising clients entering into financial or other arrangements with foreign-based entities, particularly where there is a need to rely on counter-parties' financial representations; obviously more so if joint ventures or other formal relationships are being contemplated.

Lack of familiarity with accounting principles may affect one party's judgments regarding the other's financial position and/or recent results of operations and consequentially hinder initial and continuing decisions to engage in such routine relationships as those between vendor and customer, and between lessee and lessor. The impact will be even more pronounced if U.S. entities are investees or joint venturers with foreign-based enterprises and if reporting "upstream" on an IFRS basis is suddenly mandated. Converting to a new financial reporting basis could impose a range of burdens and could have deleterious effects on these relationships, with possibly major economic consequences for attorneys' commercial clients.

Florida lawyers should, accordingly, seek quickly to develop a more in-depth understanding of the differences between current U.S. GAAP and IFRS in order to provide better service to their corporate clients. If their U.S. business clients are or become subsidiaries or investees of foreign companies, there will be an immediate demand for them to produce IFRS-basis financial statements to upstream to their parent or investor entities – a marked change from the recent past, when many of these foreign parent entities were quite willing to accept U.S. GAAP-based financial reporting packages, performing conversion duties, if at all, at the parent company level.

For large international law and accounting firms, accommodating these new demands will not prove a major problem, because resources for such undertakings doubtless already exist. For other advisors, there may be a need to establish relationships with technical experts from the law firms' regular accounting firms, other consultancies, or university faculties, which are rapidly becoming attuned to the demand for IFRS expertise.

Based on gaining an understanding of the still-substantial differences between U.S. GAAP and IFRS, various business and legal strategies may mitigate or isolate the risks of having changing GAAP affect contractual compliance. One example of such a strategy is to include what is sometimes referred to as a "frozen GAAP" contractual provision, where the accounting principles employed at the inception of the relationship are preserved, for measurement purposes, throughout the term of the arrangement. In the author's experience, this has been most successfully invoked *within* a GAAP regime (e.g., within U.S. GAAP – for instance by keeping goodwill amortization in place even in the face of new standards that eliminated amortization in favor of impairment testing after 2001).

Superimposing a "frozen GAAP" provision on the rapidly changing landscape of international financial reporting may be more challenging to achieve, however. Given the wholesale changes that would have to be made if IFRS supersedes U.S. GAAP, the need to maintain two sets of books and records may prove impractical and, even if possible, could pose potential litigation risks. Attorneys who possess an enhanced understanding of IFRS are therefore better equipped to educate proactively – and to add value for – their existing clients, as well as to market their capabilities to prospective clients more effectively. Counsel, together with accounting advisors, might offer prospective clients various aids (such as "accounting convergence checklists") to assist them further in this transition process. In the author's opinion, this would be more effective and better provide for long-term client satisfaction, than would fighting a "rear-guard" action to preserve the remnants of U.S. GAAP compliance in

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the face of growing internationalization of financial reporting standards.

Opportunities for Florida Securities Lawyers

Having the SEC's former reconciliation requirement waived (to the extent foreign private issuers file financial statements that fully comply with IFRS) provides potential opportunities for domestic law firms, as well. If firms have clients that are, or may become, affiliated with foreign companies, education should be scheduled sooner rather than later. From the perspective of foreign registrants, this move will reduce compliance costs, improve efficiencies and, most importantly, facilitate cross-border capital formation. Improving access to the U.S. capital markets by eliminating reconciliation may result in some lost business for accounting firms, but (if basic economic theory holds true) this should also result in expanded business opportunities for both law and accounting firms. Florida-based securities lawyers may be called upon to advise an expanded number of foreign would-be registrants in completing their securities offerings in U.S. capital markets, particularly if those entities have already established Florida bases of operations or strong relationships with Florida companies. Additionally, some FPIs that now have the option of filing under IFRS may wish to consult with U.S. securities counsel to determine if it is in their best interest to do so under current U.S. securities laws.

Potential Litigation Risks

Clearly, any changes to reporting standards (even routine changes to U.S. GAAP) can engender disputes that may evolve into contractual or securities litigation. Notwithstanding the significant convergence that has already occurred, substantial differences between U.S. GAAP and IFRS remain. A change from U.S. GAAP to IFRS reporting standards would create – in the near term, at least – greater risk of misunderstandings and of improper application of unfamiliar rules by preparers and even by auditors. Thus, the change could exacerbate already serious litigation risks, where investors or other users of financial statements claim to have suffered harm flowing from reliance on improperly prepared or inadequately explained financial reports. Based on the author's own extensive experience with securities litigation, the expanded use of IFRS-based reporting will, for some period of time, create expanded litigation risk, which has long been disproportionately a U.S. phenomenon. Therefore, having an awareness that these risks exist should stimulate the exercise of greater care and caution, which hopefully would, to a degree, ameliorate the dangers.

Are There Governance Implications for the Board and/or Audit Committee?

Corporate directors – and in

particular, audit committee members – need to be mindful in the selection and application of financial reporting standards. Specifically, the risks of "opportunistic behavior" by management, or "accounting principles shopping" in choosing between U.S. GAAP or IFRS adoption, in order to affect key financial ratios and other performance measures, potentially affecting bonus awards and option grants, may demand greater board scrutiny. Directors, together with any legal or accounting counsel, must gain comfort with management's choices, both as to the propriety and appropriateness of the actual accounting standards selected and also as to the internal control implications of making those choices. Furthermore, they should anticipate, and in fact insist upon, greater scrutiny of these management decisions by the reporting entity's outside auditors. This is another area where audit committee consultation with special legal counsel or independent accountants – the engagement of which is explicitly authorized under the Sarbanes-Oxley Act (Section 301) – may be particularly warranted, for both substantive and defensive reasons.

Protecting Your Client's Interests in International Commercial Transactions

The standard prescription that "an ounce of prevention is worth a pound of cure" applies to commercial transactions in general and to those involving foreign GAAP and GAAS even more so. Given the fact that financial reporting requirements are in the process of "convergence," and that many important differences remain to be addressed, it would undoubtedly be valuable to make use of tables or checklists highlighting GAAP – IFRS (or other national GAAP) discrepancies when making business and contractual decisions. These would be of particular value to any negotiations involving joint investments or profit-sharing arrangements, including earn-out agreements associated with sales of operations to foreign entities, where the selling party (say, the U.S. company) will be compensated based on future earnings of the operations sold to a foreign company that will thereafter report under different accounting standards.

