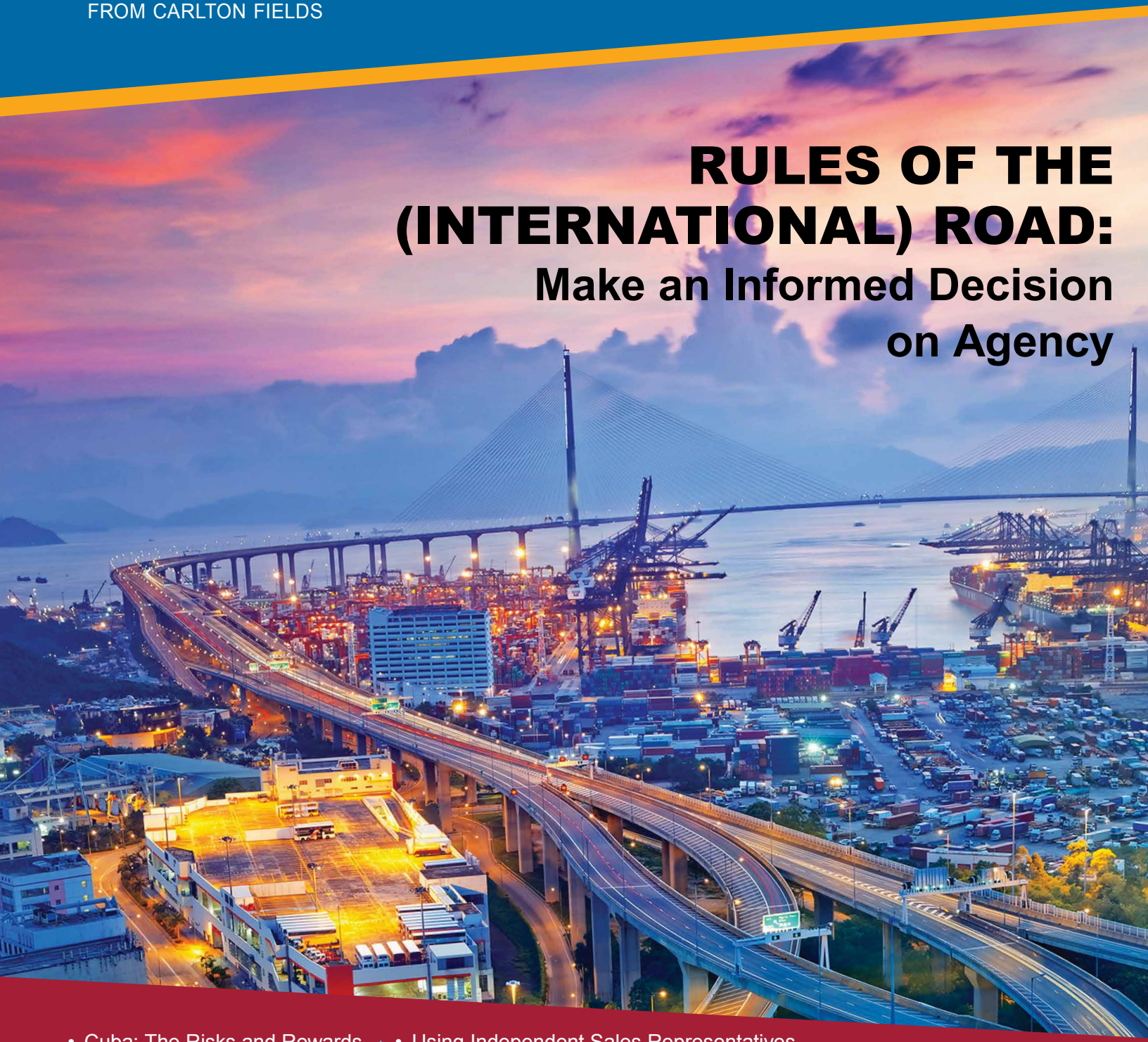
INTERNATIONAL | WINTER 2016

EXPECT FOCUS®

LEGAL ISSUES AND DEVELOPMENTS
FROM CARLTON FIELDS



RULES OF THE (INTERNATIONAL) ROAD:
Make an Informed Decision on Agency

- Cuba: The Risks and Rewards for U.S. Businesses
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CARLTON FIELDS

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EXPECTFOCUS® INTERNATIONAL, WINTER 2016

EXPECTFOCUS® International is a quarterly review of legal issues and developments related to international business, provided on a complimentary basis to clients and friends of Carlton Fields.

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Rules of the (International) Road: Make an Informed Decision on Agency

BY ANDREW J. (JOSH) MARKUS

Once you decide to do business in another country, you have choices as to the form your business presence there will take. The various options entail different types of commitments, investments, risks, and benefits. Your best option will depend on factors such as your level of familiarity with the country, and the country's legal and tax systems. This article discusses the option of appointing an agent to sell to businesses in your chosen country on your company's behalf.

