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INTERNATIONAL LAW QUARTERLY

25th Anniversary

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Register Now!

Friday, Jan. 18, 2008

International Law Section 25th Anniversary Gala

(Cocktails, Dinner, Special Presentations)

The Biltmore, Coral Gables

See page 3.

Equal Opportunity for All in Europe 2007

By Marcia S. Cohen

The European Union has declared 2007 the Year of Equal Opportunity for All. And though the EU has adopted broad legislation forbidding discrimination on the basis of sex, race, ethnic origin, religion, disability, age, or sexual orientation,[1] it has found it necessary to reinforce those laws with a year of activities in its member countries to examine root causes of discrimination and to develop strategies to eliminate, or at least, lessen the effects of those intricate patterns of inequality that still exist despite the laws that have been enacted to eliminate them.

The European Commission has been aware that, in recent years, the populations of the member states have become increasingly older and more multi-ethnic, resulting in a proliferation of complaints of discrimination. It was decided that the public had to be made aware of the problems faced by those in protected classes, and discussions should take place focused on resolutions to these problems. Thus, in June, 2005, the EU published a "Framework Strategy for Non-Discrimination and Equal Opportunities

See "Europe 2007," page 21

Message from the Chair:

The ILS Is On Mission and On Target

This is my first interim report to you as the new Chair of the International Law Section ("ILS"). We are almost six months into our year and have had a busy year already. We have also made great progress towards accomplishing many of the goals that we set for this year.

1. We have already held seminars in Rio de Janeiro and Buenos Aires, thereby exceeding the goal of holding at least one out-of-country seminar during this year.
2. We held our world renowned International Tax and Estate Planning Seminar in Miami on October 12.
3. We set a goal of signing at least six new cooperative agreements with other bar associations, and we already have two signed agreements with the Rio de Janeiro Bar and the Buenos Aires Bar, with two more in the works with the Guatemalan Bar and the Genoa Bar.

See "Chair's Message," page 2

CHAIR'S MESSAGE
from page 1

4. The planning for our annual joint immigration seminar with AILA is finished and we are set for February's conference at Jungle Island in Miami.
5. The planning for our annual International Litigation and Arbitration Committee ("ILAC") conference, which will consist of a mock international arbitration and litigation, is also well under way and we now have the teams, the judges and the arbitrators selected. The ILAC conference will be held on March 29, 2008.
6. The new International Business Transactions Committee ("IBTC"), under the joint chairmanship of Miguel Zaldivar and Elke Rolff, will be hosting a half day high level seminar in conjunction with ILAC on March 28, 2008.
7. Both the ILAC and IBTC conferences will be held at the Biltmore Hotel in conjunction with the American Arbitration Association's annual meeting in Miami, which should provide for some great cross marketing opportunities for Florida Bar members.
8. Our annual ILS Florida competition practice rounds for the Vis International Arbitration moot will be in February in Orlando, and we are in the final planning stages for that as well.
9. Our legislative committee is busy and has several major projects underway.
10. We will be announcing a major membership drive initiative at our mid-year meeting on January 18, 2008.

Our Next ILS Meeting

Our next meeting is our mid-year meeting in Miami on January 18, 2008 at the Biltmore. Everyone is welcome at the Executive Council meeting and there will be individual committee meetings immediately thereafter as called by each committee chair. This is an excellent chance for anyone who wants to get involved in the ILS. Please come. You will be welcome and integrated immediately into the ILS.

25th Anniversary Gala and Historical Video Showing

Our big event of the year will be our 25th Anniversary Gala at the Biltmore that same evening. We have arranged a fun night with Florida Bar President Frank Angones in attendance. We also hope to invite Governor Crist to attend as well. We will be showing a short video detailing the history of the International Law Section featuring interviews of all of our former chairs and some of the chairs and vice-chairs of our predecessor international law committee. I have seen the first preview of the video and it has come out great. We will have an open bar, great food – and only a few short speeches – in the beautiful setting of the Biltmore Hotel. What more can you ask for? Come and join us for a fun night of nostalgia, camaraderie and fun.

To take a look at the rest of our upcoming programs, committees and other interesting information go to our website at www.internationallawsection.org. If you want to get more active, and make no mistake that we want you to get involved, give me a call or send me an e-mail. My contact information is below.

Edward H. Davis, Jr., ILS Chair
edavis@astidavis.com
(305) 372-8282 (305) 588-1927

The Florida Bar International Law Section

25th ANNIVERSARY GALA INVITATION

Reception, Dinner and Historical Videotape Presentation

You are cordially invited to attend The Florida Bar International Law Section 25th Anniversary Gala Reception, Dinner and Historical Videotape Presentation.

Welcoming former International Law Committee Chairs and former International Law Section Chairs to celebrate our rich heritage.

Date: January 18, 2008

Location: Biltmore Hotel
Alhambra Room
1200 Anastasia Avenue
Coral Gables, Florida
(305) 445-1926

Time: 7:00 p.m. Cocktail Reception
8:00 p.m. Dinner and Historical Videotape Presentation

With Guest Speakers:
Francisco R. Angones
President, The Florida Bar
Edward H. Davis, Jr.
Chair, The Florida Bar International Law Section

Register using form on page 3

The Florida Bar International Law Section

25th Anniversary Gala

REGISTRATION FORM

The Biltmore Hotel, Coral Gables • January 18, 2008

Return this form no later than January 4, 2008. Written cancellation is required for refunds. Mail this form with check or credit card payment to: Florida Bar-International Law Section, 651 E. Jefferson Street, Tallahassee, FL 32399-2300 or Fax (850) 561-5825.

Email questions to afroelic@flabar.org / or call (850) 561-5633.

Dress for Friday reception and dinner is business attire / executive council meeting is resort casual

For hotel reservations, please call the Biltmore at (305) 445-7926. The group rate is $325 and this rate is available until December 19, 2007.

Name: _____ Bar #: _____

Address/City/Zip: _____

Email Address: _____

Name of Guest(s): _____

FRIDAY, JANUARY 18, 2008

		#Attending	Cost Per Function
2:00 p.m. – 5:00 p.m.	**International Law Section Executive Council Meeting (all invited)**	_____	$ _____
7:00 p.m. – 8:00 p.m.	**Reception**	_____	$_____
8:00 p.m. – 12:00 p.m.	**25th Anniversary Gala Dinner & Historical Videotape Presentation** *Francisco R. Angones, President of The Florida Bar* *Edward H. Davis, Jr., Chair, International Law Section*	_____	$_____ $100 /pp (93.45 + 6.55) IL015

$_____
TOTAL ENCLOSED

If you have any special dietary needs, please contact Angela Froelich at afroelic@flabar.org / or call (850) 561-5633.

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North Meets South:
*Figuring out the Discovery Puzzle in International Commercial Arbitrations**

By Luis A. Perez, Frank Cruz-Alvarez, and C. Ryan Jones

PEREZ

CRUZ-ALVAREZ

JONES

In today's international commercial environment, businesses and individuals are consistently turning to arbitration as the means for resolving contract-based disputes. As such, lawyers and parties involved in international business transactions should be thinking more about the contents of arbitration clauses. Several years ago, parties would have been content with an arbitration clause that called for arbitration of any dispute arising out of the contract and dictated that the arbitration would proceed under the procedural rules of one of the major international arbitration institutions, such as the AAA/ICDR. As the complexity of international business transactions has grown, however, so has the need for more detailed arbitration clauses in many instances.

Arbitration provides parties with the freedom and opportunity to design the mechanics of the proceedings based on their needs and the nature of the transaction. As such, at the time of contracting, parties and their counsel must give considerable thought to the types of procedures that would better serve them in the event of a dispute. One of the most important issues that needs to be considered is discovery. This is especially important in international arbitrations where the parties come from different countries and different legal traditions. For example, the American concept of "discovery," which is very broad in scope, is very different from the limited "discovery" practices that are common in Latin American countries.

To that end, parties can take several approaches when considering what discovery will be permitted in their arbitration. Parties can agree to do one of the following: (1) adopt the generalized discovery rules of one of the international arbitration institutions, most of which vests the arbitrators with broad discretion; (2) adopt the national discovery rules, if any, of the home country of one party; or (3) mix-and-match discovery procedures from a variety of sources.

For purposes of this paper we focus on arbitration agreements between US-based parties and Latin American-based parties, and try to provide a primer of the different options that parties should consider regarding discovery. We discuss the discovery rules which the major international arbitration institutions and organizations provide; discovery under the United States Federal Rules of Civil Procedure; discovery practice in Latin America; and other alternative mechanisms for obtaining discovery in the United States. In the end, there is no single solution that works best in all cases, but an understanding of what is available will help parties make an informed decision.

I. Discovery Rules of the Major International Arbitration Institutions.[1]

Traditionally, when dealing with discovery in the context of international arbitrations, the rule of thumb has been to proceed under the rules of one of the major international arbitration institutions. These arbitration institutions' procedural rules generally view discovery in narrow, issue-specific terms. The rules tend to disfavor broad discovery on the grounds that it is intrusive, time consuming, expensive, and susceptible to abuse by the parties. Instead, under the traditional approach, the arbitrators are vested with a great deal of discretion to decide the mechanics and scope of discovery, in order to minimize costs and resolve disputes in a timely fashion.[2]

A. ICC/IBA Discovery Rules and Procedures

The International Chambers of Commerce ("ICC") Rules of Arbitration discuss discovery in Article 20(1), which reads as follows: "The Arbitral Tribunal shall proceed within as short a time as possible to establish the facts of the case by all appropriate means." The purpose of this cursory treatment is to allow the parties flexibility in choosing the discovery procedure applicable to the dispute. The ICC has not adopted a set of discovery rules, but the International Bar Association's ("IBA") Rules on the Taking of Evidence in International Commercial Arbitration seem to be preferred.

The IBA Rules are generally viewed as a hybrid set of rules that take into account the strengths of both common law and civil law traditions, while still maintaining the perceived efficiencies and cost effectiveness of arbitration. For example, the IBA Rules require each party to present to the arbitrator(s) and the other party lists of relevant documents in the party's possession, power, or control. Significantly, the IBA Rules state that any document not identified in a party's list cannot subsequently be introduced into evidence at the final hearing. The guiding principle of the IBA Rules is that each side be afforded the opportunity to see all the evidence that the other side intends to introduce in support of a claim or defense. The IBA Rules also provide procedures for obtaining discovery from non-parties and presenting witness testimony.

Although the IBA Rules have not been adopted by any international arbitration institution, they provide a good starting point for thinking about the discovery pro-

cedures that should be provided for in the arbitration clause. In some instances, the IBA Rules standing alone will be sufficient, and all that is needed is a clause incorporating them. In other instances, however, the IBA Rules will need to be revised or supplemented to address the parties' specific concerns. As such, parties and their counsel would be wise to review the IBA Rules to determine if these rules standing alone are sufficient or if additional rules and procedures should be considered.

B. AAA/ICDR Discovery Rules and Procedures

Like the ICC, the American Arbitration Association ("AAA") and its international division, the International Centre for Dispute Resolution ("ICDR"), do not provide a thorough discussion of discovery procedures. Article 19 of the AAA Rules, entitled "Evidence," states that, "The tribunal may order a party to deliver to the tribunal and to the other parties a summary of the documents and other evidence which that party intends to present in support its claim, counterclaim or defense. . . ." And, "[a]t any time during the proceedings, the tribunal may order parties to produce other documents, exhibits, or other evidence it deems necessary or appropriate." The language of Article 19, like the ICC Rules discussed above, provides the arbitrators with broad discretion in ordering discovery when the parties have not reached a pre-arbitration agreement on the applicable discovery procedures.

C. ICSID Discovery Rules and Procedures

Similarly, the rules of the International Centre for Settlement of Investment Disputes ("ICSID") do not expressly provide discovery procedures. Rule 34(2)(a) of the ICSID Rules, however, allows the tribunal to "call upon the parties to produce documents, witnesses and experts" at any stage of the proceeding if the tribunal "deems it necessary." Under the ICSID Rules, a party is also allowed to send a letter requesting the tribunal to "call upon [the responding party] to produce documents."[3]

II. Different Perspectives on Discovery: Common Law vs. Civil Law.

As briefly discussed above, when dealing with discovery, the common law traditions and civil law traditions are very different in both structure and scope. For example, the concept of "discovery" in common law jurisdictions tends to include the production of all relevant documents or materials that could lead to the discovery of relevant evidence, whereas in civil law jurisdictions, the practice is to produce only those documents that the party is relying on. Similarly, the role of the court in conducting discovery is very different. In common law jurisdictions, the parties manage discovery and the court only intervenes if there is a dispute. On the other hand, in civil law jurisdictions, the court is largely responsible for the functions discovery performs in common law jurisdictions.

These differences can best be seen by comparing the discovery allowed under the United States Federal Rules of Civil Procedure and the general discovery procedures followed in most Latin American countries.[4]

A. Discovery Procedures under the Federal Rules of Civil Procedure

The Federal Rules of Civil Procedure (the "Federal Rules") governs discovery in the United States if the action is brought in federal court, or the state equivalent if the action is brought in an individual state court. Here, the discussion is limited to the Federal Rules relating to discovery—Rules 26 through 37, and 45. Rule 26 of the Federal Rules contains the "general provisions governing discovery." The Rule outlines the standard of what information is discoverable: "Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party."[5] The Rule goes on to state that relevant information "need not be admissible at trial," but rather, information is relevant if "the discovery appears reasonably calculated to lead to the discovery of admissible evidence." Despite this very broad standard, there are also important limitations on discoverable evidence. A court may limit a party's ability to take discovery, if it determines that the discovery is unreasonably cumulative or duplicative, the party seeking the discovery has already had ample opportunity to obtain the information, or the burden or expense of production outweighs the likely benefit.[6]

The standard discussed above defines what is "discoverable" material. The Federal Rules provide several devices for obtaining such material. Among the most important are depositions, interrogatories, requests for admission, requests to produce, and subpoenas.

The discovery permitted under the

See "The Discovery Puzzle," page 24

New Certification Areas

Lawyers Are Florida Bar Board Certified in First-in-the-Nation Intellectual Property and State and Federal Government and Administrative Practice Areas

TALLAHASSEE – Eighty Florida lawyers now are Florida Bar board certified in intellectual property law and 56 are certified in state and federal government and administrative practice, inaugural specialty practice areas that give Florida the greatest number of state-approved certification areas in the nation. Lists of the newly certified lawyers now are online at FloridaBar.org/certification.

Board certification evaluates attorneys' special knowledge, skills and proficiency in various areas of law and professionalism and ethics in practice.

"Board certification is a valuable credential that is becoming a significant trend in the legal profession," said Florida Bar President Francisco Angones. "Specialization recognizes lawyers' expertise and professionalism, and is a natural progression for lawyers who can demonstrate high skill levels in particular areas of law."

Certified attorneys are the only Florida lawyers allowed to identify or advertise themselves as specialists or experts. Certification is the highest level of evaluation by The Florida Bar of the competency and experience of attorneys in areas of law approved for certification by the Supreme Court of Florida. Florida currently offers 22 specialty areas of practice for which board certification is available.

Intellectual property lawyers practice primarily in the areas of patent application prosecution, patent infringement litigation, trademark law and copyright law. State and federal government and administrative practice includes but is not limited to rule-making, adjudication or advocacy for state or federal government contracts, licenses, orders, permits, policies, or rules. The specialty also includes appearing before or presiding as an administrative law judge, arbitrator, hearing officer, or member of an administrative tribunal or panel over a dispute involving an administrative or government action. The area can encompass environmental regulation and land use planning.

Attorney Bill Williams of Gray Robinson in Tallahassee chairs The Florida Bar's SFGAP certification committee.

> "State and federal government law and administrative practice are distinct legal practice areas, and differ greatly from local or municipality law," said Williams. "Rule-making, licensing and regulatory matters are becoming increasingly more complex; as the practice area has grown, so has the public's need to identify legal experts in the field."

Applications for the two new areas were due Feb. 28, 2007; exams were Oct. 1. One hundred seven lawyers submitted applications for the newly established IP area, and 58 submitted applications for SFGAP.

A lawyer who is a member in good standing of The Florida Bar and who meets the standards prescribed by the state's Supreme Court may become board certified in one or more of 22 certification fields. Approximately 4,150 Florida lawyers are board certified. Minimum requirements for certification are listed below; each area of certification may contain higher or additional standards.

- A minimum of five years in law practice
- A satisfactory showing of substantial involvement in the field of law for which certification is sought
- A passing grade on the examination required of all applicants
- Satisfactory peer review assessment of competence in the specialty field as well as character, ethics and professionalism in the practice of law
- Satisfaction of the certification area's continuing legal education requirements

Board certification is valid for five years, during which time the attorney must continue to practice law and attend Florida Bar-approved continuing legal education courses. Recertification requirements are similar to those for initial certification. Not all qualified lawyers are certified, but those who are board certified have taken the extra steps to have their competence and experience evaluated.

For more information, please visit The Florida Bar Web site at www.floridabar.org/certification or contact The Florida Bar's Legal Specialization & Education Department at 850/561-5842.

FLORIDA BAR CONTACT: Lisa Garcia 850/228-4321 or 850/561-5769.

Avoiding and Mitigating Against Detentions, Seizures and Forfeitures of Merchandise Due to Mounting Product Safety Concerns

By Lenny Feldman


FELDMAN

Introduction

On first glance you might not think that toothpaste, seafood, toys, chili, relish, tires, and dog food have much in common. However, if you speak to individuals engaged in international trade they will readily explain that product safety issues all come to mind. Regardless of the government agency responsible for administering the laws and regulations pertaining to a particular product, U.S. Customs and Border Protection ("CBP")[1] possesses the authority to detain, seize, or forfeit such products when it has probable cause to believe that there was a violation of a law that CBP enforces regarding the specific property.[2] In such cases the merchandise often poses a palpable risk to the health, safety, and/or welfare of our citizens. Now that product safety issues have become a front-page issue and the subject of over fifty-five (55) bills introduced in Congress just over the past year,[3] it is imperative to understand CBP's enforcement process and the manner in which counsel can most effectively address such actions.

A Modern CBP Framework

The Customs Modernization provisions ("Customs Modernization Act" or "CMA") contained in Title VI of the North American Free Trade Agreement Implementation Act (P.L. 103-182), which became effective on December 8, 1993, to a great extent, codified CBP's previous detention policy.[4] In essence, section 613 of the CMA compels CBP to decide to release or detain merchandise within five (5) working days, or a longer period if specifically authorized by law, from the presentation of the merchandise for examination.[5] If not released within five (5) working days, the merchandise is deemed detained.[6]

The law mandates that if CBP decides to detain merchandise, notice of CBP's action shall be provided to the importer or other party having an interest in the merchandise no later than five (5) working days after the decision to detain.[7] The notice must state the specific reason for the detention, the anticipated length of the detention, the nature of tests or inquiries to be conducted and the nature of any information which, if supplied to CBP, would accelerate the disposition of the detention.[8] In fact, CBP is required to provide copies of any testing results and a description of the analytical methodologies utilized, to any party having an interest in the merchandise.[9]

CBP's failure to make an admissibility decision regarding the merchandise within thirty (30) days after the merchandise has been presented for examination, or such longer period if specifically authorized by law, is treated as a decision to exclude the merchandise from entry into U.S. commerce.[10] Accordingly, if such a situation arises, the importer may file a protest challenging CBP's decision to detain the merchandise.[11] A party could challenge an adverse protest decision in the Court of International Trade ("CIT").[12]

As an illustration, in *H&H Wholesale Services, Inc. v. United States*, Slip Op. 06-77 (Ct. Intl. Trade, 2006), the court recognized that failure to make a final determination within thirty (30) days after the merchandise was presented for examination is "treated as a decision… to exclude the merchandise."[13] "The practical effect of [an exclusion]…is to deny entry into the customs territory of the United States [and] [t]he importer may then dispose of the goods as he chooses."[14]

However, there is a critical caveat to these detention and exclusion procedures -- they only apply when the admissibility determination is vested in CBP.[15] That means where an agency other than CBP is responsible for the admissibility decision, the procedures granting expedited administrative and judicial review are inapplicable. The legislative history to the CMA noted that CBP often detains merchandise on behalf of other agencies and it is not directly involved in the activities which result in the decision to admit or exclude merchandise.[16]

The Civil Assets Forfeiture Reform Act

In April 2000, the Civil Assets Forfeiture Reform Act ("CAFRA") became law.[17] These new rules relating to civil asset forfeiture were intended to create a more equitable and fair procedure with the objective of streamlining seizures and forfeitures.[18] Generally, the CAFRA provides that CBP must issue a CAFRA notice of seizure within sixty (60) days of the seizure to any person with an interest in the property, unless a specific exception applies.[19]

The courts have upheld a strict interpretation of this standard, finding that a seizure occurs when CBP takes possession and control of the property and when there is some meaningful interference with a party's possessory interests in that property.[20] For example, in *United States v. Assorted Jewelry with an Approximate Value of $219,860.00*, 386 F. Supp. 2d 9 (D.P.R. 2005), the court ordered seized property returned because appropriate notice was not mailed to the claimant until sixty-three (63) days from when the United States took custody of property.[21]

However, once again there is a caveat – CAFRA provisions and requirements are inapplicable to forfeitures under the Tariff Act of 1930 or any other provisions contained in Title 19 of the United States Code pertaining to CBP seizures and forfeitures.[22] These are provided for under 19 U.S.C. §1499, as previously discussed.

Seizures arising under the Federal Food, Drug and Cosmetic Act (21 U.S.C.

continued, next page

§ 301, *et seq*.), the Trading with the Enemy Act (50 U.S.C. App. § 1, *et seq*.), and the Neutrality Act regarding illegal exports (22 U.S.C. § 401) also are excluded from the CAFRA.[23] Although seizures under other statutory provisions, such as those relating to the Bank Secrecy Act (31 U.S.C. § 5317(c)), Money Laundering Control Act (18 U.S.C. § 981), and the Contraband Act (49 U.S.C. § 80302) are subject to CAFRA's requirements, this leaves many infractions in neither of the two categories.[24]

Alternatives to a Tedious Seizure Process

5 U.S.C. § 555 of the Administrative Procedure Act recognizes that Government agencies (such as CBP) may not act in a manner that unreasonably prohibits a company or individual from availing itself of its due process rights.[25] Therein it states that:

> [w]ith due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it.[26]

Unfortunately, regardless of such provisions calling for due process, it is customary for CBP's seizure cases to extend over the course of several months, sometimes beyond a year, until CBP and the other government agency with which the admissibility vests, reach a final disposition. Meanwhile, throughout this time exorbitant storage fees for merchandise held at the CBP contractor's facilities are accruing, often due to such decision-making delays.

For these reasons, it behooves counsel to advise importers and exporters alike to consider adopting the necessary measures to avoid detentions and seizures altogether and in the case of such a proceeding to consider the viable alternatives. These include the following.

1. Confirm whether the merchandise is subject to any restriction or prohibition, which is imposed by law relating to health, safety, or conservation. If so, work with the manufacturer, product engineers, and/or third party inspection companies to ascertain whether the goods are in compliance with the applicable regulation, or statute.[27]
2. Assess prior to shipment whether the merchandise requires a license, permit, or other authorization of a United States Government agency. Ensure that the merchandise is accompanied by such license, permit, or authorization at the time of import or export.[28]
3. If it is determined that a party attempted to enter or introduce merchandise contrary to law, consider the possibility of having CBP reject or deny the entry in order to have the merchandise exported and removed from the seizure process.[29]
4. If the merchandise is not prohibited from entry altogether, consider entry into a bonded warehouse or foreign trade zone, providing for subsequent withdrawal once the defect or restriction is corrected.[30]
5. Consider asking CBP to issue a monetary penalty in lieu of seizure if the defect or restriction pertaining to the good is correctable.[31]
6. Attempt to structure an early release agreement with CBP by depositing a sum that approximates the final amount for remission of the possible forfeiture, agree to hold the U.S. Government harmless, and pay storage charges and other related costs.[32]

Conclusion

With unprecedented product safety concerns drawing attention not only in Congress, but also throughout U.S. regulatory agencies, it is practically certain that CBP's detentions and seizures of merchandise will only increase. In particular, proceedings can be very long, tedious, and frustrating where the admissibility decision does not fall under CBP nor does CAFRA apply, so no time frames exist under which the government must process the detention or seizure. Accordingly, it behooves counsel to advise clients who import or export to carefully consider early on in the production process the extent to which merchandise meets health, safety, and conservation standards and to obtain all necessary licenses, permits, or authorizations prior to export from the country of origin. Finally, in cases where merchandise is seized, it is worthwhile to explore the alternatives that CBP and the vesting agency may be willing to consider in order to expeditiously resolve such matters.

Lenny Feldman *is the managing partner of Sandler, Travis & Rosenberg, P.A.'s Miami office. He concentrates his practice in complex import and export valuation, classification, origin, textile transshipment, seizure, penalty and C-TPAT/border security issues before U.S. Customs and Border Protection, as well as other regulatory agencies. Prior to joining the Firm, Mr. Feldman was a senior attorney with the U.S. Customs Service in Washington, D.C., from 1991 to 2000. In this position, he led U.S. and international delegations abroad to consult and train foreign customs and trade officials throughout South America, Europe, Asia and the Middle East. His work included the drafting, interpretation and administration of laws regarding import valuation, classification and origin; risk assessment and compliance management; and audit and enforcement mechanisms. Previously, while serving in the Penalties, Value, and General Classification Branches, he personally advised hundreds of Customs, government and industry officials and issued numerous national guidelines, directives and administrative rulings. After leaving Customs, Mr. Feldman served as the chief compliance officer and vice president, international, for a trade and logistics software development company from 2000 to 2001. He was responsible for the company's global customs and international trade compliance practice, particularly the analysis of the laws and regulations of over 100 countries and the development of the necessary functional workflow to automate that information. Mr. Feldman holds a J.D. from the University of Florida and a B.A. in economics, anthropology, and Spanish from Emory University. He is admitted to practice before the Court of Appeals for the Federal Circuit and the Court of International Trade, and he is a member of the bar in Florida, New York and the District of Columbia. He is the co-legal counsel of the Florida Customs Brokers and Forwarders Association and a past vice-president of the Customs Lawyers Association. He also served as vice rapporteur for market access at the VIII FTAA Americas Busi-*

ness Forum. He has received the World Customs Organization Award for APEC Valuation Project and the Vice Presidential Hammer Award for Footwear Industry Informed Compliance Partnership. His publications include "U.S.-Mexico Free Trade Agreement," The Transnational Lawyer, Vol. 4, No. 2 (1991); "The North American Free Trade Agreement," Doing Business in Mexico (1991); and "German Reunification: The Effect on International Joint Ventures," Vol. 5, No. 2 U.FL International Law Journal (1990). Phone: 305-267-9200; Fax 305-267-5155; Email: lfeldman@strtrade.com.

Endnotes:

1 On March 1, 2003, the U.S. Customs Service was restructured and renamed U.S. Customs and Border Protection. http://en.wikipedia.org/wiki/United_States_Customs_Service.
2 19 U.S.C. §1595(a)(1).
3 *See* H.R. 2474, Increased Maximum Civil Penalty for Violations under the CPSA, 110th Congress, 1st Session, Rep. Bobby Rush.; H.R. 3610, Food and Drug Import Safety Act, 110th Congress, 1st Session, Rep. John Dingell; H.R. 1699, The Danny Keysar Child Product Safety Notification Act, 110th Congress, 1st Session, Rep. Janice Schakowsky; S. 2045, CPSC Reform Act of 2007, 110th Congress, 1st Session, Senator Mark Pryor.
4 *Detention of Merchandise*, 64 Fed. Reg. 43,608 (Dept. Treasury Aug. 11, 1999).
5 19 U.S.C. §1499(c)(1).
6 *Id.*
7 *Id.* §1499(c)(2).
8 *Id.*
9 *Id.* §1499(c)(3).
10 *Id.* §1499(c)(5)(A).
11 *Id.* §1514(a)(4).
12 *Id.* §1514(a).
13 *H&H Wholesale Servs., Inc. v. United States*, Slip Op. 06-77 at 8 (Ct. Intl. Trade, May 23, 2006).
14 *Id.* at 7.
15 19 U.S.C. §1499(c).
16 H.R. Rep 103-161; 103rd Cong., 1st Sess.
17 Pub. L. 106-185, §2(a), Apr. 25, 2000, 114 Stat. 202.
18 *Customs Administrative Enforcement Process: Fines, Penalties, Forfeitures and Liquidated Damages* at 8 (U.S. Customs and Border Protection Informed Compliance Publication, February 2004).
19 18 U.S.C. § 983(a)(1)(A)(iii).
20 *United States v. Assorted Jewelry with an Approximate Value of $219,860.00*, 386 F. Supp. 2d 9 (D.P.R. 2005).
21 *Id.*
22 18 U.S.C. § 983(i).
23 *Id.*
24 *Id.*
25 *See* 5 U.S.C. § 555(b).
26 5 U.S.C. § 555(b).
27 19 U.S.C. § 1595a(c)(2)(A).
28 *Id.* §1595a(c)(2)(B).
29 *Customs Administrative Enforcement Process, supra* at 18.
30 *Id.*
31 *Id.*
32 *Id.* at 15.

Section Calendar

Mark your calendars for these important Section meetings & CLE dates:

For more information contact: Angela Froelich:
850-561-5633 / afroelic@flabar.org

January 16, 2008

"INTERNATIONAL LEGAL OVERVIEW AND CERTIFICATION REVIEW" (CLE #0568)
Hyatt Regency Downtown, Miami

January 18, 2008

25TH ANNIVERSARY GALA
The Biltmore, Coral Gables

February 7 - 8, 2008

"29TH ANNUAL IMMIGRATION LAW UPDATE" (CLE #0508)
Jungle Island Treetop Ballroom, Miami Beach

February 29 - March 1, 2008

3RD ANNUAL INTERNATIONAL COMMERCIAL ARBITRATION MOOT COURT COMPETITION
Orlando Downtown Marriott, Orlando

March 28, 2008

"INTERNATIONAL BUSINESS TRANSACTIONS CONFERENCE" (CLE #0654)
The Biltmore Hotel, Coral Gables

March 29, 2008

"6TH ANNUAL INTERNATIONAL LITIGATION AND ARBITRATION CONFERENCE" (CLE #0607)
The Biltmore Hotel, Coral Gables

June 20, 2008

INTERNATIONAL LAW SECTION EXECUTIVE COUNCIL MEETING
The Florida Bar Annual Convention
Boca Raton Resort & Club

Recent Developments in French and European Laws:

When the "Old Country" Faces the 21st Century

By Roselyn Sands, Esq. and Virginie Hessel, Esq.

I. Work More To Earn More: The Recent French Law in Favor of Employment, Jobs and Purchasing Power

SANDS

HESSEL

"Work more to earn more" was the watchword of Nicolas Sarkozy when he was running in the French Presidential elections during Spring 2007.

Putting that philosophy into action, the goal of the law passed on August 21, 2007,[1] is to try and restore confidence in the French economy while encouraging employment in France and increasing the French people's purchasing power. The law provides for tax savings measures which favor the creation of each citizen's personal and family wealth.[2] Specifically, the law provides for measures such as tax credit on banking interest incurred while purchasing one's residence, lightening of inheritance taxes, establishing a ceiling on all taxes paid by citizens so that they do not exceed 50% of their income (in order to restrain the "brain drain"), and exemption of income tax for students working in order to finance their studies. However, the main focus of the law is employment-related provisions.

A. Thinking About Labor Law Differently

1. Reforming Working Time

The most controversial measure from a labor law perspective is certainly the one providing for an income tax exemption in favor of employees and reduction of employer and employee's social security contributions on salaries, for all overtime work performed from October 1, 2007. France has become well known for its 35-hour a week working time. First instituted in 1998,[3] the principle of the 35-hour a week has been amended by several laws[4] since then. Although only a segment of the population actually works only 35 hours a week -- indeed, for many employees, this 35-hour law resulted in large working days in exchange for 10 extra personal days off per year -- the 35-hour-a-week system has been criticized and blamed for the French economic situation.

Thus, since the early 2000s, employees in France were given more "free" time. In 2007, based on the report that some employees would be ready to swap some of their free time for a greater amount of pay, the law of August 2007 seeks to provide incentives to companies which offer more overtime work to their employees. As a counterpart, employees are asked to give up free time to increase their purchasing power. How does the French Government intend to encourage employers to offer, and employees to work, longer hours?

Lightening the Social Charges Born by Employers

In France, employers pay about a 40-45% social charge to the State for social security contributions in addition to an employee's salary. The new law provides that employers will benefit from a flat-rate deduction of the social charge contribution on overtime performed. Such deduction will be most important for small companies of less than 20 employees.

Eliminating Income Taxes on Employees for Overtime Performed

The law provides that employees will pay no income tax, nor social charges on the part of their income corresponding to the overtime performed as from Oct. 1, 2007.

An In-Depth Reform?

These measures appear to be the first step toward a total reform of the working week in France. Indeed, one of the government's next objectives may be to grant companies broader discretion in organizing their own work week through company-wide collective bargaining agreements. Employers prefer the ability to tailor the working to their business' needs rather than to be constrained by national legislation.

France has a long tradition of vigorous negotiation between employees and employers on labor issues. Indeed, each Company has employee representatives, elected by the employees. The most well-known body for such negotiation is the Works Council.[5] The Works Councils have specific prerogatives as regards, in particular, all significant decisions taken by the employer. Specifically, each major change contemplated by the employer is subject to a prior information and/or consultation[6] process with the company's Works Council. In addition, unions are also significantly involved in negotiating company agreements. Now, the Government is considering measures that will grant companies broader latitude and allowing employers to determine, together with their union representatives, the working time rules that will apply to a particular company. Indeed, François Fillon, the current French Prime Minister, announced before the 2007 elections that the government intends to eliminate national legislation on working time by the end of the 5-year presidential term.

2. Regulating "Golden Parachutes"

The Sarkozy government also seeks to motivate ordinary workers to work longer hours by regulating corporate executive pay. The law of August 2007 states that any contractual obligation by a company to a corporate executive that provides

for significant end of contract indemnities must be subject to performance conditions. In addition, the decision to grant a corporate executive such indemnity will be made public by the company. Moreover, the company must make an official report of the Company, indicating that the corporate executive duly met the performance conditions to which he/she was subject. The aim of such measure is to avoid abuses in severance agreements by ensuring that anybody -- including the press -- is able to access such information. Prior to passage of the new law, shareholders were required to approve any contractual document providing for the payment of end of contract indemnities to a corporate executive; from now on, the shareholders' approval will be subject to the individual agreement of each shareholder, during the shareholder's meeting. Significantly, subject to passing constitutional muster, these requirements would have retroactive effect. The law provides for an 18-month transition period to allow companies to amend their "Golden Parachute" clauses in accordance with these new provisions and, in particular, the performance condition.

3. Establishing an "Active Solidarity Income"

The French social security and welfare system is based on "solidarity." By means of tax and social security contributions, employees[7] and employers contribute to several schemes aiming at supporting disadvantaged people. However, in some cases benefiting from government-guaranteed minimum social benefits (such as "minimum integration revenue" or unemployment allowances) could make one earn more than if he/she were actually working (especially in the event of a part-time job). The law of August 2007 attempts to address this undesirable side effect of the system and boost the French economy by ensuring that individuals are encouraged to work instead of remaining on welfare and unemployment systems. Thus, pursuant to the law, people working (even at a part-time job) would thus receive compensation in order to encourage them to work, instead of receiving government allowances while staying at home.

II. Global Thinking About How To Fight Discrimination

Europe and the United States have had different approaches to discrimination and harassment. Europeans used to consider the United States' approach excessive and unnecessary. However, Europe now seems to looking to examples of the United States' experience and starting to deal with discrimination, diversity and equal treatment issues.

The first European directive related to discrimination was passed in 2000.[8] This directive was aimed at creating a general framework for fighting discrimination based on religion, handicap, age or sexual orientation. It was particularly applicable in the areas of access to employment (including selection criteria, recruitment conditions and remuneration) and conditions of employment (including dismissal and remuneration). In 2002, another directive was adopted in order to promote equality between men and women. The goal of this directive was to end any discrimination based on gender, either directly or indirectly (*i.e.* based on the matrimonial or familial situation).

In 2004, France decided to fight against discrimination by setting up the High Authority Against Discrimination and For Equal Treatment (the "HALDE"),[9] a governmental agency akin to the Equal Employment Opportunity Commission in the United States, but with much broader powers beyond employment. This authority has the responsibility for fighting discrimination prohibited by law, providing any useful documents to French citizens, supporting and accompanying victims of discrimination, and identifying and promoting good practices to encourage equality. In connection with employment issues, the HALDE publishes each year a "Practical Guide of Actions and Good Practices in Companies." The 2007 report stressed the following:

1. French Companies' Increased Commitment To Equality

French companies have mobilized themselves in order to fight discrimination by adopting Codes of Conduct or Codes of Ethics. Moreover, the 2007 report shows that companies tend to negotiate more and more specific company-wide collective agreements regarding handicaps and equality between men and women. Moreover, numerous audits related to diversity are initiated by French companies. Some of them also put in place "discrimination" tests, to verify the neutrality of their hiring processes and management of human resources.

2. A Huge Amount of Work Still To Be Done

Despite all the efforts of the government and private companies, the HALDE still recognizes that few companies have policies to promote equal treatment and very few companies have had true global thinking and concrete policies on diversity. Nonetheless, the HALDE is gaining momentum through public campaigns. Proof that this strategy is working is found in the fact that the number of complaints before the HALDE indeed has dramatically increased in 2006.[10]

In response to these increased complaints, French employment lawyers are working to assist clients by putting in place the appropriate means to fight discrimination at the workplace. For this purpose, the experience of the United States in terms of the fight against discrimination can be a critical tool for French companies.

III. Facing the Challenges of the 21st Century: "Flexicurity" in Europe

Implemented in Denmark in the early 1990s, the notion of "flexicurity" was first addressed by expert speakers at an audience at a Brussels event organised by the European Policy Centre on September 14, 2005. On November 22, 2006, the European Commission published a "Green Paper" on "*Modernizing Labour Law to Meet the Challenges of the 21st Century*." The purpose of the Green Paper was to launch a public debate in the EU on how labor laws could evolve to support the objective of achieving sustainable growth with more and better jobs. This policy is currently widely discussed as a model for other European economies with high unemployment

See "Recent Developments," page 27

Does "May" Mean "Shall" in Arbitration?

By Richard C. Lorenzo & Kristen Foslid

LORENZO

FOSLID

In recent years, an increasing number of U.S. and foreign companies have embraced arbitration as an alternative means for resolving their business disputes. Unlike prolonged litigation, arbitration offers numerous real advantages to its users, including cost savings, faster results, a neutral forum, the ability to participate in the choice of a decision-maker, and the relative finality and enforceability of arbitration awards. With careful drafting, the parties to a contract can tailor the arbitration process to meet their specific needs and circumstances.

Because of this trend towards arbitration, courts are now routinely asked to determine whether arbitration is compulsory under a given contract. One question that often arises is whether arbitration is mandatory where the arbitration provision merely provides that the parties "may" arbitrate their dispute. While federal courts uniformly answer this question in the affirmative, finding that the presence of the term "may" does not render an arbitration clause permissive,[1] Florida's courts have not yet settled on the question. However, as further discussed below, Florida should adopt the federal standard recently outlined in *Conax Florida Corp. v. Astrium Ltd.*, 499 F. Supp. 2d 1287 (M.D. Fla. 2007).

In *Conax*, the parties' arbitration clause provided that "a controversy or claim arising out of or relating to this Subcontract *may* be finally settled by arbitration."[2] (Emphasis added.) The plaintiff argued that the use of the word "may," rendered the arbitration clause permissive and required the parties to jointly agree to arbitration.[3] In support of this interpretation, the plaintiff relied on the Fourth District Court of Appeal's decision in *Young v. Dharamdass*, 695 So. 2d 828 (Fla. 4th DCA 1997), along with a series of forum-selection clause cases "which construe[d] 'may' as permissive . . . ."[4]

In *Young,* the Fourth District declared that "the arbitration clause . . . is permissive, not mandatory. It provides that either party may seek to arbitrate any dispute." *Young*, 695 So. 2d at 829. The *Conax* Court criticized *Young* because it "contain[ed] no analysis and lack[ed] acknowledgment of the policy favoring arbitration."[5] The court also rejected the plaintiff's reliance on the forum-selection clause cases as "not applicable because, among other things, the presumption in favor of arbitrability does not apply."[6]

Having disposed of the plaintiff's arguments, the *Conax* Court held that the word "may" does not give one party the right to avoid arbitration under Florida law.[7] Citing to the Third District Court of Appeal's decision in *Ziegler v. Knuck*, 419 So. 2d 818 (Fla. 3rd DCA 1982), the *Conax* Court explained that once a party insists upon arbitration, the other party cannot avoid its contractual agreement to arbitrate.[8] The court reasoned that a contrary interpretation would render the arbitration provision illusory, as parties can always agree to arbitrate, even in the absence of a contractual provision.[9] Moreover, the court found that even if the word "may" did create an ambiguity in the arbitration provision's meaning, any uncertainty would have to be resolved in favor of arbitration.[10]

While the Florida Supreme Court has not yet ruled on this issue, the *Conax* analysis should become the prevailing view in Florida. Consistent with federal case law, the term "may" suggests that if a dispute arises, and one party elects to arbitrate, the arbitration will be mandatory. An alternative construction, as the *Conax* Court recognized, would strain common sense as the parties would not negotiate for a right they already had – to jointly agree to arbitration.

In addition, unlike the Fourth District Court of Appeal's decision in *Young*, the *Conax* court recognized the strong public policy in favor of resolving disputes through arbitration.[11] Indeed, under both Florida and federal law, arbitration clauses are to be given the broadest possible interpretation in order to promote the resolution of controversies outside of the courts. *See Hirshenson v. Spaccio*, 800 So. 2d 670, 674 (Fla. 5th DCA 2001); *Moses H. Cone v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983).

Accordingly, when it comes to arbitration clauses, Florida's courts will best serve the goal of arbitration by finding that the term "may" means "shall."

***Richard C. Lorenzo** is a partner in the Miami office of Hogan & Hartson LLP and member of the firm's International Litigation & Arbitration Practice Group. Kristen Foslid is an associate in the Miami office of Hogan & Hartson LLP.*

Endnotes:

1 *See, e.g., Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 204 n.1 (1985) ("The use of the permissive 'may' is not sufficient to overcome the presumption that parties are not free to avoid the contract's arbitration procedures."); *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 879 (4th Cir. 1996) (same); *Am. Italian Pasta Co. v. Austin Co.*, 914 F.2d 1103, 1104 (8th Cir. 1990) (same); *Local 771, IATSE, AFL-CIO v. RKO Gen., Inc.*, 546 F.2d 1107, 1115-16 (2d Cir. 1977) (same); *Nemitz v. Norfolk & W. Ry. Co.*, 436 F.2d 841, 849 (6th Cir. 1971) (same); *Deaton Truck Line, Inc. v. Local Union 612*, 314 F.2d 418 (5th Cir. 1962) (same).

2 *Conax Florida Corp.,* 499 F. Supp. 2d at 1296.

3 *Id.* at 1297.

4 *Id.* at 1297 n.10.

5 *Id.*

6 *Id.*

7 *Id.*

8 *See also United Cmty. Ins. Co. v. Lewis*, 642 So. 2d 59, 60 (Fla. 3d DCA 1994) (same).

9 *Conax Florida Corp.,* 499 F. Supp. 2d at 1298.

10 *Id.*

11 *Id.* at 1297.

Minutes from the National Benefits Center Liaison/Florida Bar Liaison Meeting

July 27, 2007

1. Members report that they have had some family-based I-485 interviews (where the I-130 was previously filed and we submit the I-130 receipt notice) transferred to the District office where the Officer has advised at the time of the interview that he/she cannot adjudicate the case because the I-130 file is still in Texas or the Officer only has a T-file. For example, I-485 MSC 07 067 22529 Interview on 3/27/07, Officer stated she only had T-file.

a) Whose responsibility is it to transfer the I-130 file from TSC (District office, NBC, or the Service Center) and

b) What can we do as attorneys, if anything, to avoid delays like this at the time of the interview?

Our research indicates that the A file for this applicant and T file, containing the I-130, were both at the District Office at the time of the interview. System records show the A file was located in the Miami District office on 1/2/03. The National File Tracking System shows that the T file was in the Miami District office on 3/8/07, and was never located in Texas.

It is the NBC's standard process to request the related I-130 application if it is located at another USCIS office. If the I-130, by chance, is not received before the I-485 needs to go out for interview, the NBC will forward the I-130, upon receipt, to the interviewing office. It is also the NBC's standard process to ship cases that have been scheduled for interview at least 19 days prior to the interview in order that they arrive in the field office 14 days prior to the interview date.

2. *The following was an item on a recent South Florida AILA – Miami CIS liaison agenda. The answer was provided by the Miami District Office as this was an issue raised at a South Florida AILA Liaison meeting with the District office. We do not have specific examples.*

Question: Failure to transfer files from NBC: cases scheduled in Miami have been cancelled due to the fact that local office does not have file from NBC. Can we find out if this is a district problem or an NBC problem?

Answer: We apologize for any inconvenience this may have caused. Not only does the client suffer, but our office ends up wasting precious interview slots. This problem originates with the NBC. We have advised supervisory personnel at the NBC of these difficulties and they are working to resolve the issue.

Can you update us on this situation?

It is the NBC's standard process to ship cases that have been scheduled for interview at least 19 days prior to the interview in order that they arrive in the field office 14 days prior to the interview date. When an A file or T file is located at an office other than the NBC or the interviewing office, the NBC will request the file.

If the NBC de-schedules a case, it sends an email to the District Office informing it of the cancellation. A de-scheduling notice is generated by the system and sent to the applicant and attorney (if represented). If the de-scheduling action takes place 14 days or less from the date of interview, the NBC will make every effort to also contact the applicant/attorney by telephone to let them know of the cancellation.

The NBC has not been made aware by the Miami District Office of interviews that have been cancelled due to the District not having files from the NBC at the time of interview. Please provide us with specific examples of cases with this issue.

In the future, if an interview is cancelled because a file has not arrived at the District, please send your concern to the Florida Bar Liaison.

3. A recent Nebraska Service Center case for which the I-140 was approved and the I-485 remains pending (since July 2006) was just handled as follows:

"On May 21, 2007, we transferred this I485 APPLICATION TO REGISTER PERMANENT RESIDENCE OR TO ADJUST STATUS to our NATIONAL BENEFITS CENTER location for processing and sent you a notice explaining this action. Please follow any instructions on this notice. You will be notified by mail when a decision is made, or if the office needs something from you. If you move while this case is pending, call customer service. We process cases in the order we receive them. You can use our processing dates to estimate when this case will be done. This case has been sent to our NATIONAL BENEFITS CENTER location. Follow the link below to check processing dates. You can also receive automatic e-mail updates as we process your case. Just follow the link below to register."

Can you advise:

1) Is this a short term fix for backlogs? Or should we expect transfers from the Service Centers to the NBC for the indefinite future?

2) How will the employment based I-485s be fit in with standard NBC adjudicating duties?

3) Since I-485s don't appear on your aging report, how do we gauge the relative process of an I-485 transferred to your office?

The NBC is receiving employment based I-485 applications from the four Service Centers which they deem require an interview. This process was implemented May 1, 2007. Once at the NBC, the cases are processed similarly to a family-based adjustment of status I-485 application.

The NBC serves as a pre-interview processing hub for I-485 applications. When the NBC completes the pre-inter-

continued, next page

view processing steps and determines a case to be interview ready, it places the application in the scheduling queue. USCIS field offices then schedule these cases for interview, which in turn alerts the NBC to prepare them for shipment to the field office. It is the NBC's standard process to ship cases that have been scheduled for interview at least 19 days prior to the interview in order that they arrive at the field office 14 days prior to the interview date.

The I-485 application does not appear on the NBC's processing time report because the interview and adjudication of these cases occurs in the USCIS field office. Check the USCIS website for the processing times of I-485 applications at each field office at https://egov.uscis.gov/cris/jsps/ptimes.jsp.

4. Lately, there has been a change of policy (i.e., we have been receiving RFEs) that the intending immigrant's income can no longer be considered as a household members if he/she was not authorized to work during the previous fiscal year. This was never the case before, as the intending immigrant's income could supplement the sponsor's income if he/she was a household members. I-485 MSC0720621877; I-485 MSC0717925088 new Affidavit of Support requirement that only lawful income from household member will be accepted.

a) When did this policy go into effect?

b) What is the legal authority for this?

c) Why was no notice given?

On June 21, 2006, US Citizenship and Immigration Services published the Affidavit of Support on Behalf of Immigrants final rule in the Federal Register. The final rule is found in Volume 71, Number 119, pages 35731-35757 of the Federal Register.

The final rule made many changes to Title 8, Code of Federal Regulations, 213a. The definitions found in 8 CFR 213a.1 include the following definition of "household income".

Household income means the income used to determine whether the sponsor meets the minimum income requirements under sections 213A(f)(1)(E), 213A(f)(3), or 213A(f)(5) of the Act. It includes the income of the sponsor, and of the sponsor's spouse and any other person included in determining the sponsor's household size, if the spouse or other person is at least 18 years old and has signed a U.S. Citizenship and Immigration Services (USCIS) Form I–864A, Affidavit of Support Contract Between Sponsor and Household Member, on behalf of the sponsor and intending immigrants. The "household income" may not, however, include the income of an intending immigrant, unless the intending immigrant is either the sponsor's spouse or has the same principal residence as the sponsor **and the preponderance of the evidence shows that the intending immigrant's income results from the intending immigrant's lawful employment in the United States or from some other lawful source that** will continue to be available to the intending immigrant after he or she acquires permanent resident status. The prospect of employment in the United States that has not yet actually begun will not be sufficient to meet this requirement.

On June 27, 2006, US Citizenship and Immigration Services also released the updated redacted Adjudicator's Field Manual that incorporated the changes to the Affidavit of Support. This portion of the Adjudicator's Field Manual is available to the public through uscis.gov. AFM 20.5(d)(4) and contains the following note.

Note: *The interim rule did not directly address the ability of a sponsor to rely on an intending immigrant's income from unauthorized employment in meeting the Poverty Guidelines threshold for the sponsor's household income. In response to a specific comment relating to the issue of the sponsor's reliance on an intending immigrant's income, the* ***revised definition of "household income" now makes it clear that income from an intending immigrant's unauthorized employment may not be considered in determining whether the sponsor's anticipated household income meets the applicable Poverty Guidelines threshold.*** *The basis for this clarification is the clear public policy, as stated in sections* ***245(c)(2)*** *and* ***274A*** *of the Act, 8 USC §§ 1255(c)(2) and 1324a, against unauthorized employment. Unauthorized employment, admittedly, is not always a bar to adjustment of status. Nevertheless, sections* ***212(a)(4)(C)*** *and* ***213A*** *of the Act clearly assume that it is primarily the sponsor himself or herself who must meet the income threshold for the Form I-864. This principle is gravely undermined by permitting the sponsor to rely on the intending immigrant's income, if it is derived from unlawful employment.*

5. According to the USCIS website, the current Processing times for EADs are greater than 90 days. Current processing times for I-131s are greater than 110 days.

When can we expect a return to 90 day processing times?

The processing times have been updated on June 18 and now showing March 15 as processing dates for both I-765 and I-131 applications (which is still just over 90 days). I am trying to get examples to send.

On June 18, 2007, the National Benefits Center reported processing dates of March 29, 2007 for Form I-765 and March 15, 2007 for Form I-131 (as posted on uscis.gov).

If you are seeing dates outside the posted timeframe, please consider the following:

- Verify status of the case using Case Status Online on the USCIS website.
- Ensure that biometrics are present in USCIS systems for the I-485 and I-765 applications. A card will not be produced if they are not present in the systems.
- Case processing will be delayed if we must request more evidence or information. If we ask for missing required initial evidence, count the processing time from when we receive that missing evidence.

Title 8, Code of Federal Regulations, 103.2(b)(10):

See "Nat'l Benefits Center," page 23

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SCHEDULE OF EVENTS

THURSDAY, FEBRUARY 7, 2008

7:45 a.m. – 8:15 a.m.
Registration and Continental Breakfast

8:15 a.m. – 8:30 a.m.
Opening Remarks
Scott Devore, Esq., Chapter Chair, S. Fla. Chapter of the American Immigration Lawyers Association ("AILA")

8:30 a.m. – 9:30 a.m.
Winning Strategies for L's and E's
-start-up issues for both
-dealing with poorly informed consulates and third country processing
-small company issues
-dealing with functional managers
-L extensions and E extensions where the petitioning companies have not grown
-dealing with L time limits, especially L-1Bs
-considerations in choosing L visas over E visas, and vice versa
-difficulties converting L to EB1-3
Eugenio Hernandez, Esq., Miami, Florida (moderator)
Timothy Murphy, Esq., Miami, Florida
Larry S. Rifkin, Esq., Miami, Florida

9:30 a.m. – 10:45 a.m.
Strategies for Employment of Temporary Workers
-what visas remain options for temporary workers
-dealing with quota restrictions and processing delays
-proving nonimmigrant intent
-strategic processing of H-2Bs
-H-3 and J visas
-practice tips and timing strategies
Jeff Bernstein, Esq., Miami, Florida (moderator)
David Grunblatt, Esq., Newark, New Jersey
Nita Itchhaporia, Esq., San Jose, CA

10:45 a.m. – 11:00 a.m.
Coffee Break

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EB-5 Investor Green Cards through American Life Inc. at the Seattle Regional Center

11:00 a.m. – 12:30 p.m.
Employment Based Immigration – Where Are We Now?
-labor certification and PERM update
-defining "extraordinary"
-securing the best priority date for your client
-creative avenues for obtaining residence
-dealing with the fluctuating quotas
-portability and the advantages and disadvantages of filing for adjustment versus consular processing
-is your client in status, or eligible for Section 245(k) or 245(i)
Tammy Fox-Isicoff, Esq., Miami, Florida (moderator)
William Stock, Esq., Philadelphia, PA
H. Ronald Klasko, Esq., Philadelphia, PA (Past President AILA)
Efren Hernandez, Esq., Washington, D.C.

The Future of Immigration Forms, Case Management and I-9 Compliance℠

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12:30 p.m. – 2:00 p.m.
President's Luncheon (included in registration fee)
Congressman Robert Wexler, Florida (invited)
Ira Kurzban, Esq., Miami, Florida - Federal Court Update

2:15 p.m. – 3:15 p.m.
Coping with Enhanced Employer Enforcement
-I-9 requirements
-what to do to correct an I-9 error
-dealing with mis-match letters
-when is an employer under constructive notice
-utilizing DHS verification systems
-know your clients' rights
Jack Finkelman, Esq., Miami, Florida (moderator)
Bo Cooper, Esq., Washington, D.C.
Eileen Scoffield, Esq., Atlanta, Georgia

3:15 p.m. – 4:00 p.m.
Strategies for Case Management and Ethical Considerations
-timing of H filings and managing client expectations
-dealing with rumor mill
-changes in priority date processing and case management
-strategies to keep children turning 21 within their parents' cases
-labor certification fee payment
Jeffrey A. Devore, Esq., Palm Beach Gardens, Florida (moderator)
Bo Cooper, Esq., Washington, D.C.
William Stock, Esq., Philadelphia, PA

4:00 p.m. – 4:15 p.m.
Coffee Break

4:15 p.m. – 5:15 p.m.
Issues in Family Immigration
-securing the best priority date
-learning your Ks
-nuances in I-751 processing
Scott Devore, Esq., Palm Beach Gardens, Florida (moderator)
Michael Shane, Esq., Miami, Florida
David Berger, Esq., Miami, Florida

5:15 p.m. – 7:00 p.m.
Cocktail Reception-Talk to the Experts.
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FRIDAY, FEBRUARY 8, 2008

8:30 a.m. – 9:15 a.m.
Can You Help the Illegal Foreign National?
-avoiding and dealing with unlawful presence
-grandfathering
-VAWA
-asylum and its risks, before and after one year in the U.S.
-putting your client in proceedings (is this possible?)
Anis Saleh, Esq., Miami, Florida (moderator)
Rebecca Sharpless, Esq., Miami, Florida

Lourdes Martinez-Esquivel, Esq., Miami, Florida

9:15 a.m. – 10:45 a.m.
Dealing with the Effects of Clients' Criminal Activity on their Immigration Status
-is your client removable?
-expanded grounds of removability and impact on Section 212(c)
-preserving issues for judicial review
-dealing with Blake-type issues
-filing affirmatively for 212(c) and determining eligibility
-to travel or not to travel
-the MIA pilot program
-legal update—what is a CIMT, crime of violence, etc.
Mary Kramer, Esq., Miami, Florida (moderator)
Stuart Karden, Esq., Palm Beach Gardens, Florida
Jeff Joseph, Esq., Denver, Colorado
The Honorable Denise N. Slavin, Immigration Judge, Miami, Florida (invited)

10:45 a.m. – 11:00 a.m.
Coffee Break

11:00 a.m. – 12:15 p.m.
Applying for Relief before the Court, USCIS, or the Consulate
-what acts can be waived, and by which waivers (fraud, unlawful presence, health, Section 212(d)(3), Section 212(h), cancellation for non-lpr and lpr)
-how to package your waiver and present your case
Jeff Joseph, Esq., Denver, Colorado (moderator)
John Pratt, Esq., Miami, Florida
Antonio Revilla, Esq., Miami, Florida
David Leopold, Esq., Cleveland, Ohio
The Honorable Stephen Mander, Immigration Judge, Miami, Florida

12:15 p.m. – 2:00 p.m.
Awards Luncheon (included in registration fee)
Senator Bill Nelson (invited)
Hot Topic Update
Maurice Berez, USCIS, Director of EB5 Program

2:15 p.m – 3:15 p.m.
BIA and Federal Court Update: Strategies for Dealing with Bad Precedent in Business and Enforcement Immigration Law
-recent decisions of import (BIA and Federal Courts)
-court stripping provisions, and laws limiting jurisdiction
-strategies for distinguishing unfavorable case law
-should your clients move to a better jurisdiction, and, if so, when?
Anis Saleh, Esq., Miami, Florida (moderator)
Lucas Guttentag, Esq., San Francisco, California
Jeff Joseph, Esq., Denver, Colorado

3:15 p.m. – 3:30 p.m.
Coffee Break

3:30 p.m. – 4:30 p.m.
Federal Court Redress for Adjudication Delays
-is mandamus alive and well?
-recent decisions of import
-choosing your circuit
-Sec. 336(b): what constitutes an "interview"
H. Ronald Klasko, Esq., Philadelphia, Pa. (moderator)
Stephen Bander, Esq., Miami, Florida
Linda Osberg Braun, Esq., Miami, Florida

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International Legal Overview and Certification Review

In conjunction with The Florida Bar Midyear Meeting

COURSE CLASSIFICATION: ADVANCED LEVEL

January 16, 2008

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[Course No. 0568R]

Schedule of Events

8:00 a.m. – 8:15 a.m. **Late Registration**

8:15 a.m. – 8:30 a.m.
Introductory Comments and Welcome Remarks
Peter A. Quinter, Becker & Poliakoff, P.A., Fort Lauderdale – Program Co-Chair
Malcolm C. Riddell, President, The Riddell Group, Sarasota – Program Co-Chair

8:30 a.m. – 9:15 a.m.
Foreign Investment Issues in the U.S.
Andrew Josh Markus, Carlton Fields, P.A., Miami

9:15 a.m. – 9:45 a.m.
International Aspects of Estate Planning
TBA

9:45 a.m. – 10:00 a.m. **Break**

10:00 a.m. – 11:15 a.m.
Litigating an International Case and Problems with Conflicts of Laws
TBA

11:15 a.m. – 12:00 noon
Taxation and the International Client
Arturo J. Aballi, Jr., Aballi, Milne, Kalil & Escagedo, P.A., Miami

12:00 noon – 1:15 p.m.
Lunch (included in registration fee)
Current Challenges of an International Practice and Ethical Issues of Working with Foreign Counsel
Gilbert K. Squires, Gilbert K. Squires, P.L., Miami Beach

1:15 p.m. – 2:00 p.m.
Issues in Public International Law and General Comparative Legal Issues
Prof. Pamella A. Seay, Florida Gulf Coast University, Punta Gorda

2:00 p.m. – 2:45 p.m.
Negotiating International Agreements: International Business Transactions and the Foreign Corrupt Practices Act
John C. Bierley, Smith Clark Delesie et al, Tampa

2:45 p.m. – 3:00 p.m.
Break

3:00 p.m. – 3:45 p.m.
Immigration Issues
Larry S. Rifkin, Rifkin & Fox-Isicoff, P.A., Miami

3:45 p.m. – 4:15 p.m.
International Protections of Intellectual Property
Jorge T. Espinosa, Kluger Peretz Kaplan & Berlin, P.L., Miami

4:15 p.m. – 4:45 p.m.
Customs, Import, Export, and Payment Methods
Edward M. Joffe, Sandler Travis & Rosenberg, P.A., Miami

4:45 p.m. – 5:00 p.m.
About the Certification Exam
J. Brock McClane, McClane Tessitore, Orlando
Malcolm C. Riddell, President, The Riddell Group, Sarasota

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- ❑ Full-time law college faculty or full-time law student: $150
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❑ **AUDIO CD** (includes course book)

$225 plus tax (section member)

$250 plus tax (non-section member)

TOTAL $ _____

for All,"[2] which provided the foundation for the 2007 Year.

The goals for the year were to make people more aware of their rights to enjoy equal treatment and to be free from discrimination, to promote equal opportunity, and especially to launch a major debate on the benefits of diversity for individuals and European societies in general.

The Four R's

The Year's activities have centered on four key objectives:

Rights - to raise awareness of the legal right to equality and non-discrimination and of the problem of discrimination on more than one ground (*e.g.,* discrimination against black females). The focus is on celebration of diversity, not sameness.

Representation - to stimulate debate on ways to increase the participation of groups in society which have been traditional victims of discrimination and to promote a balance between the presence of women and men in community affairs. Women are in the minority in the parliaments of European countries, as are members of ethnic minorities and disabled persons. Key targets under this rubric are businesses and the political sector.

Recognition - to achieve greater public awareness of the positive contribution each person can make to society as a whole, regardless of race, sex, ethnic origin, religion, handicap, age, or sexual orientation. Members of the media are encouraged to attend open public debates on the value of differences in society.

Respect - to promote a more cohesive and diversified society. Activities around Europe have been organized to illuminate the importance of eradicating stereotypes, derogatory clichés and violence. These activities are particularly directed at European young people.

The Underlying Law

Since 1957 the Treaty of Rome establishing the European Economic Community (EEC) has contained a provision prohibiting unequal pay for men and women, which was revised in the Treaty of Amsterdam.[3] Beginning in 1957, the EU has issued several directives on sex discrimination (generally referred to as gender discrimination) which have been interpreted numerous times by the European Court of Justice.[4] The key objective is to eliminate inequalities and promote gender equality throughout the European Community in accordance with Articles 2 and 3 of the EC Treaty (gender mainstreaming) as well as Article 141 (equality between women and men in matters of employment and occupation) and Article 13 (sex discrimination within and outside the work place).

From the outset, the EEC Treaty also contained provisions prohibiting nationality discrimination and guaranteeing the free movement of workers within the European Union.[5] These provisions have been strengthened by the Treaty of Amsterdam (Articles 12 and 39). The European Court of Justice has interpreted these provisions in a great number of cases.

But by the end of the 20th century, it was increasingly clear that these laws alone did not prevent discrimination and that social integration in the workforce was a dream that had not yet come true. So it was that in the year 2000, the European Community enacted two laws, or Directives, forbidding discrimination on the basis of race and ethnic origin, as well as on grounds of religion, disability, age, and sexual orientation.[6]

The Racial Equality Directive provides protection against discrimination in employment, training, education, social security, healthcare, membership in employment organizations, access to goods and services, and housing. It allows for "positive action," similar to affirmative action, and the right of an aggrieved person to make a complaint to a judicial or administrative body. An exception is made where a difference in treatment on the ground of race or ethnic origin constitutes a genuine occupational requirement. The burden of proof is shared between complainant and respondent, unlike that under Title VII of the U.S. Civil Rights Act of 1964, as amended.

The Employment Equality Directive implements the principle of equal treatment in employment and training irrespective of religion, disability, age, or sexual orientation. It is similar in nature to the Racial Equality Directive, including the right to positive action, right to legal redress, and sharing of the burden of proof. This Directive requires employers to make reasonable accommodation to enable a person with a disability who is qualified to do the job in question to obtain or retain the employment.

Transposition of EU Directives Into National Law

In order for objectives set forth in EU Directives to become binding as to individual citizens, an "act of transposition" by the legislators of member states is required. When drafting laws incorporating the objectives of the Directives, national parliaments have some flexibility to adapt the aims and goals laid down in Directives to specific circumstances of the nation. Once enacted, however, such legislation may not be amended in a manner contrary to the EU Directives.

In exceptional cases, the European Court of Justice has ruled that certain provisions of a Directive may be directly applicable to a member state without an act of transposition. This is so where the period for transposition has expired and the Directive has not been transposed or has been transposed inadequately, where the provisions of the Directive are imperative as to their substance, and where the provisions of the Directive confer rights on individuals.[7]

These exceptions have been applied in cases of discrimination when an individual is complaining against the State or its agencies, but not when the respondent is a privately owned company. The individual complaining about a privately owned company is not without a remedy, however. The European Court of Justice (ECJ) has called in those circumstances upon national judges to interpret the

national law in accordance with the provisions of the EC legislation, in a procedure known as a "Marleasing" case. In Case 106/89, *Marleasing SA v. La Comercial Internacional de Alimentation SA* [1990] ECR 1839, the ECJ ruled that national courts are required to interpret national law in the light of the letter and spirit of the EU Directive.

The Equality Directives in Action

In order for an individual who believes he or she has been the victim of discrimination to make use of the Equality Directives to achieve a remedy, the individual must have recourse first to the courts of the nation in which she or he resides. But the complainant can ask that the national judge request the ECJ to interpret the Directives. A preliminary ruling may be needed. It is up to the ECJ to decide whether there is a genuine issue of the interpretation of EC law. Only in such cases would the ECJ render a decision. Otherwise, the individual must rely only on national anti-discrimination law.

These procedures have often been thought inadequate to protect the rights of individuals not to be discriminated against in employment, housing, social benefits, or public accommodations. Such misgivings eventually gave rise to the implementation of the 2007 EU Year of Equal Opportunity for All, which is meant to strengthen the impetus toward fostering diversity in all aspects of European society.

An Activity of the Equal Opportunity Year in Paris

On September 26, 2007, the Paris-based Association in Favor of Professional Integration (AFIP) held a conference at the Press Club of France to discuss and further develop a Best Practices Guide to enhance employment opportunities for women, minorities, and disabled persons. Perspectives were presented from government officials, corporate officers, and lawyers of three countries: the United States, France, and Great Britain. Questions under discussion included the difficulty of ensuring diversity in hiring and recruiting, while at the same time not requiring applicants to divulge their ethnic or religious identities; training recruiters and human resources professionals in equal opportunity law; and reporting progress in diversifying workforces while protecting the privacy of minority employees.

The exchange of views was lively and the questions from members of the Paris media after the presentations were spirited. Extremely well attended (the hall was filled to bursting), this event, one of many throughout the year, demonstrated the keen interest in Europe and the U.S. in developing strategies to continue more successfully to integrate minorities, disabled individuals, and women into the mainstream of society and to reap the benefits of diversity.

Marcia S. Cohen *holds a Bachelor of Arts degree in Education from Roosevelt University of Chicago, a Masters degree in Music Composition from Northwestern University, and received her Juris Doctor degree from Stetson University College of Law in 1984. Since becoming a member of The Florida Bar, she has practiced almost exclusively in the area of labor and employment law with a concentration in employment discrimination and sexual harassment, and more recently in the area of international law. Ms. Cohen now divides her time between St. Petersburg, Florida and Paris, France, where she is of counsel to Cabinet Cimadevilla, a French firm specializing in international law. Ms. Cohen is the 2007 recipient of the ACLU Gardner Beckett Civil Rights Award.*

Endnotes:

1 Racial Equality Directive 2000/43/EC, Employment Equality Directive 2000/78/EC, Article 141(1) EC Treaty, Article 141 (3) EC Treaty, Directive 2002/73/EC, Council Directive 96/97 EC.
2 2005/0107 (COD), [SEC (2005) 690].
3 Article 13, Treaty of Amsterdam, 1997.
4 Directive 2002/73/EC, Directive 98/52/EC, Directive 97/80/EC, Directive 96/97/EC, Directive 86/378/EEC, Directive 76/207/EEC, Directive 75/117/EEC.
5 EURLEX058710, 1957/CEE 1 EN TRAITES.
6 Previously cited *supra*.
7 For further information on EU anti-discrimination law, see *www.ec.europa.eu/employment_social/fundamental right/legis.*

The *International Law Quarterly* is prepared and published by the International Law Section of The Florida Bar.

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 or WordPerfect (with the use of endnotes, rather than footnotes.) Please contact Manjit Gill at msgill@becker-poliakoff.com for submissions to the *Quarterly* and for any questions you may have concerning the *Quarterly*.

DEADLINE FOR NEXT ISSUE IS JANUARY 30, 2008.

from page 14

(ii) *Effect on interim benefits.* Interim benefits will not be granted based on an application or petition held in suspense for the submission of requested initial evidence, except that the applicant or beneficiary will normally be allowed to remain while an application or petition to extend or obtain status while in the United States is pending.

The NBC does not waive the requirement to process I-765 applications within 90 days. If you encounter cases that fall outside of the 90 day period, please work with your local field office or the AILA committee member.

6. What is the preferred order of documents when filing an I-485/I-130 packet?

Please note that an application will be processed regardless of the order of the documents submitted.

If you choose to order the documents, we suggest the following order to facilitate Lockbox processing:

1. Fee paper clipped (or stapled) to front left of uppermost document
2. G-28, if applicable (with original signatures of both the representative and the applicant)
3. Primary application/petition (with original signature of applicant/petitioner)
4. Supporting documentation

For example, the following are the types of documents that would support the submission of a family-based I-485:

• I-797 Receipt or Approval Notice for I-130 Petition for Alien Relative

• Any documents that establish basic eligibility:

• Visa Eligibility: The applicant is eligible to receive an immigrant visa under the category in which he or she has applied.

• Entry: The applicant was inspected, admitted, or paroled into the U.S., or has filed under section 245(i).

• Visa Availability: An immigrant visa is immediately available to the applicant at the time of filing.

• Other supplementary documents

The guidelines below apply to both individual applicant packages as well as family packages.

7. Does USCIS prefer that names are written on the back of photos?

The name of the applicant or petitioner should be written on the back of each photo which is submitted to USCIS. It is also helpful to write "petitioner" or "applicant" on the back of each photo as well as the A number if it is available.

8. Does USCIS and the NBC prefer colored paper for the G-28 and G-325A forms which are submitted?

The blue colored paper is preferred for the G-28. Colored paper is not necessary for the G-325A forms.

Family Package Guidelines

Remittance for father's I-485
Father's G-28
Father's I-485
Father's I-485 supporting documentation

Remittance for mother's I-485
Mother's G-28
Mother's I-485
Mother's I-485 supporting documentation

Remittance for father's I-765
Father's I-765
Father's I-765 supporting documentation

Remittance for mother's I-131
Mother's I-131
Mother's I-131 supporting documentation

Remittance for child #1's I-485
Child #1's G-28
Child #1's I-485
Child #1's I-485 supporting documentation

Remittance for Child #2's I-485
Child #2's G-28
Child #2's I-485
Child #2's I-485 supporting documentation

Remittance for child #1's I-131
Child #1's I-131
Child #1's I-131 supporting documentation

Remittance for child #2's I-131
Child #2's I-131
Child #2's I-131 supporting documentation

Federal Rules of Civil Procedure is similar to the discovery allowed in other common law jurisdictions; however, the scope and breadth of the discovery allowed in the United States is unprecedented even by common law standards. The broad view of discovery promoted by the Federal Rules has many advantages, including the avoidance of gamesmanship, prevention of trial by ambush, promotion of settlement by providing each side a better understanding of the weaknesses and strengths of its case, and narrowing issues for trial/final hearing.[7]

B. Discovery Practice in Latin America

Discovery in Latin America is much more restrictive than in the United States. In most Latin American countries the court plays a very active role and acts as the "gatekeeper" regarding discovery requests. There are some basic principles that distinguish "discovery" in Latin America from "discovery" in the United States.

In most civil law jurisdictions, such as Latin America, the right against self-incrimination is strongly protected. For example, in a civil lawsuit, the parties are only obligated to present documents that support their claims or defenses in the case. At the outset, parties are not required to present any document or evidence that *could* be contrary to their interest. Indeed, parties do not have to acknowledge that adverse documents or evidence even exists. In other words, parties can, and do, hide documents that could adversely impact their position.

The courts in Latin America are granted significant discretion in deciding the type of evidence that can be obtained or sought from an adverse party. In order to secure evidence from parties or non-parties, requests are not made to the party or non-party, but rather, the request is made to the court and it decides what should and should not be produced. Typically, the court's decision is influenced by the type of case and the issues in dispute.

Discovery in most Latin American lawsuits usually involves one or more of the following procedures, all of which are subject to the discretion of the presiding court:

1. The court can compel the appearance of the parties before the court to give testimony. Generally, because the right against self-incrimination is greatly protected, the testimony given by a party is done without taking an oath to tell the truth.[8] Moreover, the questions are not typically presented to the party directly; rather, the questions are presented to the court who decides their propriety and can modify the questions if it desires. And, there is no verbatim transcript of the testimony. Instead, the court provides the parties a summary of the questions asked and the answers given.
2. A party can be served with a type of written interrogatory related to his/her claim or defense. Nevertheless, the number and scope of questions that can be asked can be, and usually is, limited by the court.
3. Parties can be compelled to produce documents in their possession which they did not volunteer at the outset of the action. However, it takes some guess work by the adverse party to identify the information that might be available for production. Moreover, if the document sought is not specifically identified, the court can refuse the request.
4. As discussed above, non-parties can be brought into the litigation for purposes of giving testimony and producing documents. Again, the court is provided with a significant amount of discretion in deciding what is, and is not, an appropriate request to a non-party.
5. Although expert witnesses are allowed to give testimony, this is only permissible when allowed by the court in a specific case. If the court believes that it needs "technical" assistance on a specific subject, the court may, on its own or at the request of one or more parties, appoint an expert to assist in the investigation of a technical issue. The duty of such an expert is to report to the court. The court has the discretion to decide whether to adopt or reject the expert's report. Parties can appoint their own experts (or Technical Advisors), but such witnesses will have only a limited role in the litigation. Typically, the Technical Advisor will assist counsel in the preparation of technical legal issues and papers that will be submitted to the court with the suggestion that they be answered by the court-appointed expert. Significantly, because the court acts as the gatekeeper between the different experts, the court can decide which questions are appropriate.
6. Lastly, a practice that is common in some civil law jurisdictions is "confessionals," which is a practice that has its roots in the Spanish Inquisition. This procedure requires the appearance of a party before the court and the party is asked a series of leading questions related to the issues that frame the dispute. The only acceptable answers are either "yes" or "no." If a party answers "yes," then the issue is conclusively established for purposes of the case.

In short, discovery in Latin America is very restrictive because the court acts as a "gatekeeper" in the exchange of information between the parties. As such, the parties cannot engage in the "free-for-all" discovery that is common in the United States and some other common law jurisdictions.

III. Obtaining Discovery Through Other Means: 28 U.S.C. § 1782.

Another discovery option that parties to an international agreement should be mindful of is Section 1782 of the United States Code, which provides foreign litigants with a mechanism for obtaining all the benefits of the Federal Rules of

Civil Procedure, with virtually none of the drawbacks. The United States Congress created Section 1782 to "provide federal-court assistance in gathering evidence for use in foreign tribunals."[9] However, controversy continues to surround the breadth of the assistance that Section 1782 provides.[10]

The statute contemplates proceedings in a foreign or international tribunal where the tribunal itself, or an interested person, seeks discovery from a person who resides or is found within the United States. It allows a local federal district court to order the discovery sought according to the Federal Rules of Civil Procedure. The seminal case interpreting Section 1782 is *Intel v. Advanced Micro Devices*. In *Intel*, the United States Supreme Court discussed the statute's requirements, but also noted that Section 1782 "authorizes, but does not require, a federal district court to provide judicial assistance."[11] Thus, courts should proceed with a two-step inquiry: determine whether the necessary elements have been met, and, if so, determine whether the court should exercise its discretion to order the discovery.

A. Statutory Requirements

Courts have noted that Section 1782 imposes three necessary elements: (1) the party from which discovery is sought "resides or is found" within the district, (2) the party seeking the discovery is a foreign or international tribunal, or an "interested person," and (3) the discovery will be used in a "foreign or international tribunal."[12] Additionally, in *Intel* the Supreme Court disapproved two lower-court limitations on the statute. The Court noted that Section 1782 does not contain a "foreign-discoverability" requirement.[13] That is, the information sought need not be "discoverable" in the home country of the party seeking the discovery.[14] The Court also refused to limit the statute to allow judicial assistance only to "pending adjudicative proceedings."[15] Rather, Section 1782 requires only that a "dispositive ruling … be within reasonable contemplation."[16]

The residency requirement does not require the permanency and continuity elements as does a finding of domicile.[17] Indeed, a court need not even determine whether the party is a resident, so long as that party can be "found in" the district.[18] The "party-seeking-discovery" element is likewise broadly construed because the term "interested party" "reaches beyond the universe of persons designated 'litigant.'"[19]

The third element—what constitutes a "foreign or international tribunal"—is subject to more debate. The Second and Fifth Circuit Courts of Appeals previously held that the statute does not apply to arbitral tribunals.[20] But recently, courts have expanded the statute's application.[21]

Roz Trading is a controversial decision currently on appeal to the 11th Circuit Court of Appeals.[22] Relying on the reasoning of *Intel*, *Roz Trading* broke away from the rules announced by the Second and Fifth Circuits. In *Intel*, the Court noted in dicta that the term "tribunal" was a broad term and quoted with approval language that included "arbitral tribunals" within the term's meaning in Section 1782(a).[23] The court in *Roz Trading* also viewed the functionality of the arbitral tribunal, just as the Court in *Intel* viewed the functionality of the European Commission; both tribunals were "first-instance decision makers that issue decisions both responsive to the complaint and reviewable in court."[24] Moreover, statutory construction, common usage, and the widely-accepted definition of the term "tribunal" supported the court's reasoning that arbitral tribunals were indeed included in that term.[25] Thus, the court declined to follow the Second and Fifth Circuits because, in light of the Supreme Court's reasoning in *Intel*, the cases are no longer persuasive authority.[26]

B. Discretion of the Court

As the Supreme Court noted, "a district court is not required to grant a §1782(a) discovery application simply because it has the authority to do so."[27] Instead, the Court enumerated factors that a court should consider in deciding whether to exercise its discretion to order such discovery.

First, the Court noted that the need for the statute's assistance is generally greater when the discovery is sought from a non-participant in the matter.[28] A foreign tribunal has jurisdiction over participating parties and can order discovery from such parties, whereas a non-participant may be outside of the tribunal's jurisdiction and discovery may not be obtainable absent Section 1782.[29] Second, a court may take into account "the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court judicial assistance."[30] Third, courts may consider an opposing party's suggested "categorical limitations."[31] Specifically, the Court stated that a district court should consider whether a party is merely attempting to circumvent a foreign discovery restriction, and that courts may reject or modify unduly intrusive or burdensome requests.[32] Nevertheless, Section 1782 can be a very powerful tool in the arsenal of a non-U.S. party embroiled in a foreign dispute with a U.S.-based party, or a party found in the United States.

C. Implications for International Commercial Arbitrations

So what are the implications for international commercial arbitration? If approved, *Roz Trading* may have a profound impact on discovery before arbitral tribunals. Foreign parties to international commercial arbitrations will now have complete access to the discovery tools provided by the Federal Rules of Civil Procedure, without subjecting themselves to the same broad discovery per-

continued, next page

mitted under the rules. Needless to say, such opportunities create a potential for abuse.

For example, where a foreign party requests discovery from a U.S.-based party pursuant to the agreed-upon discovery rules and procedure, and the request is denied, the foreign party, using Section 1782, may be able to seek the un-obtained discovery from a district court in the United States. As such, the *Roz Trading* decision may provide a one-sided discovery advantage for foreign parties. For instance, Latin American countries generally have a restrictive approach to discovery whereas the United States has a very liberal approach. In an arbitration proceeding between parties from these regions, the Latin American party could potentially obtain discovery pursuant to the liberal United States rules through Section 1782, while allowing the restrictive approach of its home country to limit the opposing party's ability to obtain discovery.

While these concerns may exist, tribunals, parties, and their counsel can take steps to minimize this effect. First, as discussed above, *Intel* specifically allows a court to exercise discretion in deciding whether to order discovery. Just as the Court seemed to frown upon an attempt to circumvent a foreign-discovery restriction, so too would a court likely refuse to exercise its discretion to circumvent a denied-discovery request from an arbitral tribunal. And even if the party obtains the previously-precluded discovery, the circumvented arbitral tribunal may not be receptive to evidence obtained in such a manner. Also, parties can take preemptive steps by including a provision in their arbitration clause that precludes the use of evidence obtained through discovery procedures that fall outside the agreed upon rules and procedures.

The greater challenge, however, will be to minimize the impact of a party seeking discovery from a United States district court while enjoying the protection of its home country's discovery rules. In this case, the party opposing discovery is free to point out the potential for abuse of the discovery systems to the court. The "factors" enumerated for a courts' consideration in exercising discretion were not exhaustive. A party should take the opportunity to expose the one-sided discovery game that a requesting party is playing. Arguably, this concern is relevant to the "nature of the proceedings" factor, and should influence the court not to exercise its discretion.

IV. Conclusion and Final Observations.

In the end, there will never be a "one-size fits all" solution to discovery matters in international commercial arbitrations. The best outcome that parties and lawyers can hope for is to craft arbitration clauses that address the evidentiary needs they anticipate if a dispute arises. Clear and detailed arbitration clauses are encouraged in order to minimize the uncertainty and conflict that arises when dealing with discovery. As such, parties and their lawyers are encouraged to pay close attention to these issues while negotiating the contract.

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Endnotes:

1 The rules that are discussed in this section are not intended to be an exhaustive list, nor do we discuss the rules of all the major international arbitration institutions. Rather, this section is intended to provide a general overview of the discovery mechanics and procedures under the rules of some of the major international arbitration institutions.
2 *See, e.g.*, ICC Arb. Rules, Art. 20; ICDR Int'l Arb. Rules, Art. 19(2).
3 *See, e.g.*, *Tokios Tokeles v. Ukraine*, Case No. ARB/02/18, Jan. 18, 2005, Order No. 3 (discussing six letters sent by a claimant requesting the tribunal to "call upon" the respondent to produce documents; notably stating that one such request was "not a request for documents … but an interrogatory … [and] thus no action requested of this Tribunal").
4 Broad generalizations have been made when referring to Latin American jurisdictions because it would be beyond the scope of this paper to analyze the discovery rules and practice of each country in Latin America.
5 Fed. R. Civ. P. 26(b)(1).
6 *Id.* R. 26(b)(2)(C).
7 *See United States v. Proctor & Gamble Co.*, 356 U.S. 677 (1958); *Hickman v. Taylor*, 329 U.S. 494 (1947); *Krause v. Rhodes*, 671 F.2d 212 (6th Cir. 1982).
8 Because the testimony is offered without an oath, there is no action for perjury when a party provides false testimony. Interestingly, non-parties that are compelled to appear before the court are administered an oath and can be prosecuted for perjury if they are found to give false testimony.
9 *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 247 (2004).
10 *See* Garfinkel and Nelson, Sweet Georgia: *Roz Trading* Upholds the Use of Section 1782 in Aid of Foreign Private Arbitration, Mealey's Intl. Arbitration Report, vol. 22 (Jan. 2007).
11 *Intel*, 542 U.S. at 247.
12 *See, e.g.*, *In re Application of OxusGold PLC*, 2006 U.S. Dist. Lexis 74118, *11 (D.N.J. Oct. 10, 2006); *In re Application of Roz Trading Ltd.*, 469 F. Supp. 2d 1221, 1223 (N.D. Ga. Dec. 19, 2006).
13 *Intel*, 542 U.S. at 253.
14 *Id.* at 260.
15 *Id.* at 258.
16 *Id.* at 259.
17 *See Oxus Gold*, 2006 U.S. Dist. Lexis at *12.
18 *Id.* at *13 (stating that a party was "found in" New Jersey when he "stays in New Jersey at a property that he rents for a total of two months out of every year").
19 Intel, 542 U.S. at 258 (stating that AMD, as a complainant before the Commission of European Communities, triggered an investigation, has a significant role in the process, and "possess[es] a reasonable interest in obtaining [judicial] assistance,' and therefore qualifies as an 'interested person' within any fair construction of that term").
20 *Nat'l. Broad Co., Inc. v. Bears Stearns & Co.*, 165 F.3d 184 (2d Cir. 1999); *Kaz. v. Beidermann Int'l*, 168 F.3d 880 (5th Cir. 1999).
21 *See Intel supra* (allowing a federal court to assist a complainant in a European Commission competition proceeding); *Oxus Gold supra* (allowing discovery in an international arbitration between an investor and a state); *Roz Trading* (allowing discovery in an international commercial arbitration).
22 *See In re Roz Trading Ltd.*, 2007 U.S. Dist. Lexis 2112, *2 (N.D. Ga. Jan. 11, 2007).
23 *Roz Trading*, 469 F.Supp.2d at 1224-25.
24 *Id.* (internal quotation marks omitted).
25 *Id.* at 1225-26.
26 *Id.* at 1228.
27 *Intel*, 542 U.S. at 264.
28 *Id.*
29 *Id.*
30 *Id.*
31 *Id.*
32 *Id.* at 265.

rates - such as Germany and France. Implementing the policy of flexicurity, Denmark cut its unemployment figures by 50% within five years.

The Green Paper drawn up by the Commission highlighted the following issues:

1. The objectives of flexicurity.

The concept of flexicurity rests on the assumption that flexibility and security are not contradictory, but complementary and even mutually supportive. It brings together a low level of protection of workers against dismissals (indeed, most European countries do not have "at-will" employment) with high unemployment benefits and a labour market policy based on an obligation and a right of the unemployed to training.

The concept of "*job security"* is replaced by "*employment security."* Consequently, employees will not be guaranteed a permanent specific job, but they should have the security to easily move from one job to the next, while being protected with unemployment while they change jobs.

2. The necessity of combining greater flexibility with the need to maximize security for all.

The drive for flexibility has triggered increasingly diverse contractual forms of employment with lesser protection against dismissal to promote the entry of newcomers and disadvantaged job-seekers to the labour market (fixed-term, part-time, on-call, temporary work, freelance contracts, etc.). The changes in the work place create a need to provide for flexible and reliable contractual arrangements in order to allow companies and employees to adjust and remain productive.

3. The necessity of implementing modern social protection systems providing adequate income support during periods of unemployment.

Workers must have the security either to stay in their jobs or to be able to find a new one quickly, with the assurance of adequate income in-between jobs. Employees must also be assured that they can move easily into a job, but also between jobs. If companies must commit to do all that is necessary to improve employees' training and level, it will benefit both employees and their employers.

4. The possible obstacles

The implementation of flexicurity is based on social dialogue between employers and employees. People will have to re-think the way they comprehend work. As a consequence, while flexicurity sounds like the right answer to the challenges of today's accelerated economy, doubts arise as to the transferability of the concept to economies other than the Scandinavian ones where it was born. Indeed, on the one hand, such a tradition does not exist in many countries, such as in Central and Eastern Europe. These people will then need to introduce such mechanisms and adapt to it.

5. The Next steps towards flexicurity

The European Union Institutions, the European Union Member States and social partners should debate and reach, by the end of year 2007, a set of common principles adopted by the European Council.

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Endnotes:

1 Law n° 2007-1223 of August 21, 2007, *«Loi en faveur du travail, de l'emploi et du pouvoir d'achat»* so-called *« loi TEPA»*.

2 France is traditionally a *«proprietor»* country, in which constituting a real estate patrimony, in particular, remains essential.

3 Law n° 98-461 of June 13, 1998, *"Loi d'orientation et d'incitation relative à la réduction du temps de travail"* so-called *«Loi Aubry»* and law n° 2000-37 of January 19, 2000.

4 Law n° 2003-47 of January 17, 2003, law n° 2004-391 of May 4, 2004, law n° 2005-296 of March 31, 2005, and law n° 2005-882 of August 2, 2005.

5 "*Comité d'Entreprise*": this elected body is mandatory in each Company employing 50 employees or more.

6 For example, any restructuring is subject to the prior information and consultation of the Works Council.

7 Employees usually pay the equivalent of 25% of their gross salary as social charges to the State.

8 Directive of the Council of the European Union, n° 2000/78 of November 27, 2000

9 Law n° 2004-1486 of December 30, 2004 creating the High Authority Against Discrimination and For Equal Treatment («HALDE»)

10 4058 complaints received on 2006 against 1410 on 2005, which was the HALDE's first year of exercise.

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