606 US Employee Liability Outside the United States

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Marcelo E. Bombau

Marcelo Bombau is the head of the Mergers & Acquisitions, customs law and foreign trade, entertainment and high technology law departments of the firm.

Ever since joining M. & M. Bomchil he has been working on a number of relevant assignments, having participated very actively in the majority of the most important mass media reorganizations, sales and purchases which took place in Argentina in the past decade.

The merger and acquisition department has represented also a very important part of his work, advising on complex deals in different areas and participating actively in due diligences, negotiations, representations, structuring and execution of an important number of high profile businesses.

He usually advises foreign customers doing business in Argentina, being most of them leaders in their respective business segments. With the support of the firm's antitrust department, Mr. Bombau and the M. & A. team have been able to close a number of against-the-clock transactions, obtaining the appropriate approvals.

Mr. Bombau is a member of the board of directors of many local companies, and has been distinctly mentioned in "Euromoney's 2001 Legal Media Group," having contributed with the Argentine chapter for the edition published by the global counsel on merger and acquisitions, as well as the Argentine section of 2001 edition on e-commerce chapter on Getting the deal through published by the "Law Business Research."

Mr. Bombau obtained his degree as a lawyer in Universidad de La Plata.

Alfred R. Cowger

Alfred Cowger is general counsel of Dana Classic Fragrances, a small but international mass-market fragrance and cosmetic manufacturer. Mr. Cowger oversees Dana's legal activities worldwide, as well as managing Dana's IP portfolio, licensing and international distribution, and human resources, as well as overseeing some of Dana's product lines.

Prior to working for Dana, he worked as in-house counsel for Alcan Aluminum Corporation in Cleveland, Ohio, and also spent one year in Sofia, Bulgaria managing a legal reform program.

Mr. Cowger received his B.A. from Cornell University and his J.J. cum laude from Case Western Reserve School of Law.

Fiona Loughrey

Fiona Loughrey is partner, head of china employment group at Simmons and Simmons in Hong Kong.

Prior to (re)joining Simmons & Simmons, Ms. Loughrey was a partner at the Hong Kong office of another international law firm.

Ms. Loughrey is a frequent invitee speaker at conferences on employment issues both in Hong Kong and internationally, and is a contributor to a number of legal publications and journals. She has been described as "undoubtedly Hong Kong's best-known employment law specialist" who "enjoys an outstanding reputation among peers", (Asia Pacific Legal 500). Ms. Loughrey is named as the "leading" individual in Hong Kong and is said to be "One of Hong Kong's most highly regarded employment practitioners..." in the Global Counsel Labour & Employee Benefits Handbook. She is consistently recognized as a "leading individual" for employment law by both the Chambers Global and Asia Pacific Legal 500 legal directories, and is listed in the "Best of the Best" (Euromoney Expert Guides 2005). She has been named "hong kong labour lawyer of the year" at the China Staff Employment Awards. She is noted as the "leading individual" in employment and employee benefits matters for Hong Kong in The Global Counsel 3000; has consistently been named as a "leading [labour] lawyer" in Hong Kong by the Euromoney Expert Guide to Labour and Employment Lawyers; and is listed in The International Who's Who of Management Labour & Employment Lawyers.

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Personal Liability for Actions Undertaken in the Course of Employment—an Overview of non-U.S. Laws and Standards

By Alfred R. Cowger, Jr.

Most U.S. personnel being assigned to non-U.S. managerial positions are completely ignorant about the extent of their personal exposure to claims by shareholders and third parties in non-U.S. jurisdictions. Many managers have an innate understanding that they are shielding in the United States from business decisions they make by the Business Judgment Rule, even if they do not know its name. They also often assume their personal exposure to tort and criminal liability when acting in good faith is likewise limited, although this assumption is probably broader than it should be, even in the United States. They would be unpleasantly surprised to learn that their presumed immunity under Business Judgment Rule concepts is limited or non-existent, or even that their exposure should be analyzed in the reverse. They would be shocked to discover the myriad of statutory liability, in some cases strict liability, which could readily give rise to monetary and criminal claims against them. For this reason, the U.S. manager and the manager's in-house counsel should not presume that any U.S. principle of liability or business law would necessary be applicable should the U.S. manager be appointed a manager of a non-U.S. affiliate. In fact, it is imperative that local counsel brief U.S. personnel on their exposure to liability before beginning an assignment outside the United Stated.

Moreover, any U.S. personnel that believe they are escaping litigious America for the calm environment of non-U.S. business and legal environments should quickly be apprised of their ignorance. Directors, officers and managers around the world are becoming more concerned about their personal exposure. In the last two to three years, a majority of European directors and managers believe there has been an increase in their personal financial, legal and reputational risk arising from an increase in personal liability for business decisions. Heidrick & Struggles, "Board Insights 2004", http://www.heidrick.com/NR/rdonlyres/3F7E256C-4880-4703-9BC1-EDC3942841E5/0/CBME_BoardInsights2004.pdf, p. 8. Even in Germany:

> "It used to be basically a country-club atmosphere, says Florian Schilling, managing partner of Heidrick & Struggle's European Board Practice in Frankfurt. "Now we are moving at considerable speed into a very professional, demanding environment, with high visibility, greatly increased liability, and a much greater workload."

Id at p. 9. In other words, the increased exposure about which U.S. managers fret will not be left behind simply by an assignment outside the United States.

Because the analysis below is only a broad review of liability issues, some caveats are in order. First, the author has rather loosely used terms such as "director" and "manager". The actual definition of these terms, and the responsibilities and exposure related to these positions, varies widely from country to country. In fact, U.S. personnel should NOT assume that the term "director" as used in the cited materials necessarily means a member of the Board of Directors as that term would be used in the United States. Furthermore, in many jurisdictions, liability arises if a person has managerial responsibilities over a company, regardless of his or her actual title (sometimes referred to as a "shadow director". Thus, for purposes of considering exposure, senior managers of non-U.S. operations should consider themselves potentially to be "directors" or "managers" (or even "managing directors") under local law.

Finally, this presentation is meant to raise issues so U.S. personnel and their counsel are sensitive to these issues, and know enough to ask questions of local counsel.

It is not intended to be a substantive country-by-country review. Furthermore, the statutes cited are often in state of flux, as countries continually modernize and harmonize their legal doctrines in the face of increasing international trade and investment, as well as pressure from international institutions such as the International Monetary Fund. As such, the statute citations and analysis cited should be considered examples of what a manager faces statutorily, not complete, definitive discussion of those statutes or their ramifications.

I. The Business Judgment Rule vs. Other Standards of Care.

Perhaps the foremost basis of liability, or immunity therefrom, arises in the context of managerial decisions, and how those decisions affect a manager's company, its shareholders and third parties. U.S. lawyers and some managers are quite familiar with the common law "Business Judgment Rule", whereby a manager cannot be held liable for decisions that:

a. were made in good faith;
b. were not the result of personal interest or bias;
c. were made after the manager took reasonable steps to be informed about the subject matter of the judgment; and,
d. rationally believed the judgment was in the best interest of the company.

Bridge Point Communications Pty Ltd., "Information Security: Corporate and Individual Liability" (October 2001), http://www.bridgepoint.com.au/Portals/0/PDF%20Docs/liabilitypaper.pdf, p. 10. Furthermore, most U.S. lawyers and managers understand that the Business Judgment Rule requires a court to give broad deference to the decisions of a manager, and thus the burden of proof and legal presumptions are in favor of the business manager.

In some cases, most often those jurisdictions that have a similar common law tradition, the Business Judgment Rule has been adopted. See, e.g., id. (Australia); Jane Burke-Robertson, "Primer for Directors of Not-For-Profit Corporations" (2002), http://strategis.ic.gc.ca/epic/internet/incilp-pdci.nsf/en/cl00692e.html#2 [Industry Canada official website], Chapter 2; "Managing the Playhouse", *The Economist* (April 20, 2006), reprinted at http://www.economist.com/world/britain/displaystory.cfm?story_id=6837402 (England).

Even in some non-common law countries, in particular some formerly Communist era countries without modernized business laws, standards similar to the Business Judgment Rule have arisen, perhaps by default due to a lack of statutory requirements to the contrary. See CMS, "Duties and Responsibilities of Directors in Europe" (2005), www.cmslegal.com/uploads/1429/Directors%20Duties%20sept%2005.pdf, p. 48 [discussing Russian law]:

> When considering the liability of a General Director or other officer the Court should take into account the normal conditions of business in the industry concerned, as well as any other relevant circumstances.

The same cannot be said in other countries, in particular civil law jurisdictions. It is true that in some civil law jurisdictions, a lack of statutory standards or restrictions resulted in almost complete authority and discretion being granted to managers. It was said in France that the "President directeur général—PDG—was subject to some criticism, and certain persons did not hesitate to compare him to a monarch governing by divine right with absolute powers." Klaus Hopt *et al.*, "European Corporate Governance in Company Law and Codes", http://corpgov.nl/page/downloads/Final%20Report2.pdf, p. 12 (2004). Similarly, in other jurisdictions the standards were so vague and the civil

procedure available to claimants so limited that the standards that did exist were not effectively enforceable. Id. at p. 33 (Italy).

Because the Business Judgment Rule itself was not originally part of traditional civil law, it has been adopted only sporadically in more recent years. In some of those cases, this adoption has often been by general statute, without specific directives. See, e.g., Lawrence Liu, "Country Report for the Role of Board Directors and Supervisors in Chinese Taipai" (2001), www.oecd.org/dataoecd/ 6/11/1873058.pdf, p. 17. In other cases, the statute has been very similar to the Business Judgment Rule, with the effect that liability for business decisions has rarely been found except in the case of "serious negligence". Nauta Dutilh, "Directors and Officers Liability in the Netherlands", www.aiu.com/aiu/PDF/Netherlands.pdf, §3.2(a), pp. 4-5.

Nonetheless, the Business Judgment Rule has been slow to spread to civil law jurisdictions, and in fact, many civil law jurisdictions have adopted statutory standards that subject a manager to liability, and either specifically do not give the manager the discretion and thus immunity of the Business Judgment Rule, or have created standards that are so vague as to give courts wide latitude to adjudge liability, in direct contrast to the deference required of U.S. courts. An example of the latter is in Belgium. Under Article 527 of the Belgian Commercial Companies Code, a director is individually liable if the director fails to exercise "reasonable care" in the management of the company, without a clear definition of what reasonable care entails. In fact, this liability can be imposed upon the director by a vote of the shareholders. CMS at p. 10. Moreover, under Article 528 directors will be jointly for the actions of their other directors unless they did not participate in the violation of reasonable care and specifically reported the breach to the shareholders at the general meeting. Id.

This liability arising out of a somewhat lack of "reasonable care" or "due care", without more specific definitions, and the joint liability for the likewise vaguely defined "mismanagement" by others, can be found in other jurisdictions as well. For example, in Portugal it has been observed that:

> "The degree of diligence required [in Article 64 of the Portuguese Companies Code] is not easily determined. In practice, the degree of diligence varies not only in relation to the circumstances under which the Director or Manager act, but also in respect of the nature of the act and its purpose. It is only in light of a particular case that it can be determined, based on the conduct of the Director or Manager, whether they acted with such diligence as was required and appropriate.

Maria Clara Lopes and Bruno Pina, "Directors, Officers and Managers Personal Liability: The Legal Position in Portugal, www.aiu.com/aiu/PDF/Portugal.pdf, §3.2. Moreover, it should not be assumed that the judgment will be actionable only if it rises to the level of gross negligence or fraud, since the law does not state this, and thus negligent conduct could be deemed an adequate legal basis for finding a violation of Article 64. Id. at §3.3.

The vague standards of what defines a director's duty of care extends to many other countries. Often, the duty of care varies depending on the size of the company and other subjective characteristics. Herguner, Bilgen & Ozeke, "Directors' and Officers' Liability in Turkey", www.aiu.com/aiu/PDF/Turkey.pdf, §3.5 at p. 5. See also CMS at 18 (France); Liu at 17; T.G. Kommatas & Associates, "Directors, Officers and Managers Liability—The Legal Position in Greece, www.aiu.com/aiu/PDF/Greece.pdf, p. 5; Erik Stenberg, "Directors, Officers and Managers Liability: The Legal Position in Switzerland", www.aiu.com/aiu/PDF/Switzerland.pdf, p. 5 As a result, this liability is, in essence, the reverse of the Business Judgment Rule—rather than wide deference given to

the manager's decisions, the manager is subject to liability for violation of a vague standard. To further complicate matters, in some jurisdictions, if the actions of a manager or director has resulted in some harm or loss to the company, the actions are presumed to be a violation of the duty of care, and the burden of proof actually shifts to the individual. Herguner *et. al.* at §3.9, pp. 6-7 (Turkey).

It should be noted that the World Bank and IMF have made adopting a business judgment rule one standard by which countries are adjudged to have adequate corporate legal systems. As a result, the World Bank has been critical of countries which do not have a clear business judgment rule. See, e.g., Alexander Berg and Tatiana Nenova, "Report on the Observance of Standards and Codes (ROSC): Corporate Governance Country Assessment JORDAN" (2004), www.worldbank.org/ifa/jor_rosc_cg.pdf, p. 14; Sucre, Arias and Reyes, "Report on the Observance of Standards and Codes (ROSC): Corporate Governance Country Assessment PANAMA" (2004), www.worldbank.org/ifa/rosc_cg_pan.pdf, p. 13.

However, even the Business Judgment Rule has been subject to recent attack and restriction. One need only consider the U.S. adoption of the Sarbanes-Oxley bill. Even in the motherland of the Rule, England, Parliament is now considering the Company Law Reform Bill, which:

> proposes to charge directors with more than safeguarding the financial interests of the companies they serve. They will also have to keep in mind their employees, customers and suppliers, as well as nurture communities and the environment. And the bill makes it easier for shareholders to sue wayward directors.
>
> Critics, generally from business, warn that together these revisions threaten to release a torrent of litigation as suppliers, customers, environmentalists and others ask the courts to reverse company decisions. The mere threat of such suits may gum up board meetings as directors pay more attention to protecting themselves from legal action and less to doing what they get paid to do—taking risky decisions that may sometimes prove wrong.

The Economist, supra. Thus, U.S. personnel assuming managerial duties of non-U.S. entities should be informed that the Business Judgment Rule, at least as they might understand it, is either limited or soon to be limited in other jurisdictions, or in fact does not exist at all, such that the manager's liability and immunity is actually the reverse of the standards the manager has come to know in the United States.

II. Other Grounds for Liability to Third Parties

A. Contract Liability

In some instances, a manager or director can be found personally liable for a breach of contract with a third party caused by that manager or director. For example, in the Czech Republic, this liability arises without the need to show intentional or even negligent behavior on the part of the manager. CMS at p. 14.

B. Liability for Personal Injury or Other Torts

Even though some U.S. personnel forget they can have tort liability arising from their managerial actions, it has long been the standard in common law countries that directors and managers are liable for their tortious conduct which causes harm to third parties, even if the conduct was done in good faith in pursuit of corporate goals. Glenn Leslie and Paul Schabas, "Canada: Personal Liability for Corporate Torts and Crimes" (September 2004), www.mondaq.com/article.asp?articleid=28317&searchresults=1, p. 1. See also Nauta Dutilh at § 5.2, p. 8. However, in some jurisdictions, this liability extends to being strictly liable for injuries to employees from work-related accidents, T.G. Kommatas at. 8 (Greece).

C. Liability to Creditors

Managers and directors can find themselves personally liable to the creditors of the company in many civil law jurisdictions if the company experiences financial problems, and the managing personnel has failed to abide by statutory requirements. The first such statutory requirement is the minimum capital required to be maintained by a company. For example, in the European Union, the Second Company Directive requires public companies to maintain a minimum capital of not less than €25,000, and more if so established by the company articles of incorporation. Christoph Van der Elst, "Economic Analysis of Corporate Law in Europe: An Introduction" (Financial Law Institute 2002), www.law.ugent.be/fli/WP/WP2002-pdf/WP2002-01.pdf, p.7. If a director allows the company to fall below this minimum, such as by issuing a dividend to a parent company, the creditors can seek compensation directly from the responsible directors. See also CMS at p. 24 (Germany). Furthermore, if a director fails to call a shareholders meeting to raise additional capital in the face of corporate losses, the director can be liable to creditors due to this failure. Id. at p. 33 (Italy).

A second statutory requirement which could give rise to personal liability involves the registration and reporting of information to governmental authorities. Most civil law countries have a Corporate Registry, or similar department, to which a wide variety of corporate information and actions must be reported, such as the name of managers and directors, changes to company articles of incorporation or bylaws and those named to be corporate agents of the company. Any failure to keep this information accurate and updated, such that a third party can claim it relied to its detriment on this information, can give rise to strict liability to the manager or director. E.g., Allen & Overy at p. 33 (Hungary). Thus, the tendency of U.S. personnel to let such "details" fall to its counsel or accountants could cause them much grief.

Statutory requirements surrounding insolvency and filing bankruptcy can also make a director individually liable if that person fails to follow the specifications of the statute. For example, in Belgium, company directors will be personally liable if they do not file for bankruptcy in "due time". Van der Elst at p. 10. See also CMS at 14 (Czech Republic); Allen & Overy, "Corporate Governance in Central and Eastern Europe" (2005), www.allenovery.com/AOWeb/binaries/26997.pdf, p. 11 (Poland); In some jurisdictions, statutes set a specific time limit for filing bankruptcy. Id. at 18 (Germany time limit of three weeks).