The Agency Option

Appointing an agent is the least intrusive way to establish a business presence, and may be a good first step toward penetrating a foreign market. If, for example, your company is just starting to sell in Country X and you do not know if sales will justify incurring large overhead, appointing an agent, with certain restrictions on the agent's ability to bind you, may make more sense than establishing a more significant in-country presence.

The agent earns a commission on sales it generates. If the agent has no ability to bind you, and you make all decisions at your home office as to price, terms, and even whether a sale will occur, as a general rule you should not be deemed to have a physical presence in Country X for income tax purposes.

Choosing an Agent

Choose and vet your agent carefully. In addition to being trustworthy and organized, the ideal agent is well-connected in the market, used to dealing with U.S. companies, and familiar with the restrictions on serving as a U.S. company's agent.

If your U.S. lawyers are familiar with agency issues, they may be able to use their connections in Country X for your benefit and help you determine a given agent's reputation. Industry sources may also be helpful in this regard. Business advisory firms, like FTI Consulting and Kroll Inc., are other, albeit potentially expensive, options. The more familiar you are with a country, the better positioned you will be to know the market's players and choose wisely.

You should have a written agency agreement that clearly delineates what the agent can and cannot do. Think ahead about what will happen if, for some reason, the market is not receptive to your product. Set goals for your agent. Ensure that your agent understands and will abide by the U.S. Foreign Corrupt Practices Act's restrictions.

Terms and Conditions of Sale

Ensure that your purchase orders' terms and conditions of sale protect you. They should address payment, delivery and return terms; what happens if a payment is late or not made at all; what happens if catastrophic events prevent you from providing all or some of the merchandise; who is obligated to insure the shipment; and what law governs the order.

International Commercial Terms (Incoterms)

These rules, promulgated by the International Chamber of Commerce, specify shipment and delivery obligations. They provide a way to designate which party in a cross-border transaction is responsible for delivering the goods, providing insurance, and retaining liability for the goods. Your Incoterms should reflect a sale in the United States and require the customer to pay the carrier and import the goods into its country.

Pitfalls

Beware of making exclusive agent appointments—should you choose the wrong agent, this may affect your ability to have your goods imported into the applicable country. You may be unable to appoint another agent, or may only be able to do so after reacquiring the rights from the exclusive agent. Know that you will owe a termination indemnity to any terminated agent, whether exclusive or non-exclusive. Finally, an agent who is an individual, as opposed to a company, may be viewed by a labor tribunal as your employee. Advance attention to these pitfalls may save you future headaches.

Using Independent Sales Representatives to do Business in the United States

BY FRANK CERZA

Domestic and foreign manufacturers and suppliers that sell their products at wholesale in the United States may benefit from contracting with local independent sales representatives in the United States to help promote sales of their products. However, many states have laws governing the engagement of independent sales representatives in the United States. Failure to comply with such laws could expose a manufacturer to civil penalties amounting to double or triple damages, plus the attorneys' fees and court costs of an aggrieved independent sales representative.

Statutory Framework

Currently, 35 states in the United States and Puerto Rico have enacted independent sales representative laws aimed at protecting local sales representatives' rights. These laws typically apply to manufacturers or principals that sell their products in the United States at wholesale, and hire independent sales representatives to solicit wholesale orders in a particular state or states. Many of these laws were enacted during a U.S. recession in the late 1980s and early 1990s. They were intended to insure that independent sales representatives were paid commissions in a timely fashion as regular employees would be paid salaries by an employer.

Typically, state sales representative statutes require that: (i) the contract be in writing, signed by both parties, and that receipt is acknowledged by the sales representative; (ii) the contract contain a provision as to how commissions will be computed and when they will be deemed earned, due, and payable; (iii) the sales representative be paid earned commissions within the time limits specified in the contract or as otherwise provided under applicable state law; (iv) each commission payment be accompanied by an accounting of the orders for which payment is made along with a written statement of the rate and method used to calculate those commissions; and (v) upon termination of the sales representative contract, all earned commissions must be timely paid to the sales representative in accordance with the terms and provisions of the contract, or as otherwise provided under applicable state law.

Complying with Applicable Statutes

- **Restrictions on Contracting Parties' Rights.** Certain states allow a principal and sales representative to agree in the contract as to how commissions will be calculated (e.g., on either invoiced or paid amounts) and when commissions are deemed earned, due, and payable to the sales representative. Other states mandate that commissions be paid to the sales representative within a certain time period; regardless of what the parties agreed to in the contract. For example, New Jersey mandates that a sales representative receive commissions on goods ordered up to and including the last day of the contract even if such orders are accepted by the principal and delivered and paid for after the end of the agreement. Commissions on such orders must be paid to the sales rep within 30 days after payment would have been due under the contract had the contract not been terminated.

- **Penalties for Violation.** Several states make a principal liable to a sales representative for the payment of two or three times the amount of any unpaid commissions (together with attorney's fees and costs) due to the principal's failure to timely pay a sales representative its commissions. These penalties apply to a principal's failure to timely pay commissions both during and after the expiration or earlier termination of the contract.