Appropriately armed with detailed guidance on the pertinent differences between the financial reporting standards used by sellers and buyers, the attorneys can construct a contractual provision that will best serve the client's interests. The following specific actions can be considered as a "checklist" of defensive steps to be taken in advising or assisting clients contemplating major transactions with foreign entities, ranging from joint ventures and acquisitions to firm supply agreements.

1. **Obtain several years' financial statements of the intended counter-party enterprise.** Five years' financial statements should be considered a minimum, to avoid being misled by a recent, unsustainable interlude of exceptional performance. Audited financial statements, attested to by a reputable firm of certified public accountants (or the equivalent under various foreign regimes), should be deemed far more reliable than unaudited financial statements (e.g., reviewed, compiled or assembled financials). If the auditors are not known by reputation, have the client's regular, independent accounting firm make inquiries through its international network to learn about the foreign firm's standing.
2. **Closely read the financial statements and auditors' reports to ascertain which set of financial reporting standards have ostensibly been utilized for the preparation thereof.** For example, the financial statements may purport to be in conformity with IFRS, or with various national standards such as U.K. GAAP. Be wary of any representation (in either auditors' reports or financial statement footnotes) suggesting that the financial statements simultaneously conform to more than one set of reporting standards (e.g., IFRS *and* U.K. GAAP), since this is virtually impossible to achieve if the financials fully apply one of the comprehensive sets of GAAP. Also, note if and when the entity has recently adopted a new set of financial reporting standards and, if so, pay particular attention to any adjustments made in the conversion process. It is not uncommonly observed that the occasions of major transactions (such as business combinations) or events (the adoption of new accounting principles) have been used to perpetrate financial reporting schemes, such as provision of "cookie jar" reserves. In particular, adoption of IFRS has been found to have encouraged a number of entities to embrace restatements of long-lived assets to revalued (fair value) amounts, which have not always been firmly grounded in verifiable values. (Note also that IFRS has a particular, rather detailed standard directing how first-time reporting under IFRS must be accomplished.)
3. **If the proposed counter-party enterprise prepared its financial statements in accordance with any set of standards other than U.S. GAAP, obtain a comprehensive comparison of the foreign standards with U.S. GAAP.** Several of the major international CPA firms offer, via their web sites, complimentary guides comparing specific foreign GAAP to either U.S. GAAP or IFRS. Various comparison tables also can be found in other publications, such as the author's *Wiley IFRS 2009*. These reference works can be used to identify the areas of potential discrepancies that are pertinent to the entity being reviewed.

   For example, if the target entity has significant self-construction of long-lived assets, be aware that IFRS permitted (until a very recent change in rules) immediate expensing of construction period financing

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At the 2010 International Business Transactions Conference

At the 2010 International Litigation & Arbitration Conference

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At the 2010 Midyear Meeting of The Florida Bar

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costs, whereas U.S. GAAP requires that interest be added to the asset cost and subsequently amortized over its useful life. Another example: LIFO inventory costing is popular in the U.S. and typically depresses earnings and reported inventory values; but under IFRS the use of LIFO is now prohibited, so earnings may appear higher than would otherwise be the case. Yet another: IFRS permits revaluations of long-lived assets (i.e., write-ups for inflation) whereas U.S. GAAP mandates historical cost accounting, meaning that U.S. GAAP-based balance sheets might be more conservatively reported than IFRS-based ones, assuming the reporting entity elects that option.

4. **Consider how the differences in financial reporting practices might impact the proposed transaction or commercial relationship.** Users of financial statements commonly select certain data contained therein to construct one or more indicators and then use those computed criteria to assist in the decision-making process. Common indicators are those pertaining to cash flows or profitability, those implying a range of transaction values (e.g., multiples), and those addressing operating characteristics (e.g. expense ratios). It is obviously critical that, if any such indicators are to be constructed and utilized, the bases for the financial statement captions from which these indexes are to be calculated must be fully understood and that, e.g., GAAP-IFRS differences not be hidden within faulty indicators.
5. **If the differences in accounting principles are more than trivial, consider engaging an accounting expert (e.g., consultants, university professors, international CPA firms) to recast the target entity's financial statements into the U.S. GAAP basis.** With the sudden awareness of the growing relevance of IFRS (and the diminishing importance of other national GAAP), many firms are gearing up to develop in-house expertise, and more universities are teaching international accounting courses. It should therefore be possible to obtain the services of a qualified advisor who can explain the impact that non-U.S. GAAP financial reporting might have on the key information elements (e.g., working capital and other solvency indicators) upon which client decisions are being based. Thanks to the Internet, finding qualified help should rarely be difficult – in fact, even "Googling" terms such as *international accounting expert* reveals the existence of many score such consulting experts, including those affiliated with Florida institutions and firms.
6. **If the recast financial statements seemingly should affect the client's decision making (e.g., the amount to be paid for an acquisition or invested in a joint venture), obtain agreement from the proposed counter-party as to the propriety of any adjustments made.** It is not unlikely that the counter-party will lack a detailed (or even any)

Section Scene

Genesis of an Idea – The ILAC Planning Committee at Work

understanding of U.S. GAAP and therefore may not be capable of agreeing with the proposed adjustments to bring its financial statements into conformity with U.S. GAAP. However, unless the prospective business partners reach an understanding, later disputes become much more probable. An alternative approach in such situations would be to have qualified assistance to convert the U.S. entity's (the client's) financial statements into foreign GAAP (most likely, into IFRS). The objective is to facilitate an "apples-to-apples" comparison, and it is actually less important *which set of standards* is used to accomplish this. However, there will be more effort required to educate the U.S. client if its financial statements are to be recast, probably further underscoring the need for qualified assistance from accounting experts.

7. **Consider the foregoing in developing proposed representations and warranties to be incorporated into the contractual agreement.** For example, if the foreign counter-party's financial statements were recast, its formal acknowledgement of the propriety of the revisions should be obtained and set forth in the agreement so that ownership of the restatement is assumed by the counter-party, which would affect the basis for any later claims regarding misrepresentations made (e.g., the counter-party's assertion as to its net current assets at the transaction date). It is important that no opportunity be left for either party to direct responsibility to the consulting accountants who "translated" from one set of financial reporting standards to another, whose work should be ratified by all the contracting parties.