Furthermore, in many jurisdictions bankruptcy could expose a director to personal liability for his violation of a statutory standard of care that contributed to the bankruptcy. This standard of care may be "gross negligence" as in Belgium, CMS at p. 10, or merely "negligent management" as in Italy. CMS at p. 33. Indeed, in some jurisdictions, if the actions of the officers or directors led to the insolvency, they can be liable to creditors, and it does not matter what the standard of care was, so long as the actions caused the insolvency. See Hopt at p. 19 (France).

Under the insolvency provisions of many civil law jurisdictions, a manager or director will face personal liability to creditors for company debts owed to them if he or she continues to contract or otherwise trade with the creditors after the moment he or she knew or should have known the company was insolvent. Times Online, "Ask the Experts: Fiduciary Liability" (2003), http://business.timesonline.co.uk/article/0,9929-710512,00.html, p. 1. This imputed knowledge can go back several years. Id.

Moreover, the definition of "insolvency" can be very different under local codes than the manager might have assumed based on U.S. financial principles.

III. Criminal Liability

Perhaps the worst surprise to a manager could be the knock on the office door by local police or prosecutors, with the intention of arresting the manager for a crime the manager did not even realize was considered a crime. Not only does the manager risk significant prison sentences and fines if convicted of these crimes, but the manager first faces potential long incarceration prior to trial, depending on the jurisdiction, and a court system which has not adopted the criminal procedures or even burdens of proof which a U.S. manager had learned from a decade of watching "Law & Order" on television. Thus, U.S. personnel must be extremely sensitive to what actions could result in criminal liability, and in fact should never assume that a wrong caused by them would solely be a civil action resulting in monetary damages, from which the personnel would simply seek indemnification from his or her employer.

A. Violation of Health and Safety Statutes

Many jurisdictions have enacted legislation that makes any employee responsible for safety and health oversight personally criminally responsible for a violation of safety and health standards, including environmental laws and worker safety laws. In some instances, the employee is actually subject to measures that would not be applicable to the employer company. Felice Morgenstern, "Civil and Criminal Liability in Relation to Occupational Safety and Health" (1982), www.ilo.org/encyclopedia/?print&nd=857400103, p. 1. Furthermore, in some countries, such as Italy, it is actually common practice to prosecute managers for serious injury caused to third parties by the company managed by those individuals. Celia Wells, "Corporate Manslaughter: Reforming the Law (Part B): Part 3: Corporations and the Risk of Criminal Liability" (2002), http://www.freedomtocare.org/ page166.htm#corporate%20manslaughter%202, Section 3, originally printed in The Whistle (Bulletin of Freedom to Care, ISSN 0969-2118), No. 10 (April 1996). The violation of the law need not be intentional or knowing on the part of the manager, but rather mere negligence in performing the manager's duties that result in the violation could subject the manager to criminal liability. See, e.g., Allen & Overy at p. 23 (Czech Republic) and at p. 12 (Poland).

B. Economic Crimes; Crimes Related to Insolvency and/or Bankruptcy

Managers and directors must understand that if their actions lead to losses by the government or their creditors they can be found criminally liable for violating economic crimes. See, e.g. CMS at p. 14 (Czech Republic); Id. at p.18 (France); Allen & Overy at p. 13 (Poland). Even the failure to file for bankruptcy within the statutory time requirements (which may be nothing more than an "appropriate" time) will expose directors to criminal as well as monetary liability. Id. at p. 12; CMS at p. 24 (Germany). In fact, in some jurisdictions, the criminal liability is significant. For example, in Portugal, the mere "negligent conduct which also prevents honouring the Company's obligations towards its creditors" may result in "the Directors may be sentenced up to one year or to a daily fine of up to 60 days … varying between €1 and €498.79. Lopes at § 3.6.

C. Crimes Arising from Tortious Behavior--Defamation

The final area of criminal liability which might be a bitter surprise to managers involves crimes which have nothing to do with a manager's obligations to run a company in a safe and economic manner, and in the United States would be considered purely civil matters, and thus would be resolved, at most, by litigation between the manager and the aggrieved party. The primary example of this would be a claim of defamation. Although many Western European countries have done away with the concept of criminal defamation, this concept is still very much alive in other countries, in particular, but not necessarily only, those countries for which this concept was (if not currently) a tool by the government to control and quash complaints against public officials or their business cronies.

Under these criminal statutes, a person may be charged with a crime of defamation for a publicly made utterance that has caused harm to the reputation of a legal person and is false. The liability can arise for the intentional or negligent dissemination of the utterance, and even if the defamed person is deceased, the next of kin may press charges. See, e.g., the Law on Protection Against Defamation of the Federation of Bosnia and Hezegovina, Article 6. Under these laws, a manager who makes a negative statement about a competitor to a potential customer, or who complains about the actions of a public official, may find himself in jail awaiting prosecution for criminal defamation. Furthermore, because the actual standards under many of these laws about what constitutes a false statement that causes harm, and what immunities attach to such statements on grounds of public policy, a prosecutor and judge have uncomfortably broad discretion for determining the guilt of the charged manager. As a result, U.S. managers have to understand their aggressive behavior outside the United States, whether in the name of competition or defending a company against governmental misconduct, can lead to jail cell rather than a monetary judgment.

Managers should not ignore criminal defamation liability just because they are not based in a former Soviet Bloc country or a current dictatorship. For example, in Japan, one commentator has noted that "[d]efamatory statements usually lead to the criminal liability as well as civil liability. Shigenori Matsui, "The ISP's Liability for Defamation on the Internet—Japan", www.iias.or.jp/old/res_houmodel/20021129/ 820Matsui.pdf, p. 2 (2002). In fact, as the use of the Internet has increased, so too has criminal prosecution in Japan for defamatory statements made via the Internet. Id., p. 3. Thus, managers must understand completely their exposure to criminal charges for statements made outside the United States that inside the United States would be protected speech, or at the most subject them to civil monetary damages.

IV. Limiting Liability or Exposure

Non-U.S. jurisdictions offer limited, but viable, means for limiting personal liability. In many jurisdictions, a director or manager's potential liability to the corporation or its shareholders will be forever negated by a resolution passed at a shareholder meeting. See, e.g., CMS at p. 11 (Belgium Commercial Companies Code, Article 554); Id. at p. 24 (Germany). Likewise, some jurisdictions permit a company to guarantee or indemnify its personnel against all liability but that arising from intentional fault or fraud, although this guarantee does not extend to criminal fines. Id.; T.G. Kommatas at 14 (Greece); Nauta Dutilh at §5, pp. 8-9 (Netherlands). However, others, for example France, prohibit the limitation of liability by a company of its directors or

managers. CMS at p. 18 (France). Finally, many jurisdictions allow a company to obtain D & O insurance on behalf of managers and directors. Id. at p. 24 (Germany); Nauta Dutilh at §6, pp. 9-11; T.G. Kommatas at 14 (Greece). Indeed, in many jurisdictions, "[d]ue to the frequency and the severity that claims against Directors, Officers and Managers may have and given the negative impact of such (especially if successful) claims on both the company and the Directors, etc., D&O insurance coverage has become nowadays essential". Id.

"U.S. Employee Liability Outside the United States"

General Outline

I. Practical Considerations for U.S. citizens Being Transferred Outside the United States (Marcelo E. Bombau, Partner, The Bomchil Group)

A. CORPORATE. FOREIGN EXCHANGE

1. Investments through: (a) companies (flow-through structure), or (b) agreements. Boards: (i) majority with residence in Argentina, and (ii) need to pay an insurance for the coverage of their duties. Limitations on offshore companies.

2. Limitations on transfer of money abroad for the payment of profits and dividends and the purchase of foreign currency by non-Argentine residents.

B. IMMIGRATION. IMPORTS

1. Immigration permits requirements for the expatriate and his family. Attribution of liabilities in case of worker without labor visa.

2. Restrictions on imports of goods/personal property.

C. LABOR

1. Differences on the expatriates´ treatment (payroll vs. autonomous worker). 2.
2. Exemptions on social security payments for expatriates.

D. TAX

1. Tax identification number requirement.
2. Individual Tax liability, e.g. country-source income vs. worldwide income for taxation purposes. Examle: Expatriates who stay in Argentina for working purposes for a maximum of a 5-year period are deemed to be "non-residents" for tax purposes (thus only subject to tax on Argentine-source income). "Residents" pay on worldwide income.
3. Foreign companies tax liability: payment of country-source income subject to withholding tax.

E. JUDICIAL

1. Reorganization proceedings: information to the court for travelling outside the country. Bankruptcy proceedings: (i) request of authorization from the court for travelling outside the country, (ii) disqualification for a 1-year period (i.e. for being director), and (iii) personal liability for damages caused to the employer through fraud or willful misconduct.

II. U.S. Laws Applicable to U.S. citizens Working Outside the United States (Terry Sobnosky, Associate General Counsel, Applied Industrial Technologies)

A. Extra-territorial application of U. S. employment laws.

1. Title VII of Civil Rights Act of 1964
2. Americans with Disabilities Act
3. Age Discrimination in Employment Act
4. Single employer test – EEOC
5. "Foreign laws" defense
6. Dual coverage protection

B. FCN treaties and protections

C. Foreign Sovereign Immunity Act

D. Foreign Corrupt Practices Act

F. Trading with embargoed countries

G. Offshore employment laws and practices

1. Mandatory severance
2. Mandatory retirement
3. Different/expanded discrimination laws
4. What is "cause"?

H. Privacy Issues
1. EU Directive
2. Safe Harbor principles

I. Insurance and indemnification issues

III. Personal Liability for Actions Undertaken in the Course of Employment—non-U.S. Laws and Standards (Alfred R. Cowger, Jr., General Counsel, Dana Classic Fragrances)

A. The Business Judgment Rule vs. Other Standards of Care
1. Existence in common law countries
2. Adoption by other countries
3. Civil law jurisdictions—standard is reversed!
a. Rather than subjective standard protecting employee, vague standard can be applied subjectively by Court against employee.
b. Burden of proof is against employee, not in favor of employee.
c. Joint and several liability of directors/managers for actions taken by cohorts in violation of standard.
d. Weakening of Business Judgment Rule protections even in common law countries.

B. Other Grounds for Liability to Third Parties

1. Contract liability for contracts entered into by manager or breached due to managers actions.
2. Liability for personal injury or other torts: potential for strict or vicarious liability.
3. Liability to creditors
a. arising from violation of statutes related to minimum capital, filing requirements, and other "administrative" or "technical" requirements.
b. arising from violations of duties in light of insolvency/bankruptcy.
c. violations of statutory management standards leading to bankruptcy.
d. continue to trade with creditors after company insolvent.

C. Criminal Liability

1. Health, Safety, Environmental Law violations resulting in criminal liability (with or without intent or knowledge)
2. Criminal liability for insolvency of company
3. Criminal liability for tortious activity never considered criminal in the U.S., e.g. defamation

D. Indemnification/Insurance Against Personal Liability

1. Waiver by shareholder action
2. Indemnification by company
a. sometimes completely barred
b. sometimes limited to negligence and non-criminal acts
c. sometimes unlimited
3. D&O insurance: an increasingly necessary "employee benefit".

IV. Personal liability issues in less developed legal systems (Fiona Loughrey Partner, Head of China Employment Group, Simmons & Simmons)

A. Personal liability issues.

B. Contract rights and obligations limited territorily

C. Choice of Law (regardless of what was stipulated in employment contract)

D. Extradition Issues for Criminal Charges

ACC outline: Liability for laws outside US etc
Introduction
Actions of employees (especially directors, managers and other seniors) can attract liability arising under non-US laws. This potential is in our experience [ie as employment lawyers advising multiple US and other non-Asian based groups/employers with interests in Hong Kong/PRC/elsewhere in Asia] not always anticipated or fully understood. It is very important to ask the right questions.
Examples
Examples/types of liability to which managers who work on or with non-US operation need to be alerted:

- NB personal liability

Hong Kong and all other common law jurisdictions distinguish between vicarious and individual liability. This is very important in the context of anti-discrimination laws: regularly, complainants challenge both the corporate employer and the individual manager. (Separate legal advice then needed.) No "business interests" defence.
[Personal liability may also arise under some civil law jurisdictions – to be checked]

- Legislation/contracts may not be limited territorially
- Conflicts: could have an employment contract stated to be governed by a US law; but performed in example Hong Kong or China – this is common. Discuss non-US employment laws which apply. Can mean eg termination "at will" not permitted.
- Directors' liability – if appointed as director (or officer) could be liable

[Note: directors and officers insurance possible, will mention.]

- "Nat West Three" – extradition by UK? to US: this is topical; the move attracted huge [negative] publicity in UK [eg June to August 2006]
- Corporate manslaughter – in serious cases of personal injury or death, potential for individual liability

Hypothetical scenarios/case studies
Steps to take

- training (all levels)
- policies/employee handbooks – global standard?
- ethical issues ("confidential" disclosures; company responsible for individual perpetrator? Indemnities?)

[As of July 22, 2004]

ANTI-BRIBERY AND BOOKS & RECORDS PROVISIONS OF THE FOREIGN CORRUPT PRACTICES ACT

Current through Pub. L. 105-366 (November 10, 1998)

UNITED STATES CODE

TITLE 15. COMMERCE AND TRADE

CHAPTER 2B--SECURITIES EXCHANGES

§ 78m. Periodical and other reports

(a) Reports by issuer of security; contents

Every issuer of a security registered pursuant to section 78l of this title shall file with the Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate for the proper protection of investors and to insure fair dealing in the security--

(1) such information and documents (and such copies thereof) as the Commission shall require to keep reasonably current the information and documents required to be included in or filed with an application or registration statement filed pursuant to section 78l of this title, except that the Commission may not require the filing of any material contract wholly executed before July 1, 1962.

(2) such annual reports (and such copies thereof), certified if required by the rules and regulations of the Commission by independent public accountants, and such quarterly reports (and such copies thereof), as the Commission may prescribe.

Every issuer of a security registered on a national securities exchange shall also file a duplicate original of such information, documents, and reports with the exchange.

(b) Form of report; books, records, and internal accounting; directives

* * *

(2) Every issuer which has a class of securities registered pursuant to section 78l of this title and every issuer which is required to file reports pursuant to section 78o(d) of this title shall--

(A) make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer; and

(B) devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that--

(i) transactions are executed in accordance with management's general or specific authorization;

(ii) transactions are recorded as necessary (I) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and (II) to maintain accountability for assets;

(iii) access to assets is permitted only in accordance with management's general or specific authorization; and

(iv) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.

(3) (A) With respect to matters concerning the national security of the United States, no duty or liability under paragraph (2) of this subsection shall be imposed upon any person acting in cooperation with the head of any Federal department or agency responsible for such matters if such act in cooperation with such head of a department or agency was done upon the specific, written directive of the head of such department or agency pursuant to Presidential authority to issue such directives. Each directive issued under this paragraph shall set forth the specific facts and circumstances with respect to which the provisions of this paragraph are to be invoked. Each such directive shall, unless renewed in writing, expire one year after the date of issuance.

(B) Each head of a Federal department or agency of the United States who issues such a directive pursuant to this paragraph shall maintain a complete file of all such directives and shall, on October 1 of each year, transmit a summary of matters covered by such directives in force at any time during the previous year to the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate.

(4) No criminal liability shall be imposed for failing to comply with the requirements of paragraph (2) of this subsection except as provided in paragraph (5) of this subsection.

(5) No person shall knowingly circumvent or knowingly fail to implement a system of internal accounting controls or knowingly falsify any book, record, or account described in paragraph (2).

(6) Where an issuer which has a class of securities registered pursuant to section 78l of this title or an issuer which is required to file reports pursuant to section 78o(d) of this title holds 50 per centum or less of the voting power with respect to a domestic or foreign firm, the provisions of paragraph (2) require only that the issuer proceed in good faith to use its influence, to the extent reasonable under the issuer's circumstances, to cause such domestic or foreign firm to devise and maintain a system of internal accounting controls consistent with paragraph (2). Such circumstances include the relative degree of the issuer's ownership of the domestic or foreign firm and the laws and practices governing the business operations of the country in which such firm is located. An issuer which demonstrates good faith efforts to use such influence shall be conclusively presumed to have complied with the requirements of paragraph (2).

(7) For the purpose of paragraph (2) of this subsection, the terms "reasonable assurances" and "reasonable detail" mean such level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs.

* * *

<§ 78dd-1 [Section 30A of the Securities & Exchange Act of 1934].

Prohibited foreign trade practices by issuers

(a) Prohibition

It shall be unlawful for any issuer which has a class of securities registered pursuant to section 78l of this title or which is required to file reports under section 78o(d) of this title, or for any officer, director, employee, or agent of such issuer or any stockholder thereof acting on behalf of such issuer, to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to--

(1) any foreign official for purposes of--

(A) (i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage; or

(B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person;

(2) any foreign political party or official thereof or any candidate for foreign political office for purposes of--

(A) (i) influencing any act or decision of such party, official, or candidate in its or his official capacity, (ii) inducing such party, official, or candidate to do or omit to do an act in violation of the lawful duty of such party, official, or candidate, or (iii) securing any improper advantage; or

(B) inducing such party, official, or candidate to use its or his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality.

in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person; or

(3) any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office, for purposes of--

(A) (i) influencing any act or decision of such foreign official, political party, party official, or candidate in his or its official capacity, (ii) inducing such foreign official, political party, party official, or candidate to do or omit to do any act in violation of the

lawful duty of such foreign official, political party, party official, or candidate, or (iii) securing any improper advantage; or

(B) inducing such foreign official, political party, party official, or candidate to use his or its influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person.

(b) Exception for routine governmental action

Subsections (a) and (g) of this section shall not apply to any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official.

(c) Affirmative defenses

It shall be an affirmative defense to actions under subsection (a) or (g) of this section that--

(1) the payment, gift, offer, or promise of anything of value that was made, was lawful under the written laws and regulations of the foreign official's, political party's, party official's, or candidate's country; or

(2) the payment, gift, offer, or promise of anything of value that was made, was a reasonable and bona fide expenditure, such as travel and lodging expenses, incurred by or on behalf of a foreign official, party, party official, or candidate and was directly related to--

(A) the promotion, demonstration, or explanation of products or services; or

(B) the execution or performance of a contract with a foreign government or agency thereof.

(d) Guidelines by Attorney General

Not later than one year after August 23, 1988, the Attorney General, after consultation with the Commission, the Secretary of Commerce, the United States Trade Representative, the Secretary of State, and the Secretary of the Treasury, and after obtaining the views of all interested persons through public notice and comment procedures, shall determine to what extent compliance with this section would be enhanced and the business community would be assisted by further clarification of the preceding provisions of this section and may, based on such determination and to the extent necessary and appropriate, issue--

(1) guidelines describing specific types of conduct, associated with common types of export sales arrangements and business contracts, which for purposes of the Department of Justice's present enforcement policy, the Attorney General determines would be in conformance with the preceding provisions of this section; and

(2) general precautionary procedures which issuers may use on a voluntary basis to conform their conduct to the Department of Justice's present enforcement policy regarding the preceding provisions of this section.

The Attorney General shall issue the guidelines and procedures referred to in the preceding sentence in accordance with the provisions of subchapter II of chapter 5 of Title 5 and those guidelines and procedures shall be subject to the provisions of chapter 7 of that title.

(e) Opinions of Attorney General

(1) The Attorney General, after consultation with appropriate departments and agencies of the United States and after obtaining the views of all interested persons through public notice and comment procedures, shall establish a procedure to provide responses to specific inquiries by issuers concerning conformance of their conduct with the Department of Justice's present enforcement policy regarding the preceding provisions of this section. The Attorney General shall, within 30 days after receiving such a request, issue an opinion in response to that request. The opinion shall state whether or not certain specified prospective conduct would, for purposes of the Department of Justice's present enforcement policy, violate the preceding provisions of this section. Additional requests for opinions may be filed with the Attorney General regarding other specified prospective conduct that is beyond the scope of conduct specified in previous requests. In any action brought under the applicable provisions of this section, there shall be a rebuttable presumption that conduct, which is specified in a request by an issuer and for which the Attorney General has issued an opinion that such conduct is in conformity with the Department of Justice's present enforcement policy, is in compliance with the preceding provisions of this section. Such a presumption may be rebutted by a preponderance of the evidence. In considering the presumption for purposes of this paragraph, a court shall weight all relevant factors, including but not limited to whether the information submitted to the Attorney General was accurate and complete and whether it was within the scope of the conduct specified in any request received by the Attorney General. The Attorney General shall establish the procedure required by this paragraph in accordance with the provisions of subchapter II of chapter 5 of Title 5 and that procedure shall be subject to the provisions of chapter 7 of that title.

(2) Any document or other material which is provided to, received by, or prepared in the Department of Justice or any other department or agency of the United States in connection with a request by an issuer under the procedure established under paragraph (1), shall be exempt from disclosure under section 552 of Title 5 and shall not, except with the consent of the issuer, be made publicly available, regardless of whether the Attorney General responds to such a request or the issuer withdraws such request before receiving a response.

(3) Any issuer who has made a request to the Attorney General under paragraph (1) may withdraw such request prior to the time the Attorney General issues an opinion in response to such request. Any request so withdrawn shall have no force or effect.

(4) The Attorney General shall, to the maximum extent practicable, provide timely guidance concerning the Department of Justice's present enforcement policy with respect to the preceding provisions of this section to potential exporters and small businesses that are unable to obtain specialized counsel on issues pertaining to such provisions. Such guidance shall be limited to responses to requests under paragraph (1) concerning conformity of specified prospective conduct with the Department of Justice's present enforcement policy regarding the preceding provisions of this section and general explanations of compliance responsibilities and of potential liabilities under the preceding provisions of this section.

(f) Definitions

For purposes of this section:

(1) A) The term "foreign official" means any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.

(B) For purposes of subparagraph (A), the term "public international organization" means--

(i) an organization that is designated by Executive Order pursuant to section 1 of the International Organizations Immunities Act (22 U.S.C. § 288); or

(ii) any other international organization that is designated by the President by Executive order for the purposes of this section, effective as of the date of publication of such order in the Federal Register.

(2) (A) A person's state of mind is "knowing" with respect to conduct, a circumstance, or a result if--

(i) such person is aware that such person is engaging in such conduct, that such circumstance exists, or that such result is substantially certain to occur; or

(ii) such person has a firm belief that such circumstance exists or that such result is substantially certain to occur.

(B) When knowledge of the existence of a particular circumstance is required for an offense, such knowledge is established if a person is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist.

(3) (A) The term "routine governmental action" means only an action which is ordinarily and commonly performed by a foreign official in--

(i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;

(ii) processing governmental papers, such as visas and work orders;

(iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country;

(iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or

(v) actions of a similar nature.

(B) The term "routine governmental action" does not include any decision by a foreign official whether, or on what terms, to award new business to or to continue business with a particular party, or any action taken by a foreign official involved in the decision-making process to encourage a decision to award new business to or continue business with a particular party.

(g) Alternative Jurisdiction

(1) It shall also be unlawful for any issuer organized under the laws of the United States, or a

State, territory, possession, or commonwealth of the United States or a political subdivision thereof and which has a class of securities registered pursuant to section 12 of this title or which is required to file reports under section 15(d) of this title, or for any United States person that is an officer, director, employee, or agent of such issuer or a stockholder thereof acting on behalf of such issuer, to corruptly do any act outside the United States in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to any of the persons or entities set forth in paragraphs (1), (2), and (3) of this subsection (a) of this section for the purposes set forth therein, irrespective of whether such issuer or such officer, director, employee, agent, or stockholder makes use of the mails or any means or instrumentality of interstate commerce in furtherance of such offer, gift, payment, promise, or authorization.

(2) As used in this subsection, the term "United States person" means a national of the United States (as defined in section 101 of the Immigration and Nationality Act (8 U.S.C. § 1101)) or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship organized under the laws of the United States or any State, territory, possession, or commonwealth of the United States, or any political subdivision thereof.

§ 78dd-2. Prohibited foreign trade practices by domestic concerns

(a) Prohibition

It shall be unlawful for any domestic concern, other than an issuer which is subject to section 78dd-1 of this title, or for any officer, director, employee, or agent of such domestic concern or any stockholder thereof acting on behalf of such domestic concern, to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to--

(1) any foreign official for purposes of--

(A) (i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage; or

(B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person;

(2) any foreign political party or official thereof or any candidate for foreign political office for purposes of--

(A) (i) influencing any act or decision of such party, official, or candidate in its or his official capacity, (ii) inducing such party, official, or candidate to do or omit to do an act in violation of the lawful duty of such party, official, or candidate, or (iii) securing any improper advantage; or

(B) inducing such party, official, or candidate to use its or his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person;

(3) any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office, for purposes of--

(A) (i) influencing any act or decision of such foreign official, political party, party official, or candidate in his or its official capacity, (ii) inducing such foreign official, political party, party official, or candidate to do or omit to do any act in violation of the lawful duty of such foreign official, political party, party official, or candidate, or (iii) securing any improper advantage; or

(B) inducing such foreign official, political party, party official, or candidate to use his or its influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person.

(b) Exception for routine governmental action

Subsections (a) and (i) of this section shall not apply to any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official.

(c) Affirmative defenses

It shall be an affirmative defense to actions under subsection (a) or (i) of this section that--

(1) the payment, gift, offer, or promise of anything of value that was made, was lawful under the written laws and regulations of the foreign official's, political party's, party official's, or candidate's country; or

(2) the payment, gift, offer, or promise of anything of value that was made, was a reasonable and bona fide expenditure, such as travel and lodging expenses, incurred by or on behalf of a foreign official, party, party official, or candidate and was directly related to--

(A) the promotion, demonstration, or explanation of products or services; or

(B) the execution or performance of a contract with a foreign government or agency thereof.

(d) Injunctive relief

(1) When it appears to the Attorney General that any domestic concern to which this section applies, or officer, director, employee, agent, or stockholder thereof, is engaged, or about to engage, in any act or

practice constituting a violation of subsection (a) or (i) of this section, the Attorney General may, in his discretion, bring a civil action in an appropriate district court of the United States to enjoin such act or practice, and upon a proper showing, a permanent injunction or a temporary restraining order shall be granted without bond.

(2) For the purpose of any civil investigation which, in the opinion of the Attorney General, is necessary and proper to enforce this section, the Attorney General or his designee are empowered to administer oaths and affirmations, subpoena witnesses, take evidence, and require the production of any books, papers, or other documents which the Attorney General deems relevant or material to such investigation. The attendance of witnesses and the production of documentary evidence may be required from any place in the United States, or any territory, possession, or commonwealth of the United States, at any designated place of hearing.

(3) In case of contumacy by, or refusal to obey a subpoena issued to, any person, the Attorney General may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, or other documents. Any such court may issue an order requiring such person to appear before the Attorney General or his designee, there to produce records, if so ordered, or to give testimony touching the matter under investigation. Any failure to obey such order of the court may be punished by such court as a contempt thereof.

All process in any such case may be served in the judicial district in which such person resides or may be found. The Attorney General may make such rules relating to civil investigations as may be necessary or appropriate to implement the provisions of this subsection.

(e) Guidelines by Attorney General

Not later than 6 months after August 23, 1988, the Attorney General, after consultation with the Securities and Exchange Commission, the Secretary of Commerce, the United States Trade Representative, the Secretary of State, and the Secretary of the Treasury, and after obtaining the views of all interested persons through public notice and comment procedures, shall determine to what extent compliance with this section would be enhanced and the business community would be assisted by further clarification of the preceding provisions of this section and may, based on such determination and to the extent necessary and appropriate, issue--

(1) guidelines describing specific types of conduct, associated with common types of export sales arrangements and business contracts, which for purposes of the Department of Justice's present enforcement policy, the Attorney General determines would be in conformance with the preceding provisions of this section; and

(2) general precautionary procedures which domestic concerns may use on a voluntary basis to conform their conduct to the Department of Justice's present enforcement policy regarding the preceding provisions of this section.

The Attorney General shall issue the guidelines and procedures referred to in the preceding sentence in accordance with the provisions of subchapter II of chapter 5 of Title 5 and those guidelines and procedures shall be subject to the provisions of chapter 7 of that title.

(f) Opinions of Attorney General

(1) The Attorney General, after consultation with appropriate departments and agencies of the United States and after obtaining the views of all interested persons through public notice and comment procedures, shall establish a procedure to provide responses to specific inquiries by domestic concerns concerning conformance of their conduct with the Department of Justice's present enforcement policy regarding the preceding provisions of this section. The Attorney General shall, within 30 days after receiving such a request, issue an opinion in response to that request. The opinion shall state whether or not certain specified prospective conduct would, for purposes of the Department of Justice's present enforcement policy, violate the preceding provisions of this section. Additional requests for opinions may be filed with the Attorney General regarding other specified prospective conduct that is beyond the scope of conduct specified in previous requests. In any action brought under the applicable provisions of this section, there shall be a rebuttable presumption that conduct, which is specified in a request by a domestic concern and for which the Attorney General has issued an opinion that such conduct is in conformity with the Department of Justice's present enforcement policy, is in compliance with the preceding provisions of this section. Such a presumption may be rebutted by a preponderance of the evidence. In considering the presumption for purposes of this paragraph, a court shall weigh all relevant factors, including but not limited to whether the information submitted to the Attorney General was accurate and complete and whether it was within the scope of the conduct specified in any request received by the Attorney General. The Attorney General shall establish the procedure required by this paragraph in accordance with the provisions of subchapter II of chapter 5 of Title 5 and that procedure shall be subject to the provisions of chapter 7 of that title.

(2) Any document or other material which is provided to, received by, or prepared in the Department of Justice or any other department or agency of the United States in connection with a request by a domestic concern under the procedure established under paragraph (1), shall be exempt from disclosure under section 552 of Title 5 and shall not, except with the consent of the domestic concern, by made publicly available, regardless of whether the Attorney General response to such a request or the domestic concern withdraws such request before receiving a response.

(3) Any domestic concern who has made a request to the Attorney General under paragraph (1) may withdraw such request prior to the time the Attorney General issues an opinion in response to such request. Any request so withdrawn shall have no force or effect.

(4) The Attorney General shall, to the maximum extent practicable, provide timely guidance concerning the Department of Justice's present enforcement policy with respect to the preceding provisions of this section to potential exporters and small businesses that are unable to obtain specialized counsel on issues pertaining to such provisions. Such guidance shall be limited to responses to requests under paragraph (1) concerning conformity of specified prospective conduct with the Department of Justice's present enforcement policy regarding the preceding provisions of this section and general explanations of compliance responsibilities and of potential liabilities under the preceding provisions of this section.

(g) Penalties

(1) (A) Any domestic concern that is not a natural person and that violates subsection (a) or (i) of this section shall be fined not more than $2,000,000.

(B) Any domestic concern that is not a natural person and that violates subsection (a) or (i) of this section shall be subject to a civil penalty of not more than $10,000 imposed in an action brought by the Attorney General.

(2) (A) Any natural person that is an officer, director, employee, or agent of a domestic concern, or stockholder acting on behalf of such domestic concern, who willfully violates subsection (a) or (i) of this section shall be fined not more than $100,000 or imprisoned not more than 5 years, or both.

(B) Any natural person that is an officer, director, employee, or agent of a domestic concern, or stockholder acting on behalf of such domestic concern, who violates subsection (a) or (i) of this section shall be subject to a civil penalty of not more than $10,000 imposed in an action brought by the Attorney General.

(3) Whenever a fine is imposed under paragraph (2) upon any officer, director, employee, agent, or stockholder of a domestic concern, such fine may not be paid, directly or indirectly, by such domestic concern.

(h) Definitions

For purposes of this section:

(1) The term "domestic concern" means--

(A) any individual who is a citizen, national, or resident of the United States; and

(B) any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States.

(2) (A) The term "foreign official" means any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.

(B) For purposes of subparagraph (A), the term "public international organization" means --

(i) an organization that has been designated by Executive order pursuant to Section 1 of the International Organizations Immunities Act (22 U.S.C. § 288); or

(ii)any other international organization that is designated by the President by Executive order for the purposes of this section, effective as of the date of publication of such order in the Federal Register.

(3) (A) A person's state of mind is "knowing" with respect to conduct, a circumstance, or a result if--

(i) such person is aware that such person is engaging in such conduct, that such circumstance exists, or that such result is substantially certain to occur; or

(ii) such person has a firm belief that such circumstance exists or that such result is substantially certain to occur.

(B) When knowledge of the existence of a particular circumstance is required for an offense, such knowledge is established if a person is aware of a high probability of the existence of such

http://www.usdoj.gov/criminal/fraud/fcpa/fcpastat.htm 8/4/2006

circumstance, unless the person actually believes that such circumstance does not exist.

(4) (A) The term "routine governmental action"means only an action which is ordinarily and commonly performed by a foreign official in--

(i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;

(ii) processing governmental papers, such as visas and work orders;

(iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country;

(iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or

(v) actions of a similar nature.

(B) The term "routine governmental action" does not include any decision by a foreign official whether, or on what terms, to award new business to or to continue business with a particular party, or any action taken by a foreign official involved in the decision-making process to encourage a decision to award new business to or continue business with a particular party.

(5) The term "interstate commerce"means trade, commerce, transportation, or communication among the several States, or between any foreign country and any State or between any State and any place or ship outside thereof, and such term includes the intrastate use of--

(A) a telephone or other interstate means of communication, or

(B) any other interstate instrumentality.

(i) Alternative Jurisdiction

(1) It shall also be unlawful for any United States person to corruptly do any act outside the United States in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to any of the persons or entities set forth in paragraphs (1), (2), and (3) of subsection (a), for the purposes set forth therein, irrespective of whether such United States person makes use of the mails or any means or instrumentality of interstate commerce in furtherance of such offer, gift, payment, promise, or authorization.

(2) As used in this subsection, a "United States person"means a national of the United States (as defined in section 101 of the Immigration and Nationality Act (8 U.S.C. § 1101)) or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship organized under the laws of the United States or any State, territory, possession, or commonwealth of the United States, or any political subdivision thereof.

§ 78dd-3. Prohibited foreign trade practices by persons other than issuers or domestic concerns

(a) Prohibition

It shall be unlawful for any person other than an issuer that is subject to section 30A of the Securities Exchange Act of 1934 or a domestic concern, as defined in section 104 of this Act), or for any officer, director, employee, or agent of such person or any stockholder thereof acting on behalf of such person, while in the territory of the United States, corruptly to make use of the mails or any means or instrumentality of interstate commerce or to do any other act in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to--

(1) any foreign official for purposes of--

(A) (i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage; or

(B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such person in obtaining or retaining business for or with, or directing business to, any person;

(2) any foreign political party or official thereof or any candidate for foreign political office for purposes of--

(A) (i) influencing any act or decision of such party, official, or candidate in its or his official capacity, (ii) inducing such party, official, or candidate to do or omit to do an act in violation of the lawful duty of such party, official, or candidate, or (iii) securing any improper advantage; or

(B) inducing such party, official, or candidate to use its or his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality.

in order to assist such person in obtaining or retaining business for or with, or directing business to, any person; or

(3) any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office, for purposes of--

(A) (i) influencing any act or decision of such foreign official, political party, party official, or candidate in his or its official capacity, (ii) inducing such foreign official, political party, party official, or candidate to do or omit to do any act in violation of the lawful duty of such foreign official, political party, party official, or candidate, or (iii) securing any improper advantage; or

(B) inducing such foreign official, political party, party official, or candidate to use his or its influence with a foreign government or instrumentality thereof to affect or influence

any act or decision of such government or instrumentality,

in order to assist such person in obtaining or retaining business for or with, or directing business to, any person.

(b) Exception for routine governmental action

Subsection (a) of this section shall not apply to any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official.

(c) Affirmative defenses

It shall be an affirmative defense to actions under subsection (a) of this section that--

(1) the payment, gift, offer, or promise of anything of value that was made, was lawful under the written laws and regulations of the foreign official's, political party's, party official's, or candidate's country; or

(2) the payment, gift, offer, or promise of anything of value that was made, was a reasonable and bona fide expenditure, such as travel and lodging expenses, incurred by or on behalf of a foreign official, party, party official, or candidate and was directly related to--

(A) the promotion, demonstration, or explanation of products or services; or

(B) the execution or performance of a contract with a foreign government or agency thereof.

(d) Injunctive relief

(1) When it appears to the Attorney General that any person to which this section applies, or officer, director, employee, agent, or stockholder thereof, is engaged, or about to engage, in any act or practice constituting a violation of subsection (a) of this section, the Attorney General may, in his discretion, bring a civil action in an appropriate district court of the United States to enjoin such act or practice, and upon a proper showing, a permanent injunction or a temporary restraining order shall be granted without bond.

(2) For the purpose of any civil investigation which, in the opinion of the Attorney General, is necessary and proper to enforce this section, the Attorney General or his designee are empowered to administer oaths and affirmations, subpoena witnesses, take evidence, and require the production of any books, papers, or other documents which the Attorney General deems relevant or material to such investigation. The attendance of witnesses and the production of documentary evidence may be required from any place in the United States, or any territory, possession, or commonwealth of the United States, at any designated place of hearing.

(3) In case of contumacy by, or refusal to obey a subpoena issued to, any person, the Attorney General may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, or other documents. Any such court may issue an order requiring such person to appear before the Attorney General or his designee, there to produce records, if so ordered, or to give testimony touching the matter under

investigation. Any failure to obey such order of the court may be punished by such court as a contempt thereof.

(4) All process in any such case may be served in the judicial district in which such person resides or may be found. The Attorney General may make such rules relating to civil investigations as may be necessary or appropriate to implement the provisions of this subsection.

(e) Penalties

(1) (A) Any juridical person that violates subsection (a) of this section shall be fined not more than $2,000,000.

(B) Any juridical person that violates subsection (a) of this section shall be subject to a civil penalty of not more than $10,000 imposed in an action brought by the Attorney General.

(2) (A) Any natural person who willfully violates subsection (a) of this section shall be fined not more than $100,000 or imprisoned not more than 5 years, or both.

(B) Any natural person who violates subsection (a) of this section shall be subject to a civil penalty of not more than $10,000 imposed in an action brought by the Attorney General.

(3) Whenever a fine is imposed under paragraph (2) upon any officer, director, employee, agent, or stockholder of a person, such fine may not be paid, directly or indirectly, by such person.

(f) Definitions

For purposes of this section:

(1) The term "person," when referring to an offender, means any natural person other than a. national of the United States (as defined in 8 U.S.C. § 1101) or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship organized under the law of a foreign nation or a political subdivision thereof

(2) (A) The term "foreign official" means any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.

For purposes of subparagraph (A), the term "public international organization" means --

(i) an organization that has been designated by Executive Order pursuant to Section 1 of the International Organizations Immunities Act (22 U.S.C. § 288); or

(ii) any other international organization that is designated by the President by Executive order for the purposes of this section, effective as of the date of publication of such order in the Federal Register.

(3) (A) A person's state of mind is "knowing"with respect to conduct, a circumstance, or a result if --

(i) such person is aware that such person is engaging in such conduct, that such circumstance exists, or that such result is substantially certain to occur; or

(ii) such person has a firm belief that such circumstance exists or that such result is

substantially certain to occur.

(B) When knowledge of the existence of a particular circumstance is required for an offense, such knowledge is established if a person is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist.

(4) (A) The term "routine governmental action"means only an action which is ordinarily and commonly performed by a foreign official in--

(i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;

(ii) processing governmental papers, such as visas and work orders;

(iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country;

(iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or

(v) actions of a similar nature.

(B) The term "routine governmental action" does not include any decision by a foreign official whether, or on what terms, to award new business to or to continue business with a particular party, or any action taken by a foreign official involved in the decision-making process to encourage a decision to award new business to or continue business with a particular party.

(5) The term "interstate commerce" means trade, commerce, transportation, or communication among the several States, or between any foreign country and any State or between any State and any place or ship outside thereof, and such term includes the intrastate use of —

(A) a telephone or other interstate means of communication, or

(B) any other interstate instrumentality.

§ 78ff. Penalties

(a) Willful violations; false and misleading statements

Any person who willfully violates any provision of this chapter (other than section 78dd-1 of this title), or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this chapter, or any person who willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed under this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 78*o* of this title, or by any self-regulatory organization in connection with an application for membership or participation therein or to become associated with a member thereof, which statement was false or misleading with respect to any material fact, shall upon conviction be fined

not more than $5,000,000, or imprisoned not more than 20 years, or both, except that when such person is a person other than a natural person, a fine not exceeding $25,000,000 may be imposed; but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation.

(b) Failure to file information, documents, or reports

Any issuer which fails to file information, documents, or reports required to be filed under subsection (d) of section 78*o* of this title or any rule or regulation thereunder shall forfeit to the United States the sum of $100 for each and every day such failure to file shall continue. Such forfeiture, which shall be in lieu of any criminal penalty for such failure to file which might be deemed to arise under subsection (a) of this section, shall be payable into the Treasury of the United States and shall be recoverable in a civil suit in the name of the United States.

(c) Violations by issuers, officers, directors, stockholders, employees, or agents of issuers

(1) (A) Any issuer that violates subsection (a) or (g) of section 30A of this title [15 U.S.C. § 78dd-1] shall be fined not more than $2,000,000.

(B) Any issuer that violates subsection (a) or (g) of section 30A of this title [15 U.S.C. § 78dd-1] shall be subject to a civil penalty of not more than $10,000 imposed in an action brought by the Commission.

(2) (A) Any officer, director, employee, or agent of an issuer, or stockholder acting on behalf of such issuer, who willfully violates subsection (a) or (g) of section 30A of this title [15 U.S.C. § 78dd-1] shall be fined not more than $100,000, or imprisoned not more than 5 years, or both.

(B) Any officer, director, employee, or agent of an issuer, or stockholder acting on behalf of such issuer, who violates subsection (a) or (g) of section 30A of this title [15 U.S.C. § 78dd-1] shall be subject to a civil penalty of not more than $10,000 imposed in an action brought by the Commission.

(3) Whenever a fine is imposed under paragraph (2) upon any officer, director, employee, agent, or stockholder of an issuer, such fine may not be paid, directly or indirectly, by such issuer.

Text Only Version

FOREIGN CORRUPT PRACTICES ACT

ANTIBRIBERY PROVISIONS

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INTRODUCTION

The 1988 Trade Act directed the Attorney General to provide guidance concerning the Department of Justice's enforcement policy with respect to the Foreign Corrupt Practices Act of 1977 ("FCPA"), 15 U.S.C. §§ 78dd-1, *et seq.*, to potential exporters and small businesses that are unable to obtain specialized counsel on issues related to the FCPA. The guidance is limited to responses to requests under the Department of Justice's Foreign Corrupt Practices Act Opinion Procedure (described below at p. 10) and to general explanations of compliance responsibilities and potential liabilities under the FCPA. This brochure constitutes the Department of Justice's general explanation of the FCPA.

U.S. firms seeking to do business in foreign markets must be familiar with the FCPA. In general, the FCPA prohibits corrupt payments to foreign officials for the purpose of obtaining or keeping business. In addition, other statutes such as the mail and wire fraud statutes, 18 U.S.C. § 1341, 1343, and the Travel Act, 18 U.S.C. § 1952, which provides for federal prosecution of violations of state commercial bribery statutes, may also apply to such conduct.

The Department of Justice is the chief enforcement agency, with a coordinate role played by the Securities and Exchange Commission (SEC). The Office of General Counsel of the Department of Commerce also answers general questions from U.S. exporters concerning the FCPA's basic requirements and constraints.

This brochure is intended to provide a general description of the FCPA and is not intended to substitute for the advice of private counsel on specific issues related to the FCPA. Moreover, material in this brochure is not intended to set forth the present enforcement intentions of the Department of Justice or the SEC with respect to particular fact situations.

BACKGROUND

As a result of SEC investigations in the mid-1970's, over 400 U.S. companies admitted making questionable or illegal payments in excess of $300 million to foreign government officials, politicians, and political parties. The abuses ran the gamut from bribery of high foreign officials to secure some type of favorable action by a foreign government to so-called facilitating payments that allegedly were made to ensure that government functionaries discharged certain ministerial or clerical duties. Congress enacted the FCPA to bring a halt to the bribery of foreign officials and to restore public confidence in the integrity of the American business system.

The FCPA was intended to have and has had an enormous impact on the way American firms do business. Several firms that paid bribes to foreign officials have been the subject of criminal and civil enforcement actions, resulting in large fines and suspension and debarment from federal procurement contracting, and their employees and officers have gone to jail. To avoid such consequences, many firms have implemented detailed compliance programs intended to prevent and to detect any improper payments by employees and agents.

Following the passage of the FCPA, the Congress became concerned that American companies were operating at a disadvantage compared to foreign companies who routinely paid bribes and, in some countries, were permitted to deduct the cost of such bribes as business expenses on their taxes. Accordingly, in 1988, the Congress directed the Executive Branch to commence negotiations in the Organization of Economic Cooperation and Development (OECD) to obtain the agreement of the United States' major trading partners to enact legislation similar to the FCPA. In 1997, almost ten years later, the United States and thirty-three other countries signed the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. The United States ratified this Convention and enacted implementing legislation in 1998. *See* Convention and Commentaries on the DOJ web site.

The antibribery provisions of the FCPA make it unlawful for a U.S. person, and certain foreign issuers of securities, to make a corrupt payment to a foreign official for the purpose of obtaining or retaining business for or with, or directing business to, any person. Since 1998, they also apply to foreign firms and persons who take any act in furtherance of such a corrupt payment while in the United States.

The FCPA also requires companies whose securities are listed in the United States to meet its accounting provisions. *See* 15 U.S.C. § 78m. These accounting provisions, which were designed to operate in tandem with the antibribery provisions of the FCPA, require corporations covered by the provisions to make and keep books and records that accurately and fairly reflect the transactions of the corporation and to devise and maintain an adequate system of internal accounting controls. This brochure discusses only the antibribery provisions.

ENFORCEMENT

The Department of Justice is responsible for all criminal enforcement and for civil enforcement of the antibribery provisions with respect to domestic concerns and foreign companies and nationals. The SEC is responsible for civil enforcement of the antibribery provisions with respect to issuers.

ANTIBRIBERY PROVISIONS

BASIC PROHIBITION

The FCPA makes it unlawful to bribe foreign government officials to obtain or retain business. With respect to the basic prohibition, there are five elements which must be met to constitute a violation of the Act:

A. Who -- The FCPA potentially applies to *any* individual, firm, officer, director, employee, or agent of a firm and any stockholder acting on behalf of a firm. Individuals and firms may also be penalized if they order, authorize, or assist someone else to violate the antibribery provisions or if they conspire to violate those provisions.

Under the FCPA, U.S. jurisdiction over corrupt payments to foreign officials depends upon whether the violator is an "issuer," a "domestic concern," or a foreign national or business.

An "issuer" is a corporation that has issued securities that have been registered in the United States or who is required to file periodic reports with the SEC. A "domestic concern" is any individual who is a citizen, national, or resident of the United States, or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States, or a territory, possession, or commonwealth of the United States.

Issuers and domestic concerns may be held liable under the FCPA under *either* territorial or nationality jurisdiction principles. For acts taken within the territory of the United States, issuers and domestic concerns are liable if they take an act in furtherance of a corrupt payment to a foreign official using the U.S. mails or other means or instrumentalities of interstate commerce. Such means or instrumentalities include telephone calls, facsimile transmissions, wire transfers, and interstate or international travel. In addition, issuers and domestic concerns may be held liable for any act in furtherance of a corrupt payment taken *outside* the United States. Thus, a U.S. company or national may be held liable for a corrupt payment authorized by employees or agents operating entirely outside the United States, using money from foreign bank accounts, and without any involvement by personnel located within the United States.

Prior to 1998, foreign companies, with the exception of those who qualified as "issuers," and foreign nationals were not covered by the FCPA. The 1998 amendments expanded the FCPA to assert territorial jurisdiction over foreign companies and nationals. A foreign company or person is now subject to the FCPA if it causes, directly or through agents, an act in furtherance of the corrupt payment to take place within the territory of the United States. There is, however, no requirement that such act make use of the U.S. mails or other means or instrumentalities of interstate commerce.

Finally, U.S. parent corporations may be held liable for the acts of foreign subsidiaries where they authorized, directed, or controlled the activity in question, as can U.S. citizens or residents, themselves "domestic concerns," who were employed by or acting on behalf of such foreign-incorporated subsidiaries.

B. Corrupt intent-- The person making or authorizing the payment must have a corrupt intent, and the payment must be intended to induce the recipient to misuse his official position to direct

will not take any action in furtherance of an unlawful offer, promise, or payment to a foreign public official and not take any act that would cause the U.S. firm to be in violation of the FCPA, unusually high commissions, lack of transparency in expenses and accounting records, apparent lack of qualifications or resources on the part of the joint venture partner or representative to perform the services offered, and whether the joint venture partner or representative has been recommended by an official of the potential governmental customer.

You should seek the advice of counsel and consider utilizing the Department of Justice's Foreign Corrupt Practices Act Opinion Procedure for particular questions relating to third party payments.

PERMISSIBLE PAYMENTS AND AFFIRMATIVE DEFENSES

The FCPA contains an explicit exception to the bribery prohibition for "facilitating payments" for "routine governmental action" and provides affirmative defenses which can be used to defend against alleged violations of the FCPA.

FACILITATING PAYMENTS FOR ROUTINE GOVERNMENTAL ACTIONS

There is an exception to the antibribery prohibition for payments to facilitate or expedite performance of a "routine governmental action." The statute lists the following examples: obtaining permits, licenses, or other official documents; processing governmental papers, such as visas and work orders; providing police protection, mail pick-up and delivery; providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products; and scheduling inspections associated with contract performance or transit of goods across country.

Actions "similar" to these are also covered by this exception. If you have a question about whether a payment falls within the exception, you should consult with counsel. You should also consider whether to utilize the Justice Department's Foreign Corrupt Practices Opinion Procedure, described below on p. 10.

"Routine governmental action" does *not* include any decision by a foreign official to award new business or to continue business with a particular party.

AFFIRMATIVE DEFENSES

A person charged with a violation of the FCPA's antibribery provisions may assert as a defense that the payment was lawful under the written laws of the foreign country or that the money was spent as part of demonstrating a product or performing a contractual obligation.

Whether a payment was lawful under the written laws of the foreign country may be difficult to determine. You should consider seeking the advice of counsel or utilizing the Department of Justice's Foreign Corrupt Practices Act Opinion Procedure when faced with an issue of the legality of such a payment.

Moreover, because these defenses are "affirmative defenses," the defendant is required to show in the first instance that the payment met these requirements. The prosecution does not bear the burden of demonstrating in the first instance that the payments did not constitute this type of payment.

SANCTIONS AGAINST BRIBERY

CRIMINAL

The following criminal penalties may be imposed for violations of the FCPA's antibribery provisions: corporations and other business entities are subject to a fine of up to $2,000,000; officers, directors, stockholders, employees, and agents are subject to a fine of up to $100,000 and imprisonment for up to five years. Moreover, under the Alternative Fines Act, these fines may be actually quite higher -- the actual fine may be up to twice the benefit that the defendant sought to obtain by making the corrupt payment. You should also be aware that fines imposed on individuals may *not* be paid by their employer or principal.

CIVIL

The Attorney General or the SEC, as appropriate, may bring a civil action for a fine of up to $10,000 against any firm *as well as* any officer, director, employee, or agent of a firm, or stockholder acting on behalf of the firm, who violates the antibribery provisions. In addition, in an SEC enforcement action, the court may impose an additional fine not to exceed the greater of (i) the gross amount of the pecuniary gain to the defendant as a result of the violation, or (ii) a specified dollar limitation. The specified dollar limitations are based on the egregiousness of the violation, ranging from $5,000 to $100,000 for a natural person and $50,000 to $500,000 for any other person.

The Attorney General or the SEC, as appropriate, may also bring a civil action to enjoin any act or practice of a firm whenever it appears that the firm (or an officer, director, employee, agent, or stockholder acting on behalf of the firm) is in violation (or about to be) of the antibribery provisions.

OTHER GOVERNMENTAL ACTION

Under guidelines issued by the Office of Management and Budget, a person or firm found in violation of the FCPA may be barred from doing business with the Federal government. *Indictment alone can lead to suspension of the right to do business with the government.* The President has directed that no executive agency shall allow any party to participate in any procurement or nonprocurement activity if any agency has debarred, suspended, or otherwise excluded that party from participation in a procurement or nonprocurement activity.

In addition, a person or firm found guilty of violating the FCPA may be ruled ineligible to receive export licenses; the SEC may suspend or bar persons from the securities business and impose civil penalties on persons in the securities business for violations of the FCPA; the Commodity Futures Trading Commission and the Overseas Private Investment Corporation both provide for possible suspension or debarment from agency programs for violation of the FCPA; and a payment made to a foreign government official that is unlawful under the FCPA cannot be deducted under the tax laws as a business expense.

PRIVATE CAUSE OF ACTION

Conduct that violates the antibribery provisions of the FCPA may also give rise to a private cause of action for treble damages under the Racketeer Influenced and Corrupt Organizations Act (RICO), or to actions under other federal or state laws. For example, an action might be brought under RICO by a competitor who alleges that the bribery caused the defendant to win a foreign contract.

GUIDANCE FROM THE GOVERNMENT

The Department of Justice has established a Foreign Corrupt Practices Act Opinion Procedure by which any U.S. company or national may request a statement of the Justice Department's present enforcement intentions under the antibribery provisions of the FCPA regarding any proposed business conduct. The details of the opinion procedure may be found at 28 CFR Part 80. Under this procedure, the Attorney General will issue an opinion in response to a specific inquiry from a person or firm within thirty days of the request. (The thirty-day period does not run until the Department of Justice has received all the information it requires to issue the opinion.) Conduct for which the Department of Justice has issued an opinion stating that the conduct conforms with current enforcement policy will be entitled to a presumption, in any subsequent enforcement action, of conformity with the FCPA. Copies of releases issued regarding previous opinions are available on the Department of Justice's FCPA web site.

For further information from the Department of Justice about the FCPA and the Foreign Corrupt Practices Act Opinion Procedure, contact Mark F. Mendelsohn, Deputy Chief, Fraud Section, at (202) 514-1721; or Deborah Gramiccioni, Assistant Chief, Fraud Section, at (202) 353-0449.

Although the Department of Commerce has no enforcement role with respect to the FCPA, it supplies general guidance to U.S. exporters who have questions about the FCPA and about international developments concerning the FCPA. For further information from the Department of Commerce about the FCPA contact Eleanor Roberts Lewis, Chief Counsel for International Commerce, or Arthur Aronoff, Senior Counsel, Office of the Chief Counsel for International Commerce, U.S. Department of Commerce, Room 5882, 14th Street and Constitution Avenue, N.W., Washington, D.C. 20230, (202) 482-0937.

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US Foreign Sovereign Immunities Act, as amended 1997

UNITED STATES CODE

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE

PART IV--JURISDICTION AND VENUE

CHAPTER 85--DISTRICT COURTS; JURISDICTION

§ 1330. Actions against foreign states

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

(c) For purposes of subsection (b), an appearance by a foreign state does not confer personal jurisdiction with respect to any claim for relief not arising out of any transaction or occurrence enumerated in sections 1605-1607 of this title.

CHAPTER 97--JURISDICTIONAL IMMUNITIES OF FOREIGN STATES

§ 1602. Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

§ 1603. Definitions

For purposes of this chapter--

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a

foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity--

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

§ 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

§ 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case--

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property

exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to--

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights;

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable; or

(7) not otherwise covered by paragraph (2), in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources (as defined in section 2339A of title 18) for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency, except that the court shall decline to hear a claim under this paragraph--

(A) if the foreign state was not designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)) or section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371) at the time the act occurred, unless later so designated as a result of such act; and

(B) even if the foreign state is or was so designated, if--

(i) the act occurred in the foreign state against which the claim has been brought and the claimant has not afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with accepted international rules of arbitration; or

(ii) neither the claimant nor the victim was a national of the United States (as that term is defined in section 101(a)(22) of the Immigration and Nationality Act) when the act upon which the claim is based occurred.

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: Provided, That--

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; and if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit, the service of process of arrest shall be deemed to constitute valid delivery of such notice, but the party bringing the suit shall be liable for any damages sustained by the foreign state as a result of the arrest if the party bringing the suit had actual or constructive knowledge that the vessel or cargo of a foreign state was involved; and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in paragraph (1) of this subsection or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.

(c) Whenever notice is delivered under subsection (b)(1), the suit to enforce a maritime lien shall thereafter proceed and shall be heard and determined according to the principles of law and rules of practice of suits in rem whenever it appears that, had the vessel been privately owned and possessed, a suit in rem might have been maintained. A decree against the foreign state may include costs of the suit and, if the decree is for a money judgment, interest as ordered by the court, except that the court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose. Such value shall be determined as of the time notice is served under subsection (b)(1). Decrees shall be subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction. Nothing shall preclude the plaintiff in any proper case from seeking relief in personam in the same action brought to enforce a maritime lien as provided in this section.

(d) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any action brought to foreclose a preferred mortgage, as defined in the Ship Mortgage Act, 1920 (46 U.S.C. 911 and following). Such action shall be brought, heard, and determined in accordance with the provisions of that Act and in accordance with the principles of law and rules of practice of suits in rem, whenever it appears that had the vessel been privately owned and possessed a suit in rem might have been maintained.

(e) For purposes of paragraph (7) of subsection (a)--

(1) the terms "torture" and "extrajudicial killing" have the meaning given those terms in section 3 of the Torture Victim Protection Act of 1991;

(2) the term "hostage taking" has the meaning given that term in Article 1 of the International Convention Against the Taking of Hostages; and

(3) the term "aircraft sabotage" has the meaning given that term in Article 1 of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation.

(f) No action shall be maintained under subsection (a)(7) unless the action is commenced not later than 10 years after the date on which the cause of action arose. All principles of equitable tolling, including the period during which the foreign state was immune from suit, shall apply in calculating this limitation

period.

(g) Limitation on discovery.--

(1) In general.--(A) Subject to paragraph (2), if an action is filed that would otherwise be barred by section 1604, but for subsection (a)(7), the court, upon request of the Attorney General, shall stay any request, demand, or order for discovery on the United States that the Attorney General certifies would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action, until such time as the Attorney General advises the court that such request, demand, or order will no longer so interfere.

(B) A stay under this paragraph shall be in effect during the 12-month period beginning on the date on which the court issues the order to stay discovery. The court shall renew the order to stay discovery for additional 12-month periods upon motion by the United States if the Attorney General certifies that discovery would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action.

(2) Sunset.--(A) Subject to subparagraph (B), no stay shall be granted or continued in effect under paragraph (1) after the date that is 10 years after the date on which the incident that gave rise to the cause of action occurred.

(B) After the period referred to in subparagraph (A), the court, upon request of the Attorney General, may stay any request, demand, or order for discovery on the United States that the court finds a substantial likelihood would--

(i) create a serious threat of death or serious bodily injury to any person;

(ii) adversely affect the ability of the United States to work in cooperation with foreign and international law enforcement agencies in investigating violations of United States law; or

(iii) obstruct the criminal case related to the incident that gave rise to the cause of action or undermine the potential for a conviction in such case.

(3) Evaluation of evidence.--The court's evaluation of any request for a stay under this subsection filed by the Attorney General shall be conducted ex parte and in camera.

(4) Bar on motions to dismiss.--A stay of discovery under this subsection shall constitute a bar to the granting of a motion to dismiss under rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure.

(5) Construction.--Nothing in this subsection shall prevent the United States from seeking protective orders or asserting privileges ordinarily available to the United States.

§ 1606. Extent of liability

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death

was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

§ 1607. Counterclaims

In any action brought by a foreign state, or in which a foreign state intervenes, in a court of the United States or of a State, the foreign state shall not be accorded immunity with respect to any counterclaim--

(a) for which a foreign state would not be entitled to immunity under section 1605 of this chapter had such claim been brought in a separate action against the foreign state; or

(b) arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state; or

(c) to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state.

§ 1608. Service; time to answer; default

(a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or

(4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services--and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

As used in this subsection, a "notice of suit" shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

(b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state--

(A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or

(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

(C) as directed by order of the court consistent with the law of the place where service is to be made.

(c) Service shall be deemed to have been made--

(1) in the case of service under subsection (a)(4), as of the date of transmittal indicated in the certified copy of the diplomatic note; and

(2) in any other case under this section, as of the date of receipt indicated in the certification, signed and returned postal receipt, or other proof of service applicable to the method of service employed.

(d) In any action brought in a court of the United States or of a State, a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state shall serve an answer or other responsive pleading to the complaint within sixty days after service has been made under this section.

(e) No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.

§ 1609. Immunity from attachment and execution of property of a foreign state

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.

§ 1610. Exceptions to the immunity from attachment or execution

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if--

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

(2) the property is or was used for the commercial activity upon which the claim is based, or

(3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law, or

(4) the execution relates to a judgment establishing rights in property--

(A) which is acquired by succession or gift, or

(B) which is immovable and situated in the United States: Provided, That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or

(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment, or

(6) the judgment is based on an order confirming an arbitral award rendered against the foreign state, provided that attachment in aid of execution, or execution, would not be inconsistent with any provision in the arbitral agreement, or

(7) the judgment relates to a claim for which the foreign state is not immune under section 1605(a)(7), regardless of whether the property is or was involved with the act upon which the claim is based.

(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if--

(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or

(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a) (2), (3), (5), or (7) or 1605(b) of this chapter, regardless of whether the property is or was involved in the act upon which the claim is based.

(c) No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable

period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter.

(d) The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if--

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and

(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction.

(e) The vessels of a foreign state shall not be immune from arrest in rem, interlocutory sale, and execution in actions brought to foreclose a preferred mortgage as provided in section 1605(d).

§ 1611. Certain types of property immune from execution

(a) Notwithstanding the provisions of section 1610 of this chapter, the property of those organizations designated by the President as being entitled to enjoy the privileges, exemptions, and immunities provided by the International Organizations Immunities Act shall not be subject to attachment or any other judicial process impeding the disbursement of funds to, or on the order of, a foreign state as the result of an action brought in the courts of the United States or of the States.

(b) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution, if--

(1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the waiver which the bank, authority or government may purport to effect except in accordance with the terms of the waiver; or

(2) the property is, or is intended to be, used in connection with a military activity and

(A) is of a military character, or

(B) is under the control of a military authority or defense agency.

(c) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution in an action brought under section 302 of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 to the extent that the property is a facility or installation used by an accredited diplomatic mission for official purposes.

Friday August 4, 2006

FOREIGN SOVEREIGN IMMUNITIES ACT

DISCLAIMER: THE INFORMATION IN THIS CIRCULAR IS PROVIDED FOR GENERAL INFORMATION ONLY AND MAY NOT BE TOTALLY ACCURATE IN A PARTICULAR CASE. QUESTIONS INVOLVING INTERPRETATION OF SPECIFIC FOREIGN LAWS SHOULD BE ADDRESSED TO FOREIGN COUNSEL.

Q. What is the role of the Department of State assist in effecting service on a foreign government?

A. The Department of State, Overseas Citizens Services [formerly Special Consular Services, 22 CFR 93 (sic)], Office of Policy Review & Interagency Liaison is responsible for service under the Foreign Sovereign Immunities Act (FSIA) via the diplomatic channel in accordance with 28 U.S.C. Sec. 1608(a)(4) and implementing regulations (22 C.F.R. 93). In addition, the Department provides assistance under Sec. 1608(b) of the Act by providing information about service pursuant to a letter rogatory or applicable international convention on service. Service pursuant to the FSIA is a statutory obligation and provided the hierarchical methods of service set forth in Sec. 1608 have been followed, the U.S. consular officer has no discretion in complying with the Act. See 28 U.S.C. Section 1608(a)(4); H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. (1976) reprinted in 1976 U.S. Code Cong. & Ad. News 6623; 22 C.F.R. Part 93.

Q. What is the Foreign Sovereign Immunities Act?

A. Foreign Sovereign Immunities Act of 1976, Pub. L. 94-583, 90 Stat. 2891, 28 U.S.C. Sec. 1330, 1332(a), 1391(f) and 1601-1611 [hereinafter the FSIA], limits the role of the Executive branch in suits against foreign governments and governmental entities by precluding the Department of State from making decisions on state immunity. By a circular note dated December 10, 1976, the Department of State informed all foreign embassies in Washington of the enactment of the FSIA (1976 Digest of United States Practice in International Law, Office of the Legal Adviser, U.S. Department of State, 327-328 (1977)). The US. Foreign Sovereign Immunities Act codifies the restrictive theory of immunity, incorporating criteria, which the courts had developed in applying the theory, while codifying and applying international law. (See ch. 5, Restatement 3rd, Foreign Relations Law of the United States, sec. 451-463, pp. 390, 435, American Law Institute (1986).) The Act prescribes the means of service for suits against a foreign State or agency and instrumentality in Section. For a discussion of the Act and its service provisions, See the American Law Institute (ALI)"s Restatement (Third) of the Foreign Relations Law of the United States, Chapter Five, Sec. 451, 460, pp. 390, 435 (general) (1986); Wright, Miller & Cooper, Federal Practice and Procedure, Jurisdiction and Related Matters 2d, Sec. 3662, note 7, pp. 385-385 (1985), pp. 370-371 (1997 Supp.); Wright and Miller, Federal Practice and Procedure, Civil 2d, Sec. 1111, pp. 199, 226 (1985), pp. 40, 41 (1997 Supp.); Born & Westin, International Civil Litigation in United States Courts, 335, 402 (1989); Delaume, Law and Practice of Transnational Contracts, Chapter VIII, Sec. 8.01-8.15, pp. 223, 280 (1988).

Q. What is the restrictive theory of sovereign immunity?

A. Under the U.S. legal system, however, the scope of a foreign state"s immunity is determined by judicial, rather than executive, authorities. A party to a lawsuit, including a foreign state or its agency or instrumentality, is required to present defenses such as sovereign immunity directly to the court in which the case is pending. The immunity of a State from the jurisdiction of the courts of another State is an undisputed principle of customary international law. Until the twentieth century, sovereign immunity from the jurisdiction of foreign courts seemed to have no exceptions. However, as governments increasingly engaged in state-trading and various commercial activities, it was urged

that the immunity of States engaged in such activities was not required by international law, and that it was undesirable: Immunity deprived private parties that dealt with a state of their judicial remedies, and gave states an unfair advantage in competition with private commercial enterprise. The restrictive principle of immunity spread rapidly after the Second World War. The United States moved to the restrictive theory in the early 1950"s, and adopted it by statute in 1976 (the Foreign Sovereign Immunities Act). Under the restrictive theory of sovereign immunity, a State or State instrumentality is immune from the jurisdiction of the courts of another State, except with respect to claims arising out of activities of the kind that may be carried on by private persons. Under the restrictive theory, a State is immune from any exercise of judicial jurisdiction by another State in respect of claims arising out of governmental activities (de jure imperii); it is not immune from the exercise of such jurisdiction in respect of claims arising out of activities of a kind carried on by private persons (de jure gestionis).

Q. What are the general exceptions to the jurisdictional immunity of a foreign State?

A. Since the enactment of the Act in 1976, the general exceptions to the jurisdictional immunity of a foreign state have expanded, moving beyond the realm of "commercial activity". Most recently, P.L. 105-175 of May 11, 1998 further expanded the restrictive theory. Specifically, 28 U.S.C. 1605 now provides that a foreign state shall not be immune from the jurisdiction of courts of the United States or of the states in any case in which:

1605(a) (1) - explicit or implicit waiver of immunity by the foreign state;

1605(a)(2) - commercial activity carried on in the United States or an act performed in the United States in connection with a commercial activity elsewhere, or an act in connection with a commercial activity of a foreign state elsewhere that causes a direct effect in the United States;

1605(a)(3) - property taken in violation of international law is at issue;

1605(a)(4) - rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are at issue;

1605(a)(5) - money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state;

1605(a)(6) - action brought to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration;

1605(a)(7) - money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act, if the foreign state is designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App 2405(j) or Section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371).

1605(b) - a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state which maritime lien is based upon a commercial activity of the foreign state.

Q. What is the difference between a foreign State, political subdivision, agency or instrumentality?

A. Section 1330(a) of the Act gives federal district courts original jurisdiction in personam against foreign states, which are defined as including political subdivisions, agencies, and instrumentalities of foreign states. The Act provides distinct methods of service on a foreign state or political subdivision (28 USC 1608(a)) or service on an agency or instrumentality of a foreign state (28 USC

1608(b)). In order to serve the defendant, the claimant must determine into which category the defendant falls. If in doubt, a claimant should serve the defendant according to both sets of provisions. See Born & Westin, 340-344 (1989) and George, 19 Int"l Law. 51 (1985). The term "political subdivisions" includes all governmental units beneath the central government, including local governments according to the Act"s legislative history. Section 1603(b) defines an "agency or instrumentality" of a foreign state as an entity (1) which is a separate legal person, corporate or otherwise, and (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and (3) which is neither a citizen of the a state of the United States as defined in Sec. 1332(c) and (d) nor created under the laws of any third country. An instrumentality of a foreign state includes a corporation, association, or other juridical person a majority of whose shares or other ownership interests are owned by the state, even when organized for profit. For a discussion of the responsibilities of states for the obligations of their instrumentalities, see Restatement (Third) of the Foreign Relations Law of the United States, Sec. 452, p. 399-401 (1986). See also, the legislative history of the Act at 1976 U.S. Code Cong. & Ad. News 6614-6618, in particular, which states in part: "[A]s a general matter, entities which meet the definition of an "agency or instrumentality of a foreign state" could assume a variety of forms, organizations, such as a shipping line or an airline, a steel company, a central bank, an export association, a governmental procurement agency or a department or ministry which acts and is suable in its own name. Id. at 6614. For a discussion of case law regarding the status of quasi-commercial entities in socialist states, see Born & Westin, p. 343-344 (1989); See also, Note, Breaking Out of the Capitalist Paradigm: The Significance of Ideology in Determining the Sovereign Immunity of Soviet and Eastern-Bloc Commercial Entities, 2 Hous. J. Int"l. L. 425 (1980); Note, Foreign Sovereign Immunity: Communist and Socialist Organizations - Effects of State"s System of Property Ownership on Determination of Agency or Instrumentality Status Under the Foreign Sovereign Immunities Act of 1976, 9 Ga. J. Int"l & Comp. L. 111 (1979); But see, ***Yessenin-Bolpin v. Novosti Press Agency 443 F. Supp. 849, 852 (S.D.N.Y. 1978); Outboard Marine Corp. v. Pezetel, D.C. Del. 1978, 461 F. Supp. 384; Harris v. VAO Intourist Moscow, D.C. N.Y. 1979, 481 F. Supp. 1056; United Euram Corp. v. Union of Soviet Socialist Republics, D.C N.Y. 1978, 461 F. Supp. 609; S&S Mach. Co. v. Masinenexportimport, 706 F. 2d 411 (2d Cir.), cert. denied, 464 U.S. 850 (1983); Edlow Int"l Co. v. Nuklearna Elektrarna Krsko, 441 F Supp. 827 (D.D.C. 1977); Dayton v. Czechoslovak Socialist Republic, 834 F. 2d 203 (D.C. Cir. 1987).***

Q. Is there a hierarchical order in which service must be attempted on a foreign State under the Act?

A. The FSIA (28 U.S.C. Sec. 1608(a)(1)-(4) provides for service of process on foreign state defendants in a four-step, hierarchical manner: (l) pursuant to a special agreement between the plaintiff and the foreign state; (ii) as prescribed in an applicable international agreement; (iii) via mail from the court clerk to the head of the foreign state"s Ministry of Foreign Affairs; (iv) via the diplomatic channel. See, Ristau, International Judicial Assistance (Civil and Commercial), International Law Institute, Section 3-1-15, 74-75 (1995 ed.); Born & Westin, International Civil Litigation in United States Courts, 335, 402 (1989); Born, International Litigation, The International Lawyer"s Deskbook, American Bar Association, 288 (1996); Delaume, Law and Practice of Transnational Contracts, Sec. 8.02, 224, 225 (1988). The legislative history of and court cases concerning the FSIA are extensive. The FSIA clarifies the circumstances in which a foreign state will be immune from suit and embodies a federal long-arm statute pursuant to which in personam jurisdiction can be obtained over a foreign state, political subdivision, agency or instrumentality, provided that service of process is effected in compliance with the service provisions of the Act which are found at 28 U.S.C. 1608(a). Service must be performed in a hierarchical manner --- if service cannot be made in accordance with 1608(a)(l), then service is attempted pursuant to 1608(a)

(2) and so forth until the various methods are exhausted.

Q. Are the methods described in section 1608(a)(4) exclusive? Can"t I just serve the foreign embassy or mission to the United Nations?

A. The FSIA provides the exclusive methods for effecting service of process on a foreign state, political subdivision, agency or instrumentality. See H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. (1976), reprinted in 1976 U.S. Code Cong. & Ad. News 6604, 6622-23. Service on a foreign embassy in the United States or mission to the United Nations is not one of the methods of service provided in the Act. For the proposition that service is governed by the statute see e.g., *Gray v. Permanent Mission of the People"s Republic of the Congo to the United Nations, 443 F. Supp. 816 (S.D.N.Y. 1978); 40 D 6262 Realty Corporation v. United Arab Emirates Government, 447 F. Supp. 710 (S.D.N.Y. 1978); Alberti v. Empresa Nicaraguense de la Carre, 705 F. 2d 250 (7th Cir. 1983).*

Q. How much time does the foreign State have to reply once service has been effected?

A. 28 USC 1608(d) provides that a foreign state has 60 days from the date service is effected in which to file an answer or other responsive pleading. The 60 day response period must be included in both the summons and the notice of suit where required.

Q. Do I have to have documents translated?

A. Section 1608(a)(3) and (4) require translation of the summons, complaint and notice of suit. Section 1608(b)(3) requires translation of the summons and complaint (and letter rogatory where applicable). Section 1608(e) requires translation of the default judgment and the notice of default judgment.

Q. How do I effect service on a foreign State or political subdivision?

A. The Act provides the following hierarchical steps for effecting service:

Service Pursuant to Special Arrangement: 28 U.S.C. 1608(a)(1) provides for service pursuant to special arrangement of the parties. Examples of such arrangements are found in V, G. Delaume, Transnational Contracts, Appendix (ed. 1981).

Service Pursuant to Applicable International Convention: 28 U.S.C. 1608(a)(2) provides for service under applicable international treaty or convention. There are two multilateral treaties on service of process.

(1) The Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters , 20 UST 361; TIAS 6638; Martindale-Hubbell Law Directory (Law Digest Volume, Selected International Conventions); 28 USCA Appendix, Federal Rules of Civil Procedure, Rule 4;

(2) The Inter-American Convention on Letters Rogatory and Additional Protocol with Annex [regarding service of process], Senate Treaty Doc. 98-27; 98th Congress; 2d Session; 14 Int"l. Leg. Mat. 339 (March 1975).

The Department of State, Office of Overseas Citizens Services has information flyers concerning both these conventions available on our home page on the Internet or via our automated fax service at (202) 647-3000 using the phone on your fax machine. (Documents #1051 (Hague Service) or # 1208 (Inter-American)) or from our home page on the Internet.

"Special note should be made of two means which are currently in use in attempting to commence

litigation against a foreign state ... (The) second means, of questionable validity, involves the mailing of a copy of a summons and complaint to a diplomatic mission in a foreign state. 28 U.S.C. Section 1608 precludes this method so as to avoid questions of inconsistency with Section 1 of article 22 of the Vienna Convention on Diplomatic Relations, 23 UST 3227, TIAS 7502 (1972), which entered into force in the United States on December 13, 1972. Service on an embassy by mail would be precluded under this bill. See 71 Department of State Bulletin 458-59 (1974)."

Proviso: Formal Objection of Foreign State to Service by Mail Upon Accession to the Hague Service Convention: If a foreign state which is a party to the Hague Service Convention formally objected to service by mail when it acceded to the Convention, service under Section 1608(a)(3) should not be attempted, and the plaintiff should proceed to service under Section 1608(a)(4), citing in the cover letter to the Department of State, Office of Overseas Citizens Services the foreign state"s objection to service by mail as noted in its accession to the Hague Service Convention.

To determine which foreign state has objected to service under Article 10(a) of the Hague Service Convention via postal channels, see our information on the Hague Service Convention and the Hague Conference on Private International Law web site .

Service via Diplomatic Channels: 28 U.S.C. 1608(a)(4) provides for service of a summons, complaint and notice of suit by way of the diplomatic channel if service could not be made by mail in accordance with Section 1608(a)(3) within 30 days. The Department of State will not accept a request for service under Section 1608(a)(4) if the other methods for service in Section 1608(a) have not been exhausted, if the documents are incomplete, or if requisite translations are not provided. The summons, complaint and notice of suit must be submitted to the Office of Policy Review & Interagency Liaison, Overseas Citizens Services, 2100 Pennsylvania Ave., NW 4FL, Washington, DC 20520 in duplicate. Requesting courts or plaintiff"s counsel should establish in writing to the Department that service has been attempted pursuant to 1608(a)(1), (2) and (3). Notification of such attempted service in the form of a letter to the Director, Office of Policy Review and Interagency Liaison will suffice. If service is attempted pursuant to Section 1608(a)(2), by applicable international convention, and service is denied by a foreign central authority for the convention, a copy of the denial should be furnished. As explained above, if service under Section 1608(a)(3) is inapplicable due to the foreign state"s formal objection upon accession to the Hague Service Convention, this fact should also be noted.

Q. What is a Notice of Suit?

A. 28 U.S.C. 1608(a)(3) and 1608(a)(4) require preparation of a "notice of suit". 22 CFR 93.2(e) provides a format for a notice of suit. There is no pre-printed form. 22 CFR 93.2(e) annex provides that a copy of the Foreign Sovereign Immunities Act must accompany the notice of suit.

Q. How should a request for service under Section 1608(a)(4) be transmitted to the State Department?

A. 28 U.S.C. 1608(a)(4) and 22 CFR 93.1 provide that the documents be sent to the Department of State by the clerk of court. In practice, some courts have local rules, which provide that such documents are transmitted directly by plaintiff"s counsel rather than by the clerk of court. The Department of State accepts requests under Section 1608(a)(4) received under cover of a letter from either the clerk of court or counsel for the plaintiffs.

Q. What is Proof of service via the diplomatic channel under Section 1608(a)(4)?

A. **A certified copy of the diplomatic note transmitting the summons, complaint and notice of suit to the foreign state is forwarded by the Department of State, Office of Policy Review &**

Interagency Liaison, Overseas Citizens Services to the clerk of the court where the action is pending as proof of service. A copy is provided to plaintiff"s counsel. See 22 CFR 93.1(e). But see *Filus v. LOT Polish Airlines, E.D.N.Y. 1993, 819 F. Supp. 232; Jackson v. People"s Republic of China, D.C. Ala. 1982, 550 F. Supp. 869 .*

Q. How do I effect service on a foreign State with which the United States does not have diplomatic relations?

A. The Foreign Sovereign Immunities Act makes no provision for service of process through diplomatic channels where there are no diplomatic relations between the United States and the foreign state. In practice, service has been accomplished where a protecting power arrangement exists, unless the protecting power was restricted to emergency consular protection services. See 22 C.F.R. 93.1(3). Consult the Department of State Office of Policy Review & Interagency Liaison, Overseas Citizens Services for guidance in such cases. See Restatement (Third) of the Law of the Foreign Relations of the United States, Sec. 457, p. 426, 427 (1986). See also, Digest of United States Practice in International Law 1980, Office of the Legal Adviser, U.S. Department of State, 552, 554 (1986); George, A Practical and Theoretical Analysis of Service of Process under the Foreign Sovereign Immunities Act, 19 Int"l Law. 70, 77 (1985); and Ascencio & Dry, An Assessment of the Service Provisions of the Foreign Sovereign Immunities Act of 1976, 8 University of Notre Dame Journal of Legislation, 244, 246 (1981).

Q. Do I have to follow a hierarchy regarding the methods of service under Section 1608(b)?

A. See H.R. Rep. No. 94-1487, 94th Cong., 2d Sess., (1976), reprinted in part in 1976 U.S. Code Cong. & Ad. News 6604, 6624; see also, George, Practical and Theoretical Analysis of Service of Process Under FSIA, 19 Int"l Law. 55 (1985). The legislative history of Section 1608 is not specific on this point, stating in an overview of 1608(a) and (b) that "there is a hierarchy in the methods of service" but also stating generally under 1608(b) that "if there is no special arrangement and if the agency or instrumentality has no representative in the United States, service may be made under one of the three methods provided in subsection (b)(3)" (1976 U.S. Code Cong. & Ad. News 6623, 6624). Following the hierarchy, if there is no special arrangements for service between the plaintiff and the agency or instrumentality as contemplated by 1608(b)(1), service would then be attempted under Section 1608(b)(2) either by service on an agent in the United States or by applicable international convention on service of process.

Q. How do I effect service on an agency or instrumentality of a foreign State (28 U.S.C. 1608(b)?

A. 28 U.S.C. Section 1608(b) governs service on an agency or instrumentality of a foreign State.

28 U.S.C. 1608(b)(1) provides for service by special arrangement between the plaintiff and the agency or instrumentality. Examples of such arrangements are found in V, G. Delaume, Transnational Contracts, Appendix (ed. 1981).

28 U.S.C. 1608(b)(2) offers three methods of service:

[1] "by delivery of a copy of the summons and complaint either to an officer, a managing or general agent;" or

[2] "by delivery of a copy of the summons and complaint "to any other agent authorized by appointment or by law to receive service of process in the United States;" See H.R. Rep. No. 94-1487, 94th Cong., 2d Sess., (1976), reprinted in part in 1976 U.S. Code Cong. & Ad. News, at 6604, et. seq. In particular, the Report states in pertinent part "if no such arrangements exists, than service must be made under subsection (b)(2) which provides for service upon officers, or managing, general

or appointed agents in the United States of the agency or instrumentality". Id. at 6624. Section 1608 (b)(2) does not offer a third alternative for service upon an agent abroad. If there is no agent in the United States to be served and no applicable international convention on service of judicial documents [1608(b)(2)], then service should be attempted under Section 1608(b)(3).

[3] "in accordance with an applicable international convention on service of judicial documents." There are two multilateral treaties on service of process.

(1) The Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters , 20 UST 361; TIAS 6638; Martindale-Hubbell Law Directory (Law Digest Volume, Selected International Conventions); 28 USCA Appendix, Federal Rules of Civil Procedure, Rule 4;

(2) The Inter-American Convention on Letters Rogatory and Additional Protocol with Annex [regarding service of process], Senate Treaty Doc. 98-27; 98th Congress; 2d Session; 14 Int"l. Leg. Mat. 339 (March 1975).

The Department of State, Office of Overseas Citizens Services has information flyers concerning both these conventions and how to prepare and transmit a request for service in accordance with the conventions available via our autofax service (Documents #1051 (Hague Service) or # 1208 (Inter-American)) or from our home page on the Internet.

28 U.S.C. 1608(b)(3) provides three alternative methods of service:

1608(b)(3)(A) pursuant to a letter rogatory; If service is attempted under Section 1608(b)(3)(A), by letters rogatory, the request must be transmitted through the diplomatic channel, i.e., the Office of Policy Review and Interagency Liaison, Overseas Citizens Services, to the American Embassy in the country in question for transmittal to the Foreign Ministry. In cases under the FSIA, letters rogatory requests are handled exclusively by our Office of Policy Review and Inter-Agency Liaison. However, our general information flyer on preparation of letters rogatory (designed for cases other than the FSIA) will be of assistance. This is available via our home page on the Internet at http://travel.state.gov under Judicial Assistance or via our autofax service at (202) 647-3000 using the phone on your fax machine. (See "Additional Information" below.) **Ignore references in the "Preparation of Letters Rogatory" flyer to our Office of American Citizen Services and Crisis Management, as that office is not responsible for FSIA cases. Rather, transmit the request to the Office of Policy Review and Inter-Agency Liaison, Room 4817 N.S., Department of State, 2201 C Street, N.W., Washington, D.C. 20520.** The letter rogatory and accompanying documents (summons, complaint, and translations) should be submitted in duplicate (that is, one original in English with seal of court and signature of the judge, English photocopy and two copies of the translation.) No notice of suit is required. Effective June 1, 2002, there is a $650.00 consular fee for processing letters rogatory (See Federal Register, May 16, 2002, Volume 67, Number 95, Rules and Regulations, Pages 34831-34838; 22 CFR 22.1, item 51). Counsel are requested to submit a certified bank check in the amount of $650.00 payable to the U.S. Embassy (insert name of capital of the foreign country, for example, "U.S. Embassy Tokyo"). Personal checks are not acceptable.

1608(b)(3)(B) by any form of mail requiring a signed receipt to be addressed to the agency or instrumentality to be served. Because of the length of time involved in executing letters rogatory, courts may find it preferable to effect service on the agency or instrumentality under Section 1608(b)(3)(B) by international registered mail or other form of mail requiring a signed receipt addressed to the agency or instrumentality.

Proviso: Formal Objection of Foreign State to Service by Mail Upon Accession to the Hague Service Convention: If a foreign state which is a party to the Hague Service Convention formally

objected to service by mail when it acceded to the Convention, service under Section 1608(b)(3)(B) should not be attempted, and the plaintiff should proceed to service under other methods available under Section 1608(b). If service is requested pursuant to a letter rogatory under Section 1608(b)(3)(A), the cover letter to the Department of State, Office of Overseas Citizens Services should cite the foreign state"s objection to service by mail as noted in its accession to the Hague Service Convention. To determine which foreign state has objected to service under Article 10(a) of the Hague Service Convention via postal channels, see our information on the Hague Service Convention and the Hague Conference on Private International Law web site .

1608(b)(3)(C) by order of the court in the United States consistent with the law of the place where service is to be made . In the absence of a signed return receipt as proof of service, the plaintiff may find it necessary to proceed with Section 1608(b)(3)(A) and initiate the letter rogatory process or look to 1608(b)(3)(C) to ascertain whether there is any other method of service which the court may order consistent with the law of the place where service is to be made, i.e., the foreign country, such as service by agent or service by publication. The legislative history clarifies the meaning of the phrase "consistent with the laws of the place where service is to be made". [T]his latter language takes into account the fact that the laws of foreign countries may prohibit the service in their country of judicial documents by process servers from the United States. It is contemplated that no court will direct service upon a foreign state by appointing someone to make a physical attempt at service abroad, unless it is clearly consistent with the law of the foreign jurisdiction where service is to be attempted. It is also contemplated that the courts will not direct service in the United States upon diplomatic representatives (1976 U.S. Code Cong. & Ad. News 6624.), See also, ***Hellenic Lines Ltd., v. Moore, 345 F. 2d 978 (D.C. Cir. 1965), or upon consular representatives, Oster v. Dominion of Canada, 144 F. Supp. 746 (N.D.N.Y. 1956), aff"d, 238 F. 2d 400 (2d Cir. 1956).*** Therefore, before service is attempted under Section 1608(b)(3)(C), the FSIA calls for the Court to look to the laws of the foreign state regarding service of documents, apparently to ensure that the judicial sovereignty of the foreign state is not violated inadvertently. As a practical matter, U.S. courts sometimes inquire concerning this method by contacting the Department of State for information regarding service under the laws of the foreign country. In addition to providing the court or plaintiff"s counsel with available information on service, the Department often refers the inquirer to the law library of the Library of Congress and may provide the inquirer with a list of foreign attorneys who may be in a position to provide an authoritative opinion on the subject. It should be noted that the Department of State is not a repository of foreign laws.

Q. How do I effect service of a default judgment or other documents?

A. Section 1608(e) provides that once a default judgment has been entered, a copy shall be sent to the foreign state according to the methods set forth in section (a) and (b) of the Act. A "Notice of Default Judgment" shall be prepared utilizing the format prescribed in the Annex to 22 CFR 93.2. As a practical matter, if service has been attempted in accordance with the hierarchical methods set forth in Section 1608(a) in the initial phase of the action (service of the summons, complaint, and notice of suit) without success, necessitating service under Section 1608(a)(4) through the diplomatic channel, when service of a default judgment on the Foreign State becomes necessary, plaintiffs may transmit the request for service through the diplomatic channel to the Department of State, Overseas Citizens Services without repeating efforts at service under Section 1608(a)(1)-1608(a)(3).

Q. ***Can I serve other documents through the diplomatic channel?***

A. **Requests for service via the diplomatic channel of documents other than the summons, complaint and notice of suit or the default judgment, not provided for in the Act, will be considered by the Department of State, Overseas Citizens Services, Office of Policy Review & Interagency Liaison on a case-by-case basis in coordination with the Office of the Legal**

Adviser for Diplomatic Law and Litigation.

Q. ***Where Can I Find Out More About the FSIA?***

A. These are some selected References:

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Q. How can I get information from your autofax and home page services?

A. Overseas Citizens Services has available general information flyers on international judicial assistance many of which are available through our automated fax system or via our Internet Consular Affairs home page. These topics include country-specific information about service of process and obtaining evidence abroad.

Using the Autofax System:

* Dial (202) 647-3000 using the phone on your fax machine.

* Follow the prompts to obtain the catalog of documents.

Using the Internet: Many of our judicial assistance flyers are also available on the Internet via the Department of State, Bureau of Consular Affairs home page at http://travel.state.gov under Judicial Assistance . See also, the Department of State, Office of the Legal Adviser for Private International Law home page for information regarding private international law unification. See also the home pages for many of our embassies.

Q. Where can I find information on the Internet about applicable treaties?

A. Information on which countries are party to a particular treaty is available from the following databases:

United States Department of State, Office of the Legal Adviser, Treaty Affairs, List of Treaties and Other International Agreements of the United States In Force: http://www.state.gov/www/global/legal_affairs/tifindex.html

United Nations (UN): Databases/Treaties

Hague Conference on Private International Law :

Council of Europe (COE): under Texts/Treaties

Organization of American States (OAS): under Documents/Treaties and Conventions

Q. Who do I contact with further questions?

A. For additional information, contact the Office of Policy Review & Interagency Liaison, Room 4817, Department of State, 2201 C Street N.W., Washington, D.C. 20520, telephone (202) 647-3666 or 202-647-3683.

Q. Where should requests for service under Section 1608(a)(4) or 1608(b)(3)(A)?

A. Requests for service under Section 1608(a)(4), Section 1608(e) or Section 1608(b)(3)(A) of the Act should be submitted to the Office of Policy Review & Interagency Liaison, Room 4817, Department of State, 2201 C Street, N.W., Washington, D.C. 20520.

Q. How many copies are required?

A. You need to send two sets of the documents. One will be served. The other will be returned with a copy of the proof of service. Documents include:

For Service Under Section 1608(a)(4):

Set 1:

a. Summons (English, Bearing Seal of Court and Signature of Judge or Clerk)

b. Complaint (English)

c. Notice of Suit (English, See 22 CFR 93)

d. Translations of all of the above.

Set 2:

Photocopies of all of the above (Summons, Complaint, Notice of Suit, and translations of each.)

For Service Under Section 1608(b)(3)(A)

Set 1:

a. Letter Rogatory bearing seal of court and signature of judge. (English)

b. Summons (bearing seal of court and signature of clerk) (English)

c. Complaint (English)

d. Translations of Letter Rogatory, Summons and Complaint

Foreign Corrupt Practices Act

From Wikipedia, the free encyclopedia

Some information in this article or section has **not** been **verified** and may not be reliable. Please **check for any inaccuracies**, modify and **cite sources** as needed.

The **Foreign Corrupt Practices Act of 1977** (15 U.S.C. §§ 78dd-1, et seq.) is a United States federal law requiring any company that has publicly-traded stock to maintain records that accurately and fairly represent the company's transactions; additionally, requires any publicly-traded company to have an adequate system of internal accounting controls.

As a result of U.S. Securities and Exchange Commission investigations in the mid-1970s, over 400 U.S. companies admitted making questionable or illegal payments in excess of $300 million to foreign government officials, politicians, and political parties. The abuses ran the gamut from bribery of high foreign officials to secure some type of favorable action by a foreign government to so-called facilitating payments that allegedly were made to ensure that government functionaries discharged certain ministerial or clerical duties. Congress enacted the FCPA to bring a halt to the bribery of foreign officials and to restore public confidence in the integrity of the American business system.

The Act was amended in 1998 by the International Anti-Bribery Act of 1998 which was designed to implement the anti-bribery conventions of the Organisation for Economic Co-operation and Development (OECD)."

The antibribery provisions of the FCPA make it unlawful for a U.S. person, and certain foreign issuers of securities, to make a payment to a foreign official for the purpose of obtaining or retaining business for or with, or directing business to, any person. Since 1998, they also apply to foreign firms and persons who take any act in furtherance of such a corrupt payment while in the United States.

The FCPA also requires companies whose securities are listed in the United States to meet its accounting provisions. See 15 U.S.C. § 78m. These accounting provisions, which were designed to operate in tandem with the antibribery provisions of the FCPA, require corporations covered by the provisions to make and keep books and records that accurately and fairly reflect the transactions of the corporation and to devise and maintain an adequate system of internal accounting controls.

Regarding payments to foreign officials, the act draws a distinction between bribery and facilitation or "grease payments", which may be permissible if they are not against local laws. A company's legal department generally still has to approve such payments. The primary distinction is that grease payments are made to an official to expedite his performance of the duties he is already bound to perform.

Notable cases of the application of FCPA are with Lucent Technologies and Invision Technologies.

External links

- US Department of Justice page on the FCPA (http://www.usdoj.gov/criminal/fraud/fcpa.html), including a lay person's guide (http://www.usdoj.gov/criminal/fraud/fcpa/dojdocb.htm)
- Indictments allege bribes were paid for Kazakstan oil 2 Americans accused -- but not U.S. firms, by Marlena Telvick, April 2003 (http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2003/04/07/MN278797.DTL)
- Lucent fires four executives in China over allegations of bribery (http://www.cfo.com/article.cfm/3013085?f=related)
- Governance Focus (http://www.governancefocus.com/) issues in governance worldwide, in English & Español

Retrieved from "http://en.wikipedia.org/wiki/Foreign_Corrupt_Practices_Act"

Categories: Wikipedia articles needing factual verification | 1977 in law | Corruption | Business ethics | United States federal legislation

e. Check in the amount of $650 for each letter rogatory to be transmitted payable to the U.S. Embassy in the foreign country (for example, U.S. Embassy London).

Set 2:

Photocopies of all of the above (Letter Rogatory, Summons, Complaint and translations of each)

Q. Are there any fees associated with a service requested under the Act?

A. Effective June 1, 2002 there is a fee of $650.00 for processing Foreign Sovereign Immunities Act cases under Section 1608(a)(4) for service on a foreign state or political subdivision. See Federal Register, May 16, 2002, Volume 67, Number 95, Rules and Regulations, Pages 34831-34838; 22 CFR 22.1, item 51). For transmittal of letters rogatory for service on an agency or instrumentality of a foreign State under Section 1608(b)(3)(A) there is a requisite fee under the Schedule of Fees, 22 CFR 22.01, Item 51 of $650.00. Fees are payable by certified check or corporate check to the U.S. Embassy in the foreign country, for example, U.S. Embassy London. Therefore, if a request is made for service on a foreign state or political subdivision under Section 1608(a)(4) and on an agency or instrumentality of a foreign state under Section 1608(b)(3)(A) pursuant to a letter rogatory, both fees would apply.

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Safe Harbor Overview

The European Commission's Directive on Data Protection went into effect in October, 1998, and would prohibit the transfer of personal data to non-European Union nations that do not meet the European "adequacy" standard for privacy protection. While the United States and the European Union share the goal of enhancing privacy protection for their citizens, the United States takes a different approach to privacy from that taken by the European Union. The United States uses a sectoral approach that relies on a mix of legislation, regulation, and self regulation. The European Union, however, relies on comprehensive legislation that, for example, requires creation of government data protection agencies, registration of data bases with those agencies, and in some instances prior approval before personal data processing may begin. As a result of these different privacy approaches, the Directive could have significantly hampered the ability of U.S. companies to engage in many trans-Atlantic transactions.

In order to bridge these different privacy approaches and provide a streamlined means for U.S. organizations to comply with the Directive, the U.S. Department of Commerce in consultation with the European Commission developed a "safe harbor" framework. The safe harbor -- approved by the EU in 2000-- is an important way for U.S. companies to avoid experiencing interruptions in their business dealings with the EU or facing prosecution by European authorities under European privacy laws. Certifying to the safe harbor will assure that EU organizations know that your company provides "adequate" privacy protection, as defined by the Directive.

SAFE HARBOR BENEFITS

The safe harbor provides a number of important benefits to U.S. and EU firms. Benefits for U.S. organizations participating in the safe harbor will include:

- All 25 Member States of the European Union will be bound by the European Commission's finding of adequacy
- Companies participating in the safe harbor will be deemed adequate and data flows to those companies will continue;
- Member State requirements for prior approval of data transfers either will be waived or approval will be automatically granted; and
- Claims brought by European citizens against U.S. companies will be heard in the U.S. subject to limited exceptions.

The safe harbor framework offers a simpler and cheaper means of complying with the adequacy requirements of the Directive, which should particularly benefit small and medium enterprises.

An EU organization can ensure that it is sending information to a U.S. organization participating in the safe harbor by viewing the public list of safe harbor organizations posted on the Department of Commerce's website (http://export.gov/safeharbor). This list will become operational at the beginning of November 2000. It will contain the names of all U.S. companies that have self-certified to the safe harbor framework. This list will be regularly updated, so that it is clear who is assured of safe harbor benefits.

HOW DOES AN ORGANIZATION JOIN?

The decision by U.S. organizations to enter the safe harbor is entirely voluntary. Organizations that decide to participate in the safe harbor must comply with the safe harbor's requirements and publicly declare that they do so. To be assured of safe harbor benefits, an organization needs to self certify annually to the Department of Commerce in writing that it agrees to adhere to the safe harbor's requirements, which includes elements such as notice, choice, access, and enforcement. It must also state in its published privacy policy statement that it adheres to the safe harbor. The Department of Commerce will maintain a list of all organizations that file self certification letters and make both the list and the self certification letters publicly available.

To qualify for the safe harbor, an organization can (1) join a self-regulatory privacy program that adheres to the safe harbor's requirements; or (2) develop its own self regulatory privacy policy that conforms to the safe harbor.

WHAT DO THE SAFE HARBOR PRINCIPLES REQUIRE?

Organizations must comply with the seven safe harbor principles. The principles require the following:

Notice: Organizations must notify individuals about the purposes for which they collect and use information about them. They must provide information about how individuals can contact the organization with any inquiries or complaints, the types of third parties to which it discloses the information and the choices and means the organization offers for limiting its use and disclosure.

Choice: Organizations must give individuals the opportunity to choose (opt out) whether their personal information will be disclosed to a third party or used for a purpose incompatible with the purpose for which it was originally collected or subsequently authorized by the individual. For sensitive information, affirmative or explicit (opt in) choice must be given if the information is to be disclosed to a third party or used for a purpose other than its original purpose or the purpose authorized subsequently by the individual.

Onward Transfer (Transfers to Third Parties): To disclose information to a third party, organizations must apply the notice and choice principles. Where an organization wishes to transfer information to a third party that is acting as an agent(1), it may do so if it makes sure that the third party subscribes to the safe harbor principles or is subject to the Directive or another adequacy finding. As an alternative, the organization can enter into a written agreement with such third party requiring that the third party provide at least the same level of privacy protection as is required by the relevant principles.

Access: Individuals must have access to personal information about them that an organization holds and be able to correct, amend, or delete that information where it is inaccurate, except where the burden or expense of providing access would be disproportionate to the risks to the individual's privacy in the case in question, or where the rights of persons other than the individual would be violated.

Security: Organizations must take reasonable precautions to protect personal information from loss, misuse and unauthorized access, disclosure, alteration and destruction.

Data integrity: Personal information must be relevant for the purposes for which it is to be used. An organization should take reasonable steps to ensure that data is reliable for its intended use, accurate, complete, and current.

Enforcement: In order to ensure compliance with the safe harbor principles, there must be (a) readily available and affordable independent recourse mechanisms so that each individual's complaints and disputes can be investigated and resolved and damages awarded where the applicable law or private sector initiatives so provide; (b) procedures for verifying that the commitments companies make to adhere to the safe harbor principles have been implemented; and (c) obligations to remedy problems arising out of a failure to comply with the principles. Sanctions must be sufficiently rigorous to ensure compliance by the organization. Organizations that fail to provide annual self certification letters will no longer appear in the list of participants and safe harbor benefits will no longer be assured.

To provide further guidance, the Department of Commerce has issued a set of frequently asked questions and answers (FAQs) that clarify and supplement the safe harbor principles.

HOW AND WHERE WILL THE SAFE HARBOR BE ENFORCED?

In general, enforcement of the safe harbor will take place in the United States in accordance with U.S. law and will be carried out primarily by the private sector. Private sector self regulation and enforcement will be backed up as needed by government enforcement of the federal and state unfair and deceptive statutes. The effect of these statutes is to give an organization's safe harbor commitments the force of law vis a vis that organization.

Private Sector Enforcement: As part of their safe harbor obligations, organizations are required to have in place a dispute resolution system that will investigate and resolve individual complaints and disputes and procedures for verifying compliance. They are also required to remedy problems arising out of a failure to comply with the principles. Sanctions that dispute resolution bodies can apply must be severe enough to ensure compliance by the organization; they must include publicity for findings of non-compliance and deletion of data in certain circumstances. They may also include suspension from membership in a privacy program (and thus effectively suspension from the safe harbor) and injunctive orders.

The dispute resolution, verification, and remedy requirements can be satisfied in different ways. For example, an organization could comply with a private sector developed privacy seal program that incorporates and satisfies the safe harbor principles. If the seal program, however, only provides for dispute resolution and remedies but not verification, then the organization would have to satisfy the verification requirement in an alternative way.

Organizations can also satisfy the dispute resolution and remedy requirements through compliance with government supervisory authorities or by committing to cooperate with data protection authorities located in Europe.

Government Enforcement: Depending on the industry sector, the Federal Trade Commission, comparable U.S.

government agencies, and/or the states may provide overarching government enforcement of the safe harbor principles. Where a company relies in whole or in part on self regulation in complying with the safe harbor principles, its failure to comply with such self regulation must be actionable under federal or state law prohibiting unfair and deceptive acts or it is not eligible to join the safe harbor. At present, U.S. organizations that are subject to the jurisdiction of the Federal Trade Commission or the Department of Transportation with respect to air carriers and ticket agents may participate in the safe harbor. The Federal Trade Commission and the Department of Transportation with respect to air carriers and ticket agents have both stated in letters to the European Commission that they will take enforcement action against organizations that state that they are in compliance with the safe harbor framework but then fail to live up to their statements.

Under the Federal Trade Commission Act, for example, a company's failure to abide by commitments to implement the safe harbor principles might be considered deceptive and actionable by the Federal Trade Commission. This is the case even where an organization adhering to the safe harbor principles relies entirely on self-regulation to provide the enforcement required by the safe harbor enforcement principle. The FTC has the power to rectify such misrepresentations by seeking administrative orders and civil penalties of up to $12,000 per day for violations.

Failure to Comply with the Safe Harbor Requirements: If an organization persistently fails to comply with the safe harbor requirements, it is no longer entitled to benefit from the safe harbor. Persistent failure to comply arises where an organization refuses to comply with a final determination by any self regulatory or government body or where such a body determines that an organization frequently fails to comply with the requirements to the point where its claim to comply is no longer credible. In these cases, the organization must promptly notify the Department of Commerce of such facts. Failure to do so may be actionable under the False Statements Act (18 U.S.C. § 1001).

The Department of Commerce will indicate on the public list it maintains of organizations self certifying adherence to the safe harbor requirements any notification it receives of persistent failure to comply and will make clear which organizations are assured and which organizations are no longer assured of safe harbor benefits.

An organization applying to participate in a self-regulatory body for the purposes of re-qualifying for the safe harbor must provide that body with full information about its prior participation in the safe harbor.

ww.export.gov/safeharbor/sh_overview.html 7/28/2006

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WHAT EX-PAT SHOULD KNOW ON BUSINESS AND INVESTMENTS IN ARGENTINA

The purpose of this report is to highlight certain specific issues that need to be considered by natural persons investing in –or being transferred to– Argentina. The situation of "ex-pats" requires certain knowledge of basic legal principles of the country where he/she will be working which the corporate legal department is not necessarily aware of. Local practices around the world are often a surprising set of rules where "local knowledge" is of utmost importance.

This is a brief overview of Argentine regulations in certain areas and show of practical pitfalls which an ex-pat and his/her company may face.

I. CORPORATE - FOREIGN EXCHANGE

Investments in Argentina can be made through a legal entity or through agreements (including associations, joint ventures, strategic alliances, etc.).

A. Through a legal entity:

There are basically three kinds of legal entities by means of which commercial activities may be carried out in Argentina: the corporation, the limited liability company and the branch of a foreign company. The regime applicable to said legal entities is regulated in the Argentine Commercial Companies Law 19,550 ("ACCL").

There are no "nationality" requirements in general although: (a) certain limitations may exists in areas such as mass media / press; security banking activities; or (b) preferences given to "local" companies in certain public concessions; or (c) limitation of ownership of assets in certain areas (nuclear, border, real estate).

This limited discrimination based on nationality should not affect U.S. investments given the fact that the same are god-fathered under a bilateral investment treaty entered into by Argentina and the U.S. under which U.S. nationals and investments are given a "national" or "most favored nation" treatment.

(i) Corporation (S.A.)

The corporation is the most commonly used legal entity in Argentina for the development of activities and businesses.

- *Shareholders*: a minimum of two shareholders is required. The ACCL does not establish minimum or maximum amounts of capital or percentages that a person should own in a company or corporation in order to be considered a shareholder. However, current IGJ (Argentine Companies Registrar) criteria[1] is that the maximum participation allowed to be owned by a sole shareholder is 98% of the capital stock and the other 2% of the capital stock should be owned by at least another shareholder, based on the requirement of "plurality of partners". Therefore, the IGJ would in principle not register companies controlled by a shareholder holding over 98% of voting shares.

Shareholders can be domestic or foreign companies, or individuals of any nationality or residence. Their liability is limited to full payment of the stock subscribed by each shareholder.

- *Shares*: the capital stock of the company is represented by shares. Shares must be nominative, non-endorsable and may or may not be represented by certificates.

- *Capital*: a minimum capital of at least Argentine $ 12,000 (approximately US$ 4.000) is required. Due to Resolution 9/2004 of the IGJ, corporate capital stock must be appropriate for the development of the corporate purpose. Therefore, the IGJ may request that companies being incorporated fix a capital higher than the referred to minimum.

- *Board*: The Board must appoint a president, who has the legal representation of the corporation. Appointment of one or more vice-presidents is optional. Absolute majority of the entire Board constitutes sufficient quorum and actions are taken as provided for in the by-laws.

There are no nationality requirements nor it is required that directors also be shareholders. However, the absolute majority of directors must reside in Argentina.

Directors, administrators and syndics must, among other duties, act with the diligence of a "good business man" and pursue the corporate interest of the company and common interests of all its partners. Directors need to pay a mandatory insurance for the coverage of their duties.

(ii) Limited Liability Company (S.R.L.)

The SRL is one of the most commonly used legal structures after the corporation. Its principal characteristics are:

- *Partners*: there must be a minimum of two and a maximum of 50 (the same criteria explained for the corporations regarding the maximum and minimum percentage of capital to be owned by each partner is applied by the IGJ to the SRL). Partners can also be domestic (except corporations) or foreign companies, or individuals, and no nationality or residency requirements apply. Their liability is limited to the full payment of the equity participation subscribed by each partner.

- *Capital*: represented by "cuotas". There is no minimum capital requirement as in the case of the corporation. Resolution 9/2004 of the IGJ (on corporate capital) also applies to the SRL.

- *Management*: management of the SRL is in the hands of one or more managers, acting individually or jointly as set forth in the articles of incorporation. As with the directors of the corporation, a manager is not subject to any nationality requirement. However, the absolute majority of all managers appointed by the partners must reside in Argentina. Managers need not be partners.

(iii) Participation in the capital stock of a SA or a SRL (registration as a foreign company)

Foreign companies interested in incorporating local companies or in having interests in local companies must, in accordance with Section 123 of the ACCL, be registered with the Public Registry of Commerce before filing several corporate documentation.

In accordance with Resolution 7/2003 of the IGJ, foreign companies shall also:

(a) inform whether the company is subject to prohibitions or legal restrictions to develop the activities related to its corporate purpose in its place of origin; and

(b) demonstrate that the foreign company fulfills with any of the following conditions outside Argentina: (1) the existence of one or more agencies, branches or permanent representations, (2) the ownership of participation in companies which qualify as non-current assets; or (3) the ownership of fixed assets in its country of origin.

Resolution 7/03 and 22/04 of the IGJ also require annual filings by registered foreign companies with the IGJ aimed at proving that they have assets outside Argentina. The tendency is to avoid "rubber-stamp" shareholders.

(iii) Branch

Foreign companies may use a branch to perform businesses or activities in Argentina.

- *Capital*: there is no need for the branch to have a specific amount of capital, with the exception of branches acting in certain industries such as banking or insurance.

[1] The resolutions and criteria of the IGJ are only applicable to companies registered within the jurisdiction of the city of Buenos Aires.

- *Management*: only a legal representative duly authorized to operate the branch must be appointed.

- *Accounting*: the branch must carry a separate accounting from that of its head office, and file annual financial statements with the Public Registry of Commerce.

Branches must also comply with Resolution IGJ 7/03 or, if applicable, with Resolution IGJ 22/04 (proving that the foreign companies have assets outside Argentina).

B. Through Agreements:

(a) *Distribution*: as in most countries, these agreements are characterized by the fact that producers may exert a certain control over the business of their distributors, and that they are intended to constitute stable relationships spanning over long periods of time. In Argentina, it is necessary to note that when distributors are individuals, the eventual risk of them being considered workers must be thoroughly analyzed.

(b) *Agency*: An agency agreement is one whereby one party charges the other with the task of promoting the former's business within a defined zone. It may involve the empowerment of the agent to close deals in the principal's name, but such is not always the case. As mentioned above, when agents are individuals, the potential risk of them being considered workers must be carefully addressed.

(c) *Transfer of technology*: Technology transfer agreements are governed by Law 22,426. All agreements signed between a foreign licensor and a licensee domiciled in Argentina which have effect in Argentina and in which the main or incidental objective is the transfer, assignment or licensing of foreign technology or trademarks in exchange for valuable compensation, fall under the scope of the aforementioned law. The term "technology", as defined by the Law, encompasses all patentable inventions, industrial models and designs and any other technical knowledge applicable to the manufacturing of a product or the rendering of a service. Technology transfer agreements must be filed with the National Institute of Industrial Property for information purposes only.

Foreign exchange

As one of the consequences of the currency devaluation and subsequent so-called "emergency" regime implemented as from early 2002, there has been an interest to attain strict control over foreign exchange transactions. Consequently, restrictions have been placed, *inter alia*, on the transfer of funds abroad for the payment of capital or interest, profits and dividends and the repatriation of capital.

There is a single free exchange system whereby exchange transactions can be made at the parties' freely agreed upon exchange rate, subject to the restrictions established by the Argentine Central Bank.

Exchange transactions can only be effected with entities authorized by the Central Bank to operate in foreign exchange. Transactions not complying with exchange regulations are reached by the Criminal Exchange Law 19,539, as amended.

Notwithstanding the foregoing, the Central Bank has issued several rules relaxing restrictions imposed on payments abroad, as follows:

- transfers of money abroad for the repayment of interest and capital of financial debts owed abroad are not subject to any restrictions;

- transfers of money abroad for the payment of profits and dividends corresponding to financial statements certified by external auditors are not subject to any restrictions;

- purchases of foreign currency by Argentine residents are limited to a monthly cap of US$ 2,000,000; and

- purchases of foreign currency by non-Argentine residents are limited to a monthly cap of US$ 5,000, except in certain cases in which this cap is not applicable. If such purchases are destined to implement repatriations of capital the limit is increased although subject to other limitations.

II. IMMIGRATION ISSUES

The hiring of foreign employees requires that the latter be granted a immigration permit from local authorities, since tourist visas do not allow foreigners to work within the framework of an employment contract with a local company.

There are three categories within which a labor visa may be granted:

(i) temporary residence by virtue of a contract entered into by the foreign employee with an Argentine company,

(ii) temporary residence by virtue of the transfer of a foreign company's employee to a related Argentine company, and

(iii) transitory residence.

The first two options require a double-step procedure. Firstly, the National Immigration Office must issue an entrance permit, the filing of which is initiated by the local company. Next, the foreign employee presents the permit together with the required personal documentation before the Argentine Consulate in his

foreign country of residence, after which the labor visa will be granted. In both cases the labor visa is granted for a one-year renewable period.

The third option implies a considerably shorter yet costlier procedure. It is granted on an exemption basis only and for a fifteen-day renewable period.

There is also a special case that is the foreign employee who can use a tourist visa for the purpose of reviewing or analyzing the market of a particular business. This visa is granted for a 90 days period.

The local authorities grant the same permit / visa in favor of the foreign employee's family (i.e. wife and sons). Certain restrictions on imports of goods apply.

Please bear in mind that if the local company maintains a foreign employee without a labor visa, several liabilities (i.e. fines) shall be applicable or attributable to such local company.

III. LABOR ISSUES

Argentine labor law is divided into three major areas: individual law, collective law and social security law.

Individual labor law regulates the relationship between an employer and an employee, basically by means of: (i) the Employment Contract Law; (ii) specific regulations that apply to certain professional categories (i.e. journalists, sellers of goods or domestic employees); and (iii) the applicable collective bargaining agreement, depending on the activity developed by the employer.

Collective labor law governs the relationship between the collective representatives of employees –unions- and an employer or group of employers. The result of collective negotiations are the collective bargaining agreements.

Finally, social security law establishes the mechanisms by means of which the public administration grants a monetary or other compensation to workers in the events of death, disability – due to labor and non labor illnesses or accidents –or retirement. The employer must withhold a maximum of 17% of the employee's salary as social security charges.

- Principles: the fundamental principles of our labor law include the following: impossibility for the employee to waive his labor rights, continuity of the employment contract, priority of reality over form, good faith, social justice, equity, non-discrimination, and gratuity of judicial proceedings.

- Requirements: the employee can only be a natural person with working and legal capacity, and cannot be substituted in said relationship by any other person.

An employee cannot be under fourteen years of age, and minors under eighteen years of age require parents' express authorization in order to be employed.

- Salary: through an employment contract (which is not necessarily a written document but, rather, a de-facto relation), the employee offers its services in exchange for a salary. According to the Employment Contract Law, every employee is entitled to a thirteenth salary which is paid as two semi-annual bonuses at the end of June and December each year.

The most common form of payment is by means of a deposit in the employee's banking account, which must be opened on his behalf by the employer. In certain exceptional cases, the salary may be paid in cash or by check.

- Termination: Termination of the employment contract may be motivated by various reasons. On the one hand, it can be terminated due to the employer's decision. If there is sufficient and just cause for the dismissal, no indemnification shall be due to the employee.

If the termination is due to an unjustified dismissal (without cause), the employee shall be entitled to indemnification equal to one monthly salary per year worked, or fraction equal to or higher than three months. The monthly salary to be considered is the best normal, ordinary monthly salary accrued by the employee during the last year of employment.

Notwithstanding the above, there are caps on collective bargaining agreements which must be considered for the calculation of the referred to indemnification. Such cap is equal to three times the average of all salaries foreseen by the collective bargaining agreement for the different working categories contemplated by it. In case the employee's salary is higher than said cap, the latter shall be taken into account for the calculation of the indemnification. The floor of this indemnification is one month's salary, not taking into consideration the application of the collective bargaining agreement cap.

The employee shall also be entitled to prior notice of his dismissal without cause, equal to one month if his seniority is less than five years, and to two months if his seniority is of five years or more. In lieu of prior notice, the worker shall be entitled to one or two monthly salaries, depending on the seniority of the employee.

The employment contract may also be terminated by the employee's decision motivated by any serious infringement by the employer (thus entitling the employee to receive indemnification) or without cause, in which case the employee shall not be entitled to collect any indemnification. Similarly, it may also be terminated as a result of the mutual agreement of both parties, in which case no indemnification is owed either.

- Other labor related considerations:

One should also bear in mind that:

(a) In those cases in which a company hires another entity for the performance of part of its normal, ordinary and specific activity, it shall be jointly and severally liable vis-a-vis the latter's employees for any labor law infringement.

(b) Expatriates shall be treated as an employee if he/she is registered in the payroll (the company pays social security contributions). However, if said person is member of the board of directors a "director fee" could be paid to the expatriate as an "independent" worker (also, such individual needs to pay its social security contributions).

(c) Labor legislation provides exemptions on social security payments for expatriates by the application of Double Taxation Treaties.

(d) In general, case-law benefits employees (principle "in dubio pro operario" apply).

(e) Certain new legislation is being drafted regarding labor violence (which includes, among others, change of place, harassment and differences of salary for same work). Also, a non-discrimination law is in force.

IV. TAXATION ISSUES

- Income tax:

This tax is levied on the worldwide income earned by Argentine residents, permanent establishments in Argentina of foreign companies, and only on the Argentine-source income derived by non–residents. The person or the company need to obtain a tax identification number.

Expatriates who stay in Argentina for working purposes for a maximum of a 5-year period are deemed to be non-residents for tax purposes (only subject to tax on Argentine-source income).

The payment of Argentine-source income by foreign companies is subject to withholding tax.

While for natural persons the taxable base is only their recurring income -meaning income which may be derived on a periodic basis and which implies the permanence of the source producing it- and eligible gains; companies and permanent establishments must include any income or gains –other than exempted ones- in their taxable base.

For natural persons income tax purposes, the fiscal year matches the calendar year. The fiscal period for resident entities is the commercial period established in its by-laws.

In connection with shareholders' incomes, as a rule, dividends paid out of profits subject to income tax are not subject to any further tax. An equalization tax is applicable at a 35% rate on dividends paid either to residents or non-residents when the dividends that are payable in cash or in kind exceed taxable profits accumulated at the end of the tax period preceding the distribution.

Capital gains on shares derived by non-residents are exempted from income tax. If the shareholder is a local entity (i.e. investment by means of an Argentine holding company), it should be noted that it will be subject to income tax at the regular 35% rate on those capital gains derived from the disposal of shares in other companies.

The following countries have entered into comprehensive treaties for the avoidance of double taxation with Argentina which are currently in force: Australia, Austria, Belgium, Bolivia, Brazil, Canada, Chile, Denmark, Finland, France, Germany, Italy, the Netherlands, Norway, Spain, Sweden, Switzerland and the United Kingdom. A treaty with Russia was executed but is not yet in force.

Argentina has also executed several treaties for the avoidance of double taxation with respect to income arising from international shipping and/or air transportation.

- Other taxes:

(i) Value Added Tax: applies to practically all economic transactions with very limited exemptions. General rate is 21%.

(ii) Minimum deemed Income Tax: this tax is levied on the value of assets located in Argentina and abroad belonging to, among others, companies domiciled in Argentina as well as permanent establishments of non-residents in Argentina, assessed at the closing of each fiscal period at the rate of 1%. Taxpayers with assets in the country the aggregate value of which do not exceed Pesos $ 200,000 (roughly US$ 67,000) are exempted from this tax. Shares and other participations in the capital of local companies are exempted from this tax.

(iii) Tax on bank accounts: this tax is levied mainly on credits and debits generated in bank accounts registered with financial institutions, at the general rate of 0.6%.

(iv) Personal Assets Tax: this tax is levied on natural persons domiciled and estates located in Argentina with respect to their worldwide net wealth at the end of each calendar year. It is also levied on natural persons domiciled and estates located abroad in relation to their net wealth located in Argentina at the end of each calendar year, provided certain requirements are met. Furthermore, non-residents are also subject to this net wealth tax with respect to shares held in Argentine

companies. An ordinary foreign tax credit system is also available. Individuals domiciled and estates located in Argentina are liable only on their net wealth in excess of Pesos $ 102,300 (some US$ 35,000). The tax is levied at a rate of 0.5% on taxable net wealth of up to Pesos $ 200,000 and 0.75% on taxable wealth exceeding Pesos $ 200,000.

(v) Excise taxes: this tax is levied on the transfer and importation of goods specified by law (i.e. tobacco, alcoholic and non-alcoholic beverages, extracts, cellular and satellite phone services, luxury objects and engines) and on the rendering of specified services, in only one stage. Excise taxes are levied at *ad valorem* rates based on the price of goods and services, varying from 0.1% to 60%.

(vi) Local (Municipal and Provincial) taxes: turnover tax, stamp tax, real estate tax generally apply.

V. JUDICIAL–PROCEDURAL ISSUES

Reorganization proceedings and bankruptcy proceedings are governed by Law 24.522.

- Reorganization proceedings: Both natural persons and corporations domiciled in the country as well as those domiciled abroad -regarding assets held within the country- may file for reorganization proceedings (*concurso preventivo*). In all cases it is required that the debtor be insolvent. The directors need to "inform" the court for travelling outside the country.

- Bankruptcy: A bankruptcy petition may be filed by the debtor or any creditor. Contrary to reorganization proceedings, the debtor is excluded from the administration of its assets –with the exceptions determined by law- which is vested upon the Court receiver. If the debtor is a company, bankruptcy may be extended to all members having unlimited liability. The directors:

  (i) need to "request" authorization from the court for travelling outside the country,

  (ii) will have a disqualification for a 1-year period (i.e. for being director), and

  (iii) will have personal responsibility for damages arising from fraud and willful misconduct.

VI. PERSONAL LIABILITIES

Expatriates could –same as any other manager or director or a company– face personal liability in cases of: (i) tax or social security payments evasion, (ii) accounting fraud, (iii) hazardous waste contamination or environmental damages, and/or (iv) unlawful acts performed in any condition (manager, director, proxy).

In certain cases like tax, environmental and foreign exchange areas the personal liability is assessed directly by law whereas in other situations the personal liability would need to have a direct link to the unlawful performed act.

MGPO/ACC October 2006