For example, the New York sales representative statute provides that commissions shall be paid to a sales representative within five business days after commissions are deemed earned during the contract and after termination and makes a principal liable for two times the amount of the commission owed plus the sales representative's attorneys' fees and costs of suit in the event of the principal's failure to timely pay earned commissions. The Massachusetts sales representative law provides that if a principal willfully or knowingly fails to comply with the statute, the principal can be liable to the sales representative for the amount of the commission owed plus an additional amount equal to three times the amount of the commission owed along with the sales representative's attorneys' fees and costs of suit.

- **Restrictions on Termination and Non-Renewal.** The right of a principal to terminate or not renew a contract with a sales representative may also be affected by applicable sales representative laws. For example, the Minnesota statute prohibits a principal from terminating a contract unless "good cause" exists for termination and the sales representative is given 90 days prior written notice setting forth the reason for such termination and is given a period of 60 days to cure any such default. The Minnesota statute also imposes certain restrictions on the renewal of a contract and requires a principal to give the sales representative at least 90 days written notice in

advance of the expiration of the contract of its intention not to renew the contract. A principal's failure to properly give such notice could result in the inadvertent renewal of a sales representative contract in Minnesota.

- **Choice of Law and Forum Selection Clauses.** Several states, including California, Maryland, and Pennsylvania, have statutes that make any provision in a written contract purporting to waive any of the sales representatives rights under such statute void and contrary to public policy, and make a foreign principal who enters into a contract regulated by a sales representative statute subject to the jurisdiction of the courts in that state. Certain state statutes prohibit contractual provisions limiting the sales representatives' rights to initiate litigation in their home state, or making the laws of another state or country applicable to the contract.

Planning Considerations

Given the foregoing regulations, a foreign manufacturer should identify and carefully evaluate the requirements and restrictions imposed by all applicable U.S. sales representative laws prior to appointing a U.S. sales representative. Special consideration should be given to the following issues.

- **Exclusivity or Non-Exclusivity of the Appointment.**

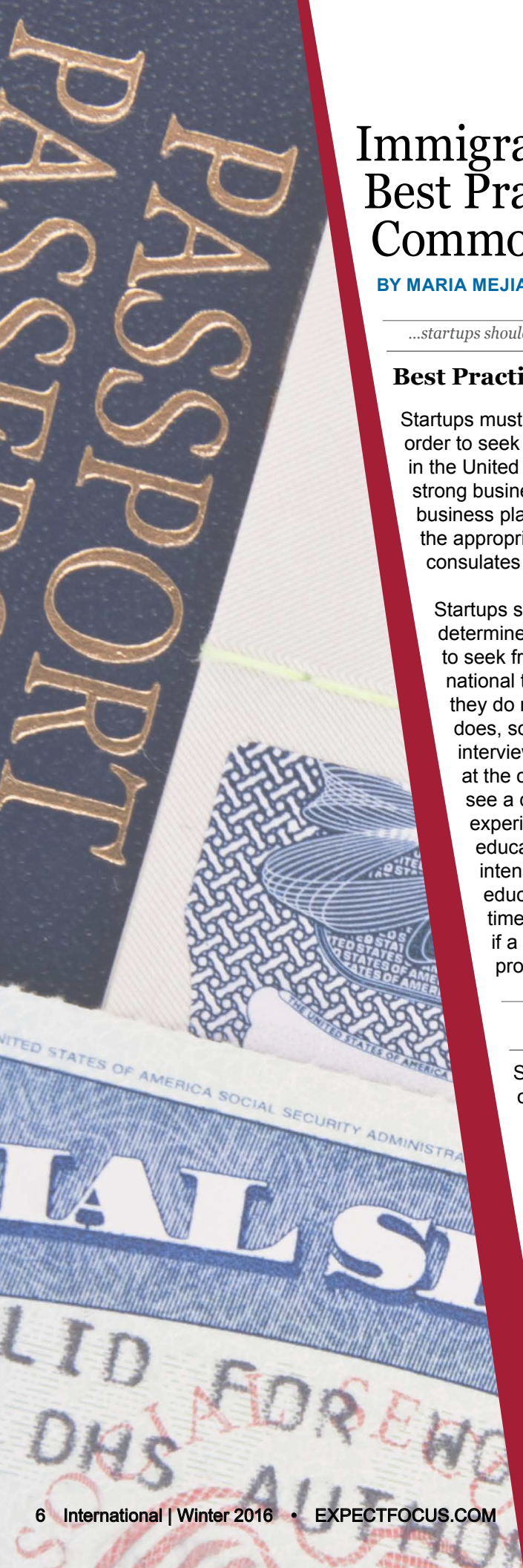
- **Territory; Multi-State Appointments.** If the "territory" to be covered by a sales representative agreement involves several states, the principal should review the laws of each state in the territory and draft the contract to comply with the requirements of the most stringent state statute to insure compliance with multi-state sales representative laws, facilitating contract administration.

- **Computation and Payment of Commissions.** The contract should specify how commissions will be determined (e.g. invoice sales versus paid invoices), when commissions are deemed earned or accrued, and when and how they are payable both during and after the contract's expiration or earlier termination.