In addition to the foregoing precautions, specific provisions can be negotiated into the transaction so that disagreements over the application of differential GAAP can be economically and efficiently resolved. In some instances, accounting experts have been identified and granted final authority over GAAP application issues, to avert costly litigation; or, at minimum, it has been contractually agreed that such disputes will be directed to experts having defined credentials for resolution.

Concluding Thoughts

The next few years will be a time of challenges and opportunities – with major changes in financial reporting regimes, particularly in the U.S., being extremely likely to occur. Securities lawyers, transactional attorneys, and outside corporate counsel, supported by accounting experts, can provide valuable services to their clients. Litigation counsel will be faced with complex but significant opportunities to help securities litigation plaintiffs and companies sort through the changing financial reporting landscape. Constructing a good foundation of IFRS competence, including an understanding about how the new reporting regime may affect preparers, auditors and users of financial statements, and the various contractual and other arrangements based thereon, should be seen as a priority for each of these groups of practicing attorneys.


B. Epstein

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[4] Johnson, Sarah, *SEC Pushes Back IFRS Roadmap*, CFO.com, February 4, 2009.

[5] Katz, David M. and Sarah Johnson, *Top Obama Advisers Clash on Global Accounting Standards*, CFO.com, January 15, 2009.

[6] For example, GAAP standards dealing with reporting accounting changes and non-monetary transactions have been essentially conformed to IFRS, and new standards, such as that dealing with accounting for business combinations, have been jointly developed with IASB, which issued a nearly identical new standard simultaneously. Certain IFRS, such as that addressing capitalization of finance costs during construction periods, have been amended to conform to or closely parallel U.S. GAAP.

[7] For example, *see* Ray Ball, *International Financial Reporting Standards (IFRS): pros and cons for investors,* (*Accounting and Business Research:* International Accounting Policy Forum, 2006, pp. 5-27); Holger Daske, Luzi Hail, and Christian Leuz, *Mandatory IFRS Reporting Around the World: Early Evidence on the Economic Consequences,* (University of Chicago Graduate School of Business, The Initiative on Global Markets, Working Paper No. 12; October, 2007); and Holger Daske, Luzi Hail, and Christian Leuz, *Mandatory IFRS Reporting Around the World: Early Evidence on the Economic Consequences,* (University of Chicago Graduate School of Business, The Initiative on Global Markets, Working Paper No. 12; October 2007).

[8] A good source for the current status of IFRS adoptions around the world is the web site maintained by international accounting firm Deloitte, www.iasplus.com. The IASB web site, www.iasb.org, is also a prime source of current information on adoptions, current proposals, and other news.

[9] "Miami exports surging, $90 billion record for total trade likely," World City Miami, http://www.worldcityweb.com/home/MIA/statistics/view/220/, December 19, 2008.

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Practical Pointers for the Florida Practitioner: Litigation Involving Foreign Parties

By Mary J. Hoftiezer, Orlando

There are special considerations to keep in mind as a Florida litigation attorney who handles any case involving a foreign party. Whether you are bringing an action in a Florida state or federal court and the defendant resides overseas, or you are defending an action on behalf of a foreign entity or individual, unique issues may arise in relation to the jurisdiction of the court, venue and the discovery process.

Timing is Everything

Unlike local clients who typically are located within the same time zone, foreign clients are likely spread out across the globe. Accordingly, one should take into consideration the time difference when communicating with a foreign client. The World Clock website[1] is a quick and easy way to determine the local time around the world. It is wise to take the time difference into account for both telephone and email communication. In our world of Blackberrys and PDAs, an email notification will reach your client immediately when it is sent. Thus, late night noisy notifications to your client may be an irritant that you do not intend.

You've Been Served

An important consideration for any practitioner who has foreign clients is service of process. One must be mindful of the requirements in the foreign party's country to effectuate service in any civil or commercial case when a client or the opposing party resides overseas. For example, over 55 countries are members of the Hague Convention. Each state that participates in the Hague Convention has organized a Central Authority to assist with service. Service is effected by the method prescribed by the internal law of the participating state, in a manner directed by the individual requesting service, or by simple delivery when directed to an addressee who accepts service voluntarily. The Central Authority may require a translation to the official language of the State, which may result in increased costs. Once service is completed, a writing is created that may be filed with the court as proof of service, which includes the place, date and method of service and the person to whom service was directed.[2]

Generally, the practitioner must be mindful that the service on an individual overseas was sufficient to obtain personal jurisdiction. For example, service by mail or posting at a residence is insufficient to obtain personal jurisdiction. This is particularly important to remember when property is involved in a lawsuit. In the absence of personal service the court cannot exercise personal jurisdiction over the foreign individual or entity and no money judgment may be entered and the judgment is limited to the property at issue. In representing a defendant, it is therefore important to be mindful of the service made on your client so as to avoid conceding to personal jurisdiction. The best practice and safest bet is to file a Motion to Quash Service. A Notice of Appearance may be construed as an appearance on behalf of the individual, and you could inadvertently expose your client to jurisdiction that was not properly obtained. Also, beware of the opposing party, or another on his or her behalf, luring your client to the U.S. under the guise of a meeting or discussion for the purpose of effecting service. Once a client steps foot on U.S. soil, he or she is fair game to be tagged with service.

The Balancing Act of *Forum Non Conveniens*

A doctrine that comes into play more often with foreign clients is *forum non conveniens*. This doctrine permits a court to dismiss a case over which it has jurisdiction when the moving party, the defendant, demonstrates that an alternate forum exists that is adequate for the case, public and private factors weigh in favor of dismissal, and the plaintiffs may bring their suit in the alternate forum without prejudice or inconvenience.[3] That an alternate forum exists is a threshold issue because "if there is no alternative forum 'the plaintiff might find himself with a valid claim but nowhere to assert it.'"[4] In considering an alternative forum, the courts have required that at least some relief is offered in that alternative forum; although, the remedies may not necessarily be identical as in a case, for example, in which in the plaintiff's choice of forum, the plaintiff is entitled to punitive damages and in the alternate forum he is not.[5] An alternate forum is presumed to be adequate unless the plaintiff establishes otherwise; however, if the remedies available in the alternate forum are unsatisfactory, that forum may be found to be inadequate.[6]

Again, when representing a defendant who resides overseas, it is important to be wary not to concede

personal jurisdiction, as consent to the forum's jurisdiction is sufficient for the purposes of a *forum non conveniens* argument.[7] Public and private interests must outweigh the strong presumption in favor of the plaintiff's choice of forum. When you represent a foreign client, though, the strength of this presumption loses force.[8] Private interests that may be considered include access to evidence and sources of proof; the convenience for and cost of attendance of willing witnesses and the available mechanisms to compel the unwilling witnesses; location of premises, if applicable; and the ease with which an expeditious and inexpensive trial may be had.[9] Public interests that may be considered include administrative considerations of the court; the localized nature of the controversy; the law at issue (foreign or domestic); and the fairness of a jury trial in an unrelated forum.[10] Particularly important to international law practitioners are issues relating to the application of foreign laws. This may lead to substantial costs in obtaining experts in a particular country's laws and present problems in conflicts of law.[11] The need to apply foreign law weighs in favor of dismissal; however, alone, that is insufficient and must be considered in light of the other public and private interests.[12] All in all, plaintiffs' counsels should be aware of the potential balancing act when a *forum non conveniens* argument is made and be prepared to sway the court in your favor by establishing the ease of the plaintiff's choice of forum. Defense counsel should be aware of alternate forums that may limit your client's liability and minimize the costs of litigation.

Discovery … You Know They've Got It

One would be remiss not to mention the substantial burden placed on practitioners attempting to obtain information from or on behalf of a foreign company that is subject to the directives of the European Union (EU). This article merely introduces the issue to the practitioner and is by no means meant to be exhaustive. Additional information may be reviewed on the EU's website.[13] However, if this issue arises in one of your cases and you are not well-versed in the issue, it would be wise to seek co-counsel.

Broad access to information through the discovery process is a fundamental tenant of our jurisprudence. Quite the contrary, the European Union believes privacy to be a fundamental right and by extension has promulgated a Directive that protects "personal data" and obligates "data controllers." Personal data is information relating to individuals and includes his or her name, telephone number and photograph. A data controller is anyone who processes data and includes, for example, a company as to its employees or a doctor as to his patients. Directive 95/46/EU protects personal data and obligates data controllers to take affirmative steps to avoid unintentional dissemination of information. The 15 Member States of

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PRACTICAL POINTERS

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the EU are required to bring their national laws in line with the provisions of the Directive. Ultimately, what this means for the U.S. practitioner is that obtaining documentation and information in support or defense of any cause of action is a significant issue. Steps should be taken to work with opposing counsel to encourage the dissemination of information for discovery purposes while limiting, to the extent possible, the potential liability of the entity or individual providing the information.

Practitioners who are involved in litigation in which foreign entities or individuals are involved must be cognizant of the particular and unique challenges faced. Keep in mind: What time is it? Is the service obtained sufficient for the needs of my client? Can a *forum non conveniens* argument be made that will help or hurt my client? And, how can I best get or provide discovery while avoiding, or at least limiting, my client's potential liability for its production?

M. Hoftiezer

***Mary J. Hoftiezer** is with Bogin, Munns & Munns, P.A., in Orlando. Her practice areas include civil litigation, real estate and family law. Ms. Hoftiezer obtained her law degree from the State University of New York at Buffalo in 2003 and was admitted to The Florida Bar that year. She subsequently pursued and achieved a Master of Business Administration degree from the Crummer Graduate School of Business at Rollins College in Winter Park. In addition to her work as an attorney, Ms. Hoftiezer has volunteered as Guardian ad Litem and, as such, has acted as an advocate for children who have been abused, abandoned or neglected by parents. She is also a member of the City of Orlando's Women and Minority-Owned Business Entities City Advisory Board. Previously she served as a mediator-arbitrator for the Better Business Bureau Community Resolution Center in Buffalo, NY.*

Endnotes:

1 http://www.timeanddate.com/worldclock.

2 Contact information for the Central Authority and other useful information regarding the participating States under the Hague Convention can be found at www.hcch.net/index_en.php?act=conventions.authorities&cid=17.

3 *In re West Caribbean Crew Members*, 632 F.Supp.1193 (S.D.Fla. 2009).

4 *London Film Productions Ltd. v. Intercontinental Commc'ns*, 580 F.Supp 47, 50 (S.D.N.Y. 1984).

5 *West Caribbean,* 632 F.Supp. at 1198.

6 *Id*. (citing *Piper Aircraft v. Reyno*, 454 U.S. 235, 255 n. 22 (1981)).

7 *Ludgate Ins. Co. Ltd. v. Becker*, 906 F.Supp. 1233, 1236 (N.D. Ill. 1995).

8 *Id*. (citing *La Seguridad v. Transytur Line*, 707 F.2d 1304, 1307 (11th Cir. 1983)).

9 *Id*. (citing *Piper Aircraft* 454 U.S. 235).

10 *Id*.

11 *See*, *e.g., De Sairigne v. Gould*, 83 F. Supp. 270 (S.D.N.Y. 1949).

12 *Ludgate Ins*., 906.F.Supp. at 1241.

13 http://ec.europa.eu/justice_home/fsj/privacy/overview/index_en.htm

U.S. Customs Seized My Merchandise: *Now What?*

By Peter A. Quinter and Jennifer Diaz, Ft. Lauderdale

Every day, U.S. Customs and Border Protection[1] officers at airports, seaports and other border crossings, stop, examine, detain and seize merchandise from both travelers and commercial cargo importers and exporters. The process of recovering your property can be a distressing one, fraught with bureaucratic delays. Fortunately, there is a set of rules[2] that U.S. Customs must follow, and knowing those rules will give you an advantage.

U.S. Customs officers may examine cargo to look for illegal drugs, counterfeit merchandise, merchandise from a country with which the U.S. has an embargo, food or medical devices not in compliance with FDA regulations, or motorcycles not approved by the Environmental Protection Agency (EPA), to name a few examples. To illustrate the regulatory framework governing the detention of merchandise at U.S borders, throughout this article we will reference a sample case of imported motorcycles, which, in addition to Customs regulations, must also comply with EPA regulations.

While held by U.S. Customs, detained cargo is transferred to a Centralized Examination Station (CES) where it is separated and intensively examined by U.S. Customs officers. Customs has 35 days from the date of arrival in the United States to detain and examine the merchandise and to make a determination of admissibility into the U.S.[3] During that period of time, it is the obligation of U.S. Customs to provide the importer, its customs broker, and/or customs attorney with an explanation for the detention. Pursuant to Customs regulations, the U.S. Customs officer must issue a written detention notice stating the specific reason for the detention; the anticipated length of the detention; the nature of the tests or inquiries to be conducted; and the nature of any information which, if supplied to U.S. Customs, may accelerate the disposition of the detention. In practice, however, detention notices do not typically include the nature of the tests or inquiries to be conducted or any information which, if supplied, may accelerate the disposition.[4] In the case of imported motorcycles, the Customs officer may also need to contact the EPA to assess whether there is a violation of EPA regulations.

U.S. Customs Regulations further require that the cargo be seized or released within 35 days.[5] Unfortunately, this is all too often ignored. The problem is that U.S. Customs must rely upon other federal agencies to advise whether or not a violation has occurred. In the case of imported motorcycles, for instance, the Customs officer may need to confer with the EPA, as well as provide digital photographs and paperwork to EPA officials in Washington, D.C., for their review and recommendation.

Additional delays often occur as a result of communications having to travel through various hands along the chain of command at U.S. Customs and other agencies, rather than directly between the supervising Customs officials and lead EPA attorneys, for example. The exchange of information is slow, and 35 days pass quickly.

Hence, despite the 35-day-requirement, Customs may not make a determination to release or seize the detained property for 60 or more days after the initial detention. Expressing your frustration or making repeated calls to a particular Customs officer may not be helpful, as he or she may similarly be waiting for an answer from someone else. Knowing who to call and when is the key to getting your cargo released.

The customs attorney hired to assist the importer needs to know the internal procedures of U.S. Customs, as well as the other agencies' laws and regulations, to identify whether and when to speak to a U.S. Customs officer or other government official. Getting involved early in the detention process is one of the most effective ways to assist Customs in efficiently making a determination of whether a violation has occurred, and to avoid a seizure or other negative action by Customs. For example, if an electronic product is a suspected counterfeit, showing a U.S. Customs Import Specialist[6] the export license from Bluetooth or Apple, as the case may be, could avoid a lengthy, expensive and totally unnecessary seizure process with Customs.

As another example, if U.S. Customs believes there is a discrepancy in the terms of a product's export license, to avoid an unnecessary seizure one might request a Licensing Officer from the Bureau of Industry and Security of the U.S. Department of Commerce in Washington, D.C., to speak directly with the U.S. Customs officer on the Anti-Terrorism Trade Enforcement Team to clarify any such suspected discrepancy. In our sample case, speaking with EPA directly is generally a desired alternative to clarify whether the motorcycle is compliant with EPA regulations.

If a violation does occur, U.S. Customs will seize the merchandise and transport it from the Centralized Examination Station to an official property warehouse. The merchandise will remain in the warehouse until Customs authorizes its release. Throughout this process, storage fees accrue and must be paid to the warehouse as a condition of releasing the merchandise.

Once the merchandise is seized, the Customs officer then forwards it to the Fines, Penalties, and Forfei-

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tures Office (FP&F), where an FP&F paralegal reviews the file and prepares a formal, written seizure notice, which is mailed to the alleged violator. As practicing customs attorneys, our standard operating procedure is to notify FP&F of our representation of an importer or exporter whose goods have been seized by U.S. Customs so that FP&F forwards the seizure notice directly to our office. The notice will identify the cargo and where it was seized, as well as the legal basis for the seizure.[7]

Upon receipt of a seizure notice, Customs regulations require the alleged violator to file a petition with U.S. Customs within 30 days to challenge the grounds for seizure.[8] The petition is the means by which the owner of the cargo may seek to persuade U.S. Customs to release the seized shipment. The petitioner may contest the occurrence of any violation and request that the merchandise be released, or, alternatively, acknowledge the occurrence of a violation but nonetheless request a release due to mitigating factors. The petition should adhere to the guidelines set forth by U.S. Customs in 19 C.F.R. part 171.

U.S. Customs has also published a very helpful handbook[9] about seizure case processing.

In our sample case, the EPA will determine whether U.S. Customs will handle the seizure process on their behalf, or if the EPA will form a separate Administrative Settlement Agreement (ASA) for the importer to comply with, in addition to the U.S. Customs decision. Typically, an EPA ASA will also include a penalty fee to be paid.[10]

Eventually,[11] U.S. Customs will either grant the petition and release the seized merchandise, or deny the petition and retain the merchandise. If the petition is denied, a supplemental petition or offer in compromise may then be submitted to U.S. Customs. Typically, the supplemental petition will state additional claims not included in the original petition. Alternatively, the offer in compromise[12] is an attempt to negotiate with U.S. Customs and offer a monetary amount to settle the dispute and release the cargo.

In summary, the administrative petition process with U.S. Customs can be a long one; however, there are a few key pointers to keep in mind:

1. Ensure that merchandise complies with all relevant laws and regulations applicable to the particular product prior to importing it into the U.S.;
2. If U.S. Customs detains your products, contact a knowledgeable customs attorney or broker who can seek to demonstrate that there is no violation; and
3. If U.S. Customs seizes your products, make certain your customs attorney knows the policies, procedures, and practices of U.S. Customs to pursue the release of the merchandise.

P. Quinter

Peter A. Quinter *has, since 1994, been in charge of the Customs and International Trade Department of the international law firm of Becker & Poliakoff, P.A., where he is a shareholder. Mr. Quinter principally represents persons and companies involved in international trade and transportation, including litigation in the federal courts located in Florida and the U.S. Court of International Trade in New York. Board Certified in International Law, Mr. Quinter was appointed by The Florida Bar to the International Law Certification Committee. Prior to joining Becker & Poliakoff, Mr. Quinter served as legal counsel at the Southeast Regional Headquarters of*

the United States Customs Service (now known as Customs and Border Protection) in Miami for five years. He is a graduate of Cornell University, the Washington College of Law at The American University, and is a frequent author and lecturer in his field.

J. Diaz

***Jennifer Diaz** is an attorney in Becker & Poliakoff's Customs and International Trade Department. She concentrates her practice on assisting clients with issues relating to the import and export of merchandise to and from the United States. She has experience working with numerous federal agencies including the Food & Drug Administration (FDA), Customs and Border Protection (CBP), Department of Homeland Security (DHS), Environmental Protection Agency (EPA), and Alcohol and Tobacco Tax and Trade Bureau (TTB.) Ms. Diaz has handled matters relating to registration requirements and entry procedures for cosmetic, over-the-counter drug, dietary supplements and medical device products; FDA voluntary recalls; classification of goods; anti-dumping matters; scope ruling requests; seizures, forfeitures, and mitigation of fines and penalties; Customs-Trade Partnership Against Terrorism (C-TPAT); and trademark recordation and infringement. Ms. Diaz is a graduate of the University of Miami and the Shepard Broad Law Center of Nova Southeastern University.*

Endnotes:

1 U.S. Customs and Border Protection is within the U.S. Department of Homeland Security. U.S. Customs' priority mission is preventing terrorists and their weapons from entering the U.S., while also securing and facilitating trade and travel and enforcing hundreds of U.S. regulations.

2 U.S. Customs laws may be found at Title 19 of the United States Code, and the implementing regulations may be found at Title 19 of the Code of Federal Regulations.

3 *See* 19 C.F.R. § 151.16 – Detention of Merchandise.

4 *See* 19 C.F.R. § 151.16(c)(1)-(5).

5 *See* 19 C.F.R. § 151.16(e).

6 The Import Specialists' primary mission includes detecting and preventing violations of U.S. customs laws and import/export regulations. They are tasked with verifying the authenticity of merchandise if U.S. Customs officers deem it counterfeit. *See* http://www.cbp.gov/linkhandler/cgov/careers/customs_careers/import_specialist/ import_specialist.ctt/import_specialist.pdf.

7 *See* 19 C.F.R. § 162.31(b).

8 *See* 19 C.F.R. § 171.2.

9 The Handbook is titled "What Every Member of the Trade Community Should Know About: Mitigation Guidelines: Fines, Penalties, Forfeitures and Liquidated Damages" and may be found at: http://www.cbp.gov/linkhandler/cgov/trade/legal/informed_compliance_pubs/icp069.ctt/icp069.pdf.

10 The EPA lists all Settlement Agreements on its website at http://cfpub.epa.gov/compliance/civil/programs/caa/ importation/.

11 Currently, there is no mandated time frame in which U.S. Customs must respond to a petition. *See* 19 C.F.R. § 171.21 (addressing written decisions by U.S. Customs but not the time frame in which they must be submitted).

12 An offer in compromise should be submitted in accordance with 19 C.F.R. § 171.31.

Exporting: Tricks of the Trade

By Robert R. Hendry and Mary J. Hoftiezer, Orlando

When considering exporting from the U.S., it is important to know where you are going and what you are selling. Herein lie the tricks of trade, so to speak, with a few helpful pointers for would-be exporters.

Where am I going?

The first rule in exporting is to know where you are going. As someone considering exporting to a country, it is important to have substantial knowledge about the country that is to receive the exports. What is their general attitude towards Americans? Is it safe? Is the infrastructure sufficient to transport my goods and me? What is my competition like? Does the country primarily import or export goods? What industries are prevalent in the country? There are many questions that must be answered before the decision is made to export from the U.S. to any country. A vast array of information is at our fingertips through the internet. We just need to know where to look.

In addition to a plethora of information about the country, including its natural resources, type of government, and languages spoken and literacy, the CIA World Factbook[1] goes into great detail about the economy of a country. From this information, one can ascertain the general strength of the economy by evaluating the GDP, unemployment rates, household income, inflation rates and the like. Perhaps most importantly, one can evaluate the level of exports or imports and the leading industries of the country.

The World Factbook also provides information about the infrastructure and communications in the country. This information is helpful to determine the ease with which one can get oneself and one's goods around the country. Also important is the ease with which one may communicate by email and telephone with the importers receiving the exported goods. The World Factbook also provides a brief detailing of the transnational issues that one doing business in a country may encounter. For example, the U.S. is said to have strong national ties to our closest neighbors, Canada and Mexico, but we are also the world's largest consumer of cocaine and a money-laundering center. Both of these characteristics may present a problem for our neighbors but likely would have little effect on the would-be exporter.

The U.S. Department of State formulates annual Country Reports on Human Rights Practices.[2] These reports address internationally-recognized human rights relating to individuals, workers, politics and civility as set forth in the Universal Declaration of Human Rights.[3] Each report gives a brief overview of each country and then provides details of the following: respect for the integrity of the person, including freedom from arbitrary or unlawful deprivation of life, politically-motivated disappearances, torture and other cruel, inhuman, or degrading treatment or punishment, prison and detention center conditions; respect for civil liberties, including freedom of speech and press, internet freedom, academic freedom and cultural events, freedom of peaceful assembly and association, freedom of religion, societal abuses and discrimination, and protection of refugees; respect for political rights, which includes the right of citizens to change their government; the government's attitude regarding international and intergovernmental investigation of alleged violations of human rights; discrimination, societal abuses, and trafficking in persons; and workers' rights, which include the right of association, the right to organize and bargain collectively, the prohibition of forced or compulsory labor, the prohibition of child labor, the existence of a minimum age for employment, and acceptable work conditions. All this information is useful when considering exporting to a country where, as in business, the similarities and dissimilarities of the vision and mission of the companies with whom we associate can make or break a working relationship.

The "Failed States Index"[4] evaluates 177 countries and assigns a status to each country as "critical," "in danger," "borderline," "stable" or "most stable." It ranks countries on the basis of four criteria: (1) 12 social, economic, political and military indicators (demographic pressures, refugees, group grievance, human flight, uneven development, economic decline, delegitimization of the State, public services, human rights, security apparatus, factionalized elites, and external intervention); (2) assessment of five core state institutions that are considered essential to national security; (3) identification of idiosyncratic factors and surprises; and (4) the risk history of the country.[5] A failing state is one in which there has been a loss of physical control of its territory or a monopoly on its legitimate use of force. Failed states have limited legitimate authority to make collective decisions, are unable to provide reasonable public services and do not interact well with other members of the international community. This index gives a good sense of the status of the level of peace and functionality in a country.

It is also essential that you check out the person with whom you want to do business to make sure they are not on the Specially Designated Nationals List (SDN) of the Office of Foreign Asset Control (OFAC) of the U.S. Treasury Department.[6] If the company or individual or any known associates appear on the list, check date of birth and place of birth and

avoid doing business with them unless the follow-up determines they are clean. Funds should not be accepted from suspected money launderers and terrorists.

There are many more resources available, but the important concept is to get to know the country and its people when considering exporting. If you do not know where you are going, exporting will become less of a business venture and too much of a risk adventure.

What am I selling?

Many export activities require licenses. Some products shipped to many countries do not require that you seek licensure. Whether a license is required depends on the country to which the product is going, what the product is and who will use it. Before you are ready to start working on an export, familiarize yourself with the website *www.BIS.DOC.GOV* (BIS site). That site has information about government departments, other than Commerce, that control certain exports. The Department of Defense, for example, controls the export of weapons, and the Treasury, through OFAC, controls exports to the restricted countries list. Most country restrictions apply to Cuba, Iran, North Korea, Sudan and Syria. The BIS site will guide you to the correct agency. To check out a product, you need the ECCN number which can be found on the Commerce Control List (CCL) on the BIS site. It is recommended that the ECCN determination be done by a person very familiar with the product. Some exports will not have an ECCN but only an EAR99 designation. These still are controlled as to the restricted countries. The purpose of some sanctions is to deny a country access to weapons; others relate to items in short supply; and still others more or less operate to punish or to affect negatively the economy of a country, such as Cuba.

The U.S. Department of Commerce's Commercial Service provides programs and expertise in exporting from offices throughout the United States. For companies desiring distributors in their target markets, the Service, through the overseas offices located in the major business centers of other countries and often in U.S. Embassies, has several programs that provide assistance in locating competent distributors or sales representatives. These programs check the credentials and, to some degree, the credit worthiness of intended buyers. The charges for these services are generally reasonable and vary from country to country, depending on the intensity of the program. Programs can be set up to meet prospects in country or to speak with them by telephone conference.

In Florida, the U.S. Commercial Service has expanded the availability of its programs by training personnel from Enterprise Florida, the Economic Development Associations in the local areas, the World Trade Centers and other entities. Enterprise Florida, the District Export Council (DEC), which the Secretary of Commerce appoints, and the World Trade Centers of Florida were instrumental in putting the trade network together with the U.S. Commercial Service.

The Florida DEC, which can best be reached in most areas by calling the U.S. Commercial Service office to get the name and number of a contact, provides mentors and conducts educational programs such as the "Export University" for exporters at several different levels. There are no paid employees of the DEC. All the work is done by volunteers, most of whom have substantial experience in trade.

There are many companies in Florida and elsewhere in the U.S. who are more or less "accidently" exporting because they have a website and accept credit card payments. Some companies are deliberately accepting credit card payments for exports. This can work well until an importer files a complaint with the credit card company and the credit card company takes back the previously made payment. It is only after taking back a payment that a credit card company advises you of the controversy and gives you a chance to contest. Because of this risk, one large shipment could be a serious problem for some exporters. Visa and Master Card have 60 days in which to take a payment back, and American Express has a substantially longer period during which they may pull back a payment. It is important to review your agreements with these providers to know what to expect and what periods apply. This could be an acceptable risk if you do many small sales to many customers, but large payments from a few customers could be dangerous. This is not intended as financial advice, and you should definitely contact an international banker in your bank or, if there is not one, in the bank you intend to use for payment receipt.

To export you need to know as much as you reasonably can about the where, what and to whom of the transaction. You need to understand how you will be paid and be comfortable with the consequences. Exporters make more profit, generally, than non-exporting companies. Take advantage of it without anyone taking advantage of you.


R. Hendry

Robert R. Hendry *of Hendry, Stoner & Brown, P.A., received both a Bachelor of Arts degree and a Juris Doctor degree from the University of Florida. Practicing principally in the areas of international, corporate, and business law, Mr. Hendry devotes a substantial portion of his time to advising and counseling clients involved in international transactions. He has served as president or chair of numerous professional and trade organizations , and he lectures extensively in the areas of international, business, litigation and real estate law. Mr. Hendry is author of the book U.S. Real Estate and the Foreign Investor and has articles published in the International Law Journal of The Florida Bar and other periodicals. He is Board*

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TRICKS OF THE TRADE

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Certified by The Florida Bar in International Law.

M. Hoftiezer

***Mary J. Hoftiezer** is with Bogin, Munns & Munns, P.A., in Orlando. Her practice areas include civil litigation, real estate and family law. Ms. Hoftiezer obtained her law degree from the State University of New York at Buffalo in 2003 and was admitted to The Florida Bar that year. She subsequently pursued and achieved a Master of Business Administration degree from the Crummer Graduate School of Business at Rollins College in Winter Park. In addition to her work as an attorney, Ms. Hoftiezer has volunteered as Guardian ad Litem and, as such, has acted as an advocate for children who have been abused, abandoned or neglected by parents. She is also a member of the City of Orlando's Women and Minority-Owned Business Entities City Advisory Board. Previously she served as a mediator-arbitrator for the Better Business Bureau Community Resolution Center in Buffalo, NY.*

Endnotes:

1 https://www.cia.gov/library/publications/the-world-factbook.

2 http://www.state.gov/g/drl/rls/hrrpt.

3 http://www.state.gov/g/drl/rls/irf/2009/127409.htm.

4 http://www.FundForPeace.org.

5 http://www.foreignpolicy.com/articles/2009/06/22/2009_failed_states_index_interactive_map_and_rankings.

6 http://www.ustreas.gov/ofac.

THE FLORIDA BAR ANNUAL CONVENTION

A View from the End of the Table – A Discussion on Mediation President's Showcase

COURSE CLASSIFICATION: INTERMEDIATE LEVEL

Recorded on Thursday, June 24, 2010
10:30 a.m. – 12:00 p.m.

Course No. 1068C

AUDIO CD ORDER FORM

Premise: Mediation is required for most civil cases pending in Florida state and federal courts. Despite the fact that it is the most effective means of resolving cases short of trial and that a large majority of cases are ultimately resolved in this fashion, mediation is an often overlooked area of our profession. Increasing the effectiveness of your mediation can lead to improved results for clients. Particular means and beneficial tactics employed by effective plaintiff and defense counsel will be highlighted in this presentation. In addition, a panel of superbly qualified mediators will address different methodologies for successful mediation in various venues; provide pointers to counsel for effective mediation and preparation; highlight minefields counsel should avoid; and discuss the optimal timing of mediation.

10:30 a.m. – 10:35 a.m.
Introductory Remarks
Moderator: Edward M. Mullins, ILS Chair-Elect, Astigarraga Davis Mullins & Grossman, P.A., Miami

10:35 a.m. – 10:50 a.m.
Overview of Mediation Methodologies
John Upchurch, Upchurch Watson White & Max, Daytona Beach

10:50 a.m. – 11:00 a.m.
Mediation in the Context of International Disputes
Lynn H. Cole, Law Offices Lynn Cole, Tampa

11:00 a.m. – 11:10 a.m.
Issues Unique to Mediating Commercial and Intellectual Property Disputes
Carol Cope, Certified Mediator, Mediation, Inc., Miami

11:10 a.m. – 11:20 a.m.
Plaintiff's Perspective
Ervin A. Gonzalez, Colson Hicks Eidson, Miami

11:20 a.m. – 11:30 a.m.
Defense Perspective
Kelly Overstreet Johnson, Broad & Cassel, Tallahassee

11:30 a.m. – 12:00 noon
Panel Discussion, Hypotheticals and Q&A
Moderator: Edward M. Mullins, ILS Chair-Elect, Astigarraga Davis Mullins & Grossman, P.A., Miami
Panelists:
Lynn H. Cole, Law Offices Lynn Cole, Tampa
Kelly Overstreet Johnson, Broad & Cassel, Tallahassee
Ervin A. Gonzalez, Colson Hicks Eidson, Miami
Carol Cope, Certified Mediator, Mediation, Inc., Miami
John Upchurch, Upchurch Watson White & Max, Daytona Beach

ILS Section Chair:
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French corporation participating in U.S. litigation may easily run afoul of the French Blocking Statute (Law No. 68-678, as amended), data processing laws (e.g. Law No. 78-17, as amended), and the EU Directive 95/46 on Personal Data ("Directive"), among others.

Indeed, after years of goading by U.S. courts, French authorities even prosecuted a French lawyer under the blocking statute. His crime was attempting to comply with a U.S. court order compelling production of documents. *See In re Christopher X*, Cour de Cassation, Chambre Criminelle, Paris, December 12, 2007, No. 07-83228 (French Supreme Court upholding conviction and €10,000 fine against French lawyer attempting to facilitate collection of evidence for use as ordered in a U.S. judicial proceeding). Examples of prior "goading" by U.S. courts include *In re Vivendi Universal S.A. Secs. Litig.,* No. 02 Civ. 5571, 2006 WL 3378115 at *3 (S.D.N.Y. 2006) (French blocking statute did not subject parties to a "realistic risk of prosecution") and *Minpeco S.A. v. Conticommodity Servs., Inc.,* 116 F.R.D. 517 at 528 (S.D.N.Y. 1987) ("this is not a situation in which the party resisting discovery has relied on a sham law such as a blocking statute to refuse disclosure").

With French and EU law acting ostensibly to prevent a litigant engaged in the U.S. litigation discovery process even from collecting a relevant employee's e-mails for litigation purposes, let alone viewing the e-mails to see if they contain relevant information, French parties seem at a distinct disadvantage in a U.S. forum. Failing to produce relevant documents is a direct path to an uncomfortable hearing before the U.S. judge and possibly severe sanctions such as a default judgment being entered against those parties for not complying with discovery orders.

Thus, *Bruno B. vs. Giraud et Migot*, Cour de Cassation, Chambre Sociale, Paris, 15 Dec. 2009, No. 07-44264 is a significant development. In that case, an accounting firm fired Bruno after the firm discovered files addressed to government regulators on his work computer wherein Bruno disparaged the firm for alleged tax and related fraud as well as working conditions.

The documents held subject lines as "Essay 1," "Essay 2," and so on, which the firm discovered without Bruno's permission or presence. Bruno sued the firm seeking damages for unjustified dismissal, arguing that the firm violated his rights under EU privacy (human rights) conventions, as well as several provisions of the French labor code, claiming the documents were his personal data. On appeal, the Cour de Cassation Chambre Sociale held for the accounting firm, finding that because Bruno failed to mark the documents as "private," the firm justifiably assumed that the documents were work-related and could open them.

The *Bruno B.* case clearly refines the general rule set forth in an earlier case from the same court, *Nikon France vs. Onof*, Cass. Soc., No. 4164 (Oct. 2, 2001), where the French high labor court established that employees have a right to privacy in the workplace and held that an employer cannot search an employee's files stored on a work computer without breaching the employee's right to privacy. The *Nikon* case's broad ruling has been the subject of private criticism, especially from business interests in France. Now, after *Bruno B.,* however, there is arguably no right to privacy to an employee's computer-stored data unless the employee takes affirmative steps to designate the information as personal. Simply labeling the documents as "personal" or "private" may have been enough to compel the *Bruno B.* court to rule in the employee's favor, but the holding is still a far cry from the absolute presumption that any data is private, and may be a helpful tool for companies in France seeking to comply with U.S. discovery obligations.

T. Jeffries

Trevor Jefferies *is a partner with Hogan Lovells in its Houston office. His practice includes general and commercial litigation, with a current emphasis on aviation, insurance, and e-discovery matters. He has consulted with corporations seeking to minimize or transfer their risk exposure before litigation arises and has handled matters pertaining to the Warsaw and Montreal Conventions on Carriage of Passengers by Air, the Hague Convention on Discovery Abroad, and the effect of the European Union (EU) Directive on the Protection of Personal Data on discovery in U.S. litigation. Prior to joining Hogan Lovells, Mr. Jeffries was a partner with a large, international law firm. He also served in the U.S. Air Force where he was a flight leader in an F-15 fighter unit. Trevor holds a Federal Aviation Administration (FAA) Airline Transport Pilot (ATP) certificate and is a dual citizen of the U.S. and Australia.*

A. Lindsay

Alvin Lindsay *is a partner with the firm of Hogan Lovells and is co-chair of its Electronic Information Group. He has litigated complex commercial cases in U.S. federal and state courts, as well as international courts of arbitration, for nearly two decades. He has extensive experience in securities fraud and shareholder class actions, catastrophic accident and product-integrity claims, constitutional lawsuits, international construction arbitration, and in handling a host of significant contract disputes. While in law school, Mr. Lindsay was editor of the University of Miami Law Review, a Dean's Scholar, and winner of the class-wide moot court competition. He currently writes and lectures frequently on litigation and the law.*

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