- **Term and Termination.** Generally, parties are free to contract and agree on the specific duration of the sales representative agreement. A principal may want to consider negotiating a one-year contract term with the right of either party to terminate the agreement at any time, without cause, on 30 or 60 days prior written notice to the other party to insure maximum flexibility in the event the business relationship does not work out.

Conclusion

To avoid potential legal and commercial pitfalls, a foreign principal should carefully review and evaluate the requirements imposed by applicable U.S. sales representative laws prior to entering into any local sales representative relationships. A principal's failure to comply with applicable U.S. sales representative laws could result in the imposition of double or triple damages, payment of attorney's fees and costs, and the inadvertent renewal of an unwanted sales representative relationship. However, careful planning should help insure a successful commercial and legal relationship with a U.S. sales representative.



Immigration Law for Startups: Best Practices, Prime Options, and Common Pitfalls

BY MARIA MEJIA-OPACIUCH

...startups should have strong business plans with five-year staffing and revenue growth projections.

Best Practices

Startups must have evidence of their corporate existence and financial viability in order to seek temporary work visas, which allow foreign nationals to work and live in the United States. Once that evidence is readily available, startups should have strong business plans with five-year staffing and revenue growth projections. These business plans are required for the nonimmigrant visa petitions that must be filed with the appropriate U.S. immigration authorities, whether in the United States or at U.S. consulates overseas.

Startups seeking to hire foreign nationals should begin the interview process early to determine which of the various nonimmigrant (temporary) work visas would be best to seek from the U.S. immigration authorities. Nonimmigrant visas allow the foreign national to live and work in the United States for a fixed length of time. Although they do not lead to permanent residence, as an immigrant visa or "green card" does, some nonimmigrant visas can be renewed indefinitely. It's best to start the interview process four months before the foreign national's anticipated start date at the company to provide a cushion. The U.S. immigration authorities will want to see a detailed job description of the position sought to be filled, its education and experience requirements, and the foreign national's qualifications. Collecting education and experience documentation from the foreign national is a time-intensive process. For some types of work visas, it requires translations and educational evaluations of the documents. Work visa application processing times at the U.S. immigration offices vary from as short as 15 business days, if a premium processing fee is paid, to as long as five months with regular processing. Planning ahead and reviewing the start date is critical.

...authorities will want to see a detailed job description of the position sought to be filled, its education and experience requirements, and the foreign national's qualifications.

Startups should understand that U.S. immigration authorities are wary of new corporate entities. They should document as much as possible regarding their corporate existence, including operating licenses, corporate bank accounts, and signed and dated corporate leases.

Foreign-owned companies starting up in the United States are advised to have the business plans described above, showing corporate existence and financial viability, plus evidence of ownership of the foreign-owned and U.S. startup to meet certain visa requirements to transfer foreign personnel to the United States.

Startups should determine the length of time a foreign national will be needed and whether the employment will be short- or long-term as this may determine the type of nonimmigrant temporary work visa sought. Some short-term visas can be converted to long-term, indefinite visas. These are immigrant visas (or "green cards") and permit the individual to remain in the United States as a permanent

resident. Early planning and review of the position is critical for the startup seeking a foreign national to work in the United States.

Startups can take advantage of certain nonimmigrant visa options ... in some cases without having to first apply through the U.S. immigration authorities...

Prime Visa Options

Startups can take advantage of certain nonimmigrant visa options that can help them to hire foreign nationals expediently, cost-effectively and, in some cases, without having to first apply through the immigration authorities in the United States. The following temporary work visas require no application through the U.S. immigration authorities in the United States and can be presented either at the U.S. consulate overseas, or at the U.S./Canadian or U.S./Mexican border:

- **TN** visa for professionals coming to the United States pursuant to the North American Free Trade Agreement (NAFTA). They can present their TN application at the U.S./Canadian border and be admitted for up to three years. Mexicans can present their TN application at the U.S. consulate in Mexico and will obtain a one-, two- or three-year TN visa stamp to enter the United States;

- **E-3** visa for Australian nationals coming to work as professionals. They can apply for the E-3 stamp at a U.S. consulate and enter to work in the United States;

- **H-1B1s** for Singaporean or Chilean nationals coming to work as professionals pursuant to free trade agreements between the United States and Chile, and the United States and Singapore. They can apply for the H-1B1 visa at the U.S. consulate overseas and enter to work in the United States;

- Canadian nationals can enter the United States as **L-1** intracompany transferees by processing at the U.S./Canadian border, or at an international airport by processing directly at these ports of entry without a formal work visa petition approval issued by the U.S. immigration authorities; and

- **E-1** or **E-2** treaty trader or investor visas can be processed directly by U.S. consulate officials overseas for certain nationalities without a formal work visa petition approval. Such work visa classifications are governed by rules. When used, they can save startups money, time, and effort.

Common Visa Pitfalls

Startups often unknowingly hire foreign nationals in the United States to work for them under the B-1 business visa. This visa is not a temporary work visa and does not allow foreign nationals to work in the United States. Further, certain nationalities are allowed to enter the United States without a formal B-1 visa stamp. This visa waiver program is reserved solely for short-term business trips. It is not to be used to circumvent U.S. immigration work visas.

All employers in all states must complete and maintain a Form I-9 employment verification form for each employee hired after November 6, 1986...

Startups also often hire foreign nationals without completing the mandatory I-9 employment verification form. All employers in all states must complete and maintain a Form I-9 employment verification form for each employee hired after November 6, 1986, the date the Immigration Reform and Control Act of 1986 was enacted. This applies regardless of the startup's size. Employers must complete the Form I-9 in a timely manner, usually within three days of hire; have the employee complete and sign the appropriate Form I-9 section (section 1); review the acceptable documents presented by the employee; and complete section 2 of the Form I-9. Employers cannot, in the process of completing the Form I-9 discriminate or retaliate by actions, remarks, threats, over-documenting or requesting specific documents. Employees must be given the list of acceptable documents, found on page nine of the form. As companies grow, it is critical to establish and maintain a formal I-9 policy and conduct regular internal I-9 audits to be compliant and avoid heavy monetary fines resulting from U.S. government audits.

Startups often fail to record the work visa expiration dates, fail to timely commence an extension process, or fail to convert to an immigrant visa far enough in advance. Failure to do timely extensions or processing of an immigrant visa can lead to gaps of employment between the expiration date of the temporary work visa and the approval of the extension or an effective date of the immigrant visa. Such gaps can lead to employees being unable to work for periods of time. Startups should use case management systems to track work visa dates, ensuring compliance and timely extensions. All nonimmigrant visas are valid for only limited periods of time, which vary from one to three years. Extensions should be commenced within four to six months of the expiration date. Determinations to proceed with a green card process should be made within four years of the expiration date of the nonimmigrant work visa.

As companies grow, it is critical to establish and maintain a formal I-9 policy...

Startups often lack written immigration policies that include provisions for hiring foreign nationals, an I-9 completion and maintenance policy, and an E-Verify policy. As your company (and workforce) grows, development and implementation of immigration policies and practices will facilitate compliance with applicable U.S. immigration laws and minimize exposure to serious civil and criminal penalties. A single employee can trigger liability for I-9 violations.

This originally appeared as a JD Supra Perspective.

A Playing Field for Trademark Pirates

BY JILL RIOLA

Now that President Obama has lifted trade restrictions, American businesses are considering whether to expand their operations to Cuba. For some corporations, it makes immediate sense. For others, it may not. But regardless of your company's short-term plans, you must be aware that trademark pirates will file trademark applications for your trademarks in their own name, and then try to sell them back to you for a large ransom.

Even if your company has no plans to do business in Cuba in the near future, third-party registration of your company's trademarks opens the door for counterfeits of your products—and may well close the door on your ability to do business there in the future.

What can you do now? Your options may include proactive filing to beat the pirates at their own game. If they've filed first, you may be able to take legal action under Cuban law and certain Pan-American treaties.

To learn more about how this threat may impact your business, and how you may protect your trademarks, please contact a member of our intellectual property and technology group.

Cuba: The Risks and Rewards for U.S. Businesses

BY DENNIS J. OLLE & JASON P. JONES

U.S. firms have a growing interest in doing business in Cuba. This is largely due to the Obama Administration's loosening of restrictions on, among other things, travel to and trade with and in Cuba, despite the ongoing U.S. trade embargo, which only the U.S. Congress can lift. Furthermore, there has been a certain, albeit restrained, reciprocity from the Cuban government.

This article explores some of the opportunities and risks associated with doing business with and in Cuba.

Facts and Recent Developments

Cuba's 2015 population was approximately 11.2 million. The country is steadily losing people due to emigration. In 2013, Cuba's estimated GDP was U.S. $77.15 billion. Since December 2014, the Obama Administration has worked to build new relationships with the country, which was ruled by communist strongman Fidel Castro from 1959 until 2008, when he turned over control to his brother, Raul Castro. Raul announced he will not serve as president beyond February 2018. Thus far, he has shown a greater willingness to work with the United States than his brother.

The Obama Administration has loosened Cuban trade restrictions incrementally. The regulations issued by the U.S. government on January 26, 2016 amend the Cuban Assets Control Regulations and Export Administration Regulations to implement changes that include:

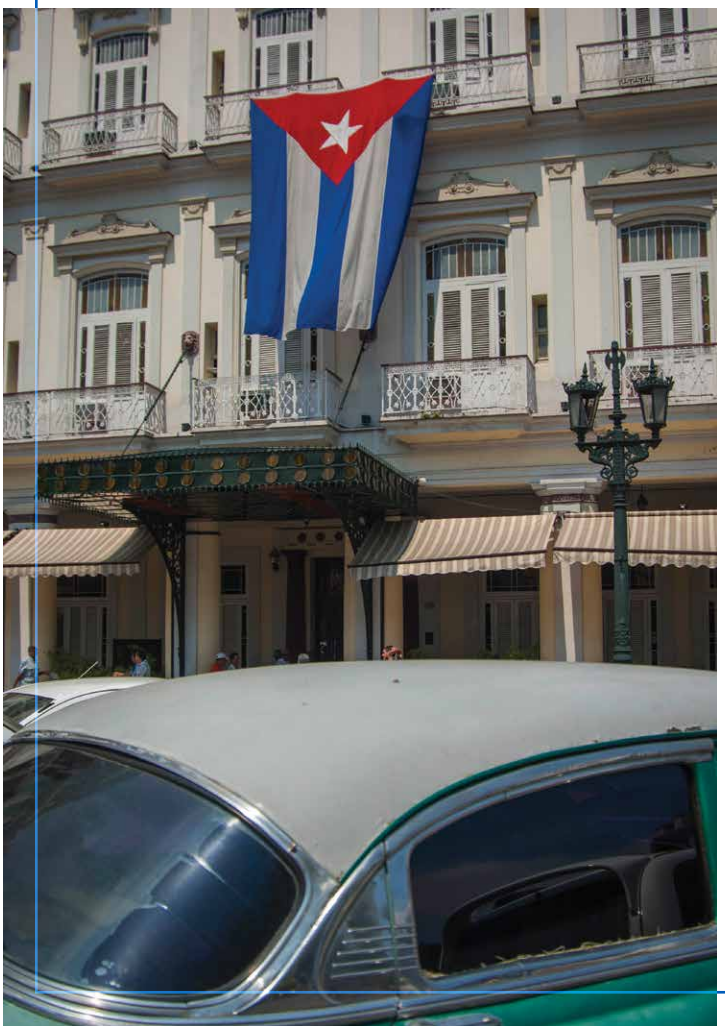
1. Removal of financing restrictions for most kinds of authorized exports and re-exports such that U.S. financial institutions can now provide financing for the export of most products.

2. Expansion of general license categories to facilitate travel to and from Cuba.

3. A new licensing approval policy whereby the Bureau of Industry and Security (BIS) will generally approve license applications for the export and re-export of commodities, software, and telecommunications items to the Cuban people, exposing the country to more American goods, people, and ideas.

4. License applications for the export of items that have been banned for decades because they might benefit the Cuban government (e.g., textbooks, sanitation equipment and construction cranes) can now be approved by the BIS on a case-by-case basis.

5. Loosening of travel restrictions to facilitate re-establishment of direct flights and for Americans traveling to Cuba to make films, record music, organize professional meetings and athletic competitions, or work on cruise ships or airliners.



Although these amendments removed major impediments between the United States and Cuba, the question remains as to how useful American businesses will find them. Exports to Cuba must still be approved and distributed by a state-run ministry. Furthermore, the prohibitions still apply to exports that would generate money primarily for the Cuban government, or that would go directly to the Cuban police, military, intelligence, or security services. Essentially, these amendments nibble around the edge of what is still a nearly comprehensive embargo of the country.

Areas of Opportunity

Cuba's "opening" may present discrete areas of opportunity for U.S. business.

Hospitality

The hospitality industry is the most obvious beneficiary. In Cuba, hotel rates are rapidly escalating. Airbnb, the website devoted to short-term home rentals, has sought to take advantage of these circumstances. However, well-known U.S. hospitality brands have made no brick-and-mortar investment, and it is not clear that European hospitality brands' efforts in Cuba have been profitable.

We believe most hospitality opportunities will, for the short term, exist on the "marine fringe," which refers to cruising, marinas, fishing/diving and related eco-tourism efforts. Assuming limited government interference—by no means a given—these endeavors are likely to prosper immediately.

Perhaps more important, there will be opportunities for suppliers to these industries. Remember, most who prospered during the California Gold Rush were not miners, but sellers of shovels, picks, pans, and various mining accoutrements.

Mariel Harbor Project

In connection with the "marine fringe," the Mariel Harbor project, known in Spanish as the Zona Especial de Desarollo Mariel (ZEDM) will be key. This $1 billion project, designed to modernize the port and create a special economic zone, is expected to position Mariel as a major stopping point along the global maritime thoroughfare from Asia. The project is expected to be completed in 2016 and is predicted to become a major transportation/distribution hub for post-Panamax ships, especially for cargo ultimately destined for the Caribbean and northern South America. In addition to modern port facilities, ZEDM will offer foreign companies various tax incentives, including an exemption from taxes on profits for 10 years, no sales taxes for a year, and no customs duties on imported materials. Businesses will only be required to make a quarterly payment of one-half percent of gross revenue each trimester.

The Mariel project has already generated significant interest internationally. Brazil is footing much of the $1 billion bill to modernize the massive deep-water port that could become the Caribbean's largest. Since ZEDM is considered more conducive to industrial projects than locations near Havana or in the Cuban countryside, international interest has been shown in developing everything from automotive and pharmaceutical factories to large-scale energy projects. In fact, more than 100 industrial projects have been proposed. Approval of foreign projects reached $200 million last year and is expected to more than double that in 2016. Unilever is perhaps the best-known firm to receive approval to operate in the area. This Dutch-British consumer products manufacturer agreed to build a $35 million soap and toothpaste factory in Mariel, which will be fully operational by 2018.

However, several questions remain as to ZEDM:

1. Will it be a free trade zone similar to China's economic zone in Shenzhen, which was created in the 1970s and gave breaks from regulations and taxes that helped spur that country's rapid economic growth?
2. Will it be a forum (geographic niche) for full-blown, U.S.-style capitalism on the socialist island?
3. Will it have separate pro-business laws?

Health Care

Eased travel and trade restrictions will also present great opportunities for the health care tourism industry. Given Cuba's tropical climate, the island's size, its proximity to the United States, an aging U.S. population with an increasing demand for health care at reduced costs, and, most important, the availability of trained Cuban health care professionals, this industry is poised for quick growth—and is already developing much as it has in Costa Rica and elsewhere.

On a related note, Cuba may become popular with retired U.S. expatriates, again like Costa Rica, along with Panama, Mexico and Ecuador. Businesses that can help Cuban entities accommodate this expected demographic wave could prosper. This includes those that already facilitate this phenomenon in other countries.

Telecommunications

With a median age of 40, Cuba's demographic skews young. This fact, plus the trend toward worldwide connectedness, presents opportunities for U.S. telecom companies. Already, the United States has implemented new rules that allow American companies to sell personal communications equipment in Cuba, work on joint ventures with Cuba's telecom monopoly ETECSA to improve the island's outdated telecommunications infrastructure, open offices in Cuba, and hire Cubans to staff them. However, Cuba has been wary of offers from U.S. companies and is proceeding cautiously in this regard. Furthermore, this space may already be sufficiently occupied by international telecom players. Still, there may be opportunities for U.S. suppliers – of telephone equipment and more. Because the telecom sector is intertwined with more widespread Internet use, it will be closely regulated by the Cuban government.

Risks of Doing Business in Cuba

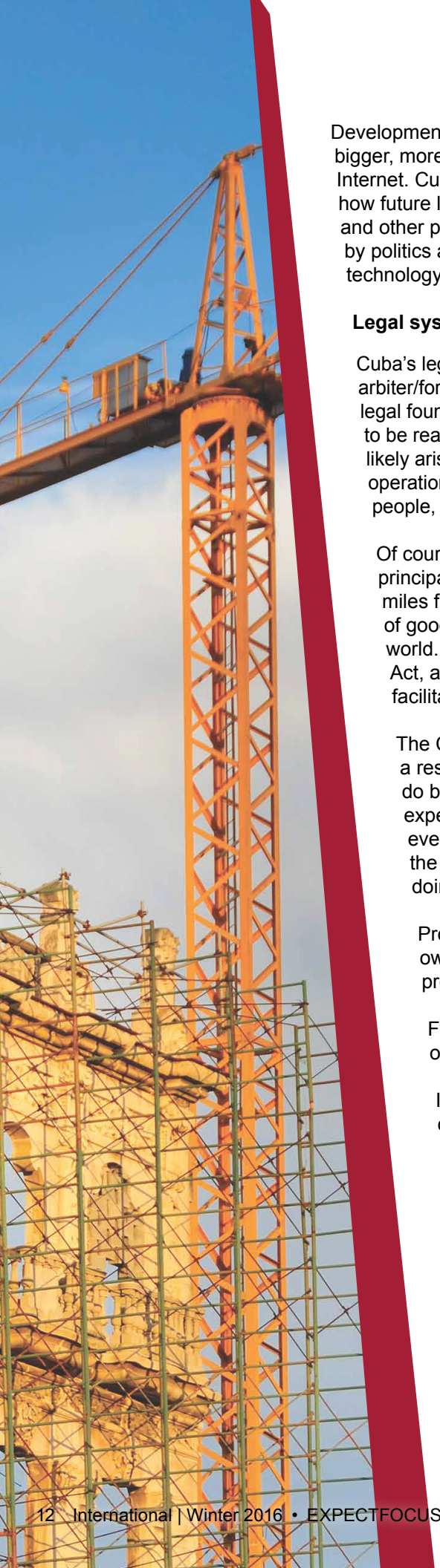
Cuba's lack of modern infrastructure presents significant risks and limitations.

Hardscapes

These include office buildings, roads, bridges, and utilities (water, electricity, etc.). Havana lacks the infrastructure to address a serious influx of demanding American tourists or to satisfy the demands of U.S.-type business operations on any meaningful scale. These infrastructure conditions are even worse outside Havana. The U.S. cruise ship industry is an exception. A cruise ship can "snuggle up" to dock, assuming the port can accommodate ships of this size (a big assumption). A cruise ship brings its own comfortable sleeping facilities, fresh meals, and toilet paper—none of which exist in reliable quantities in Cuba. Of course the lack of hardscapes may, in the intermediate term, offer opportunities for construction-related businesses and their suppliers.

Technology

In Cuba, despite certain exceptions—including, perhaps, in the health care industry—Internet and WiFi access is generally limited and erratic. The country has one of the lowest connectivity rates in the world; only 5 to 25 percent of the population has Internet service. While this could be easily overcome, the Cuban government seeks to restrain robust use of this increasingly important business tool. If Cuba's citizens and visitors lack unencumbered Internet access and the opportunities associated with it, businesses will be severely limited in their ability to staff and grow.



Development of Chinese-style capitalism is highly unlikely in Cuba. The Chinese government is bigger, more prosperous, and better-suited culturally to play "Big Brother" when it comes to the Internet. Cuba's fading Castro regime cannot play this overseer role. It will be interesting to see how future leaders handle the increasing demand for openness, especially from the millennial and other post-revolution generations. The telecommunications industry, though constrained by politics and hardscape limitations, is probably the most obvious possible player in the technology space.

Legal system

Cuba's legal system is relatively underdeveloped and risky. There is no principled, robust arbiter/forum for business disputes. Cuban culture neither uses nor depends on attorneys and legal foundations as U.S. businesses do. There is no reason to expect Cuban legal institutions to be ready, willing, or able to accommodate the inevitable commercial disputes that would likely arise immediately. Uncertainty is the single biggest risk to the normal business operations that U.S. businesses expect. Despite the much-touted hospitality of the Cuban people, U.S. businesses should expect a relatively unfriendly atmosphere.

Of course U.S. businesses have successfully operated in some very hostile places globally, principally in parts of the developing world. However, given that Cuba lies less than 100 miles from the United States, it is likely Americans will expect and demand more, in terms of good, traditional business behavior, than they do from countries halfway around the world. More objectively, given the Federal Corrupt Practices Act, Federal Tort Claims Act, and other regulatory confines, U.S. business simply cannot attempt "shortcuts" to facilitate business in Cuba.

The Cuban military is directly involved in almost all aspects of the Cuban economy. As a result, we suspect Cuban government and military officials will determine who gets to do business in Cuba and what each party's "cut" will be. Many U.S. businesses have experienced this phenomenon elsewhere, e.g., in China. However, we suspect that even black market systems are unrefined in Cuba, and certainly insufficient to withstand the expectations and demands of U.S. businesses. Given the relatively small market, doing business in Cuba may not be worth the hassle.

Property rights, as we know them, do not exist in Cuba. Additionally, real estate ownership in Cuba is a conundrum—but it is safe to assume you can neither own property nor obtain title insurance.

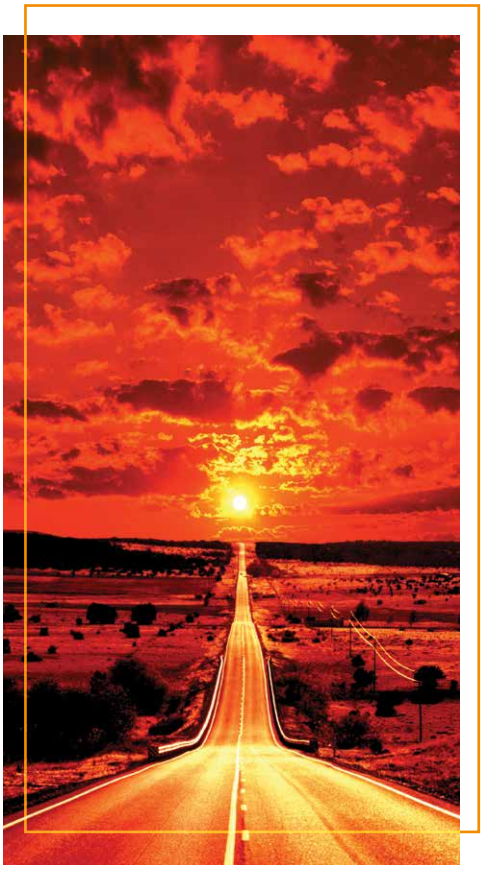
Further, any business must be controlled (majority-owned) by the Cuban government or an affiliate.

In addition, the United States and Cuba are likely to battle over trademarks and other intellectual property rights (*see* "A Playing Field for Trademark Pirates" on page 12). Both sides have grievances. In the past, the United States has denied Cuban companies the same trademark protection enjoyed by brands from other countries. And, although Cuba protects trademarks registered with the government, it permits and even officially sanctions the resale of unlicensed music, software, and entertainment.

A further complication is that there is generally poor knowledge of trademark/IP law among the Cuban population, as evidenced by the fact that many Cubans name their businesses after well-known American brands (e.g., "Cafeteria La McDonald's Camagueyana"). We will address intellectual property issues in more detail in a subsequent client alert. For now, it is important to know that the protection of trademarks and other intellectual property should be a significant concern for U.S. businesses investing in Cuba.

Labor market

For more than 60 years, the United States, and particularly Miami, has drained some of Cuba's "brightest and best." While there are certainly highly-educated and qualified employees and entrepreneurs in Cuba, we question whether there are sufficient Cubans with the right skills to begin to satisfy the personnel demands of U.S. businesses. This suspected deficiency can be addressed relatively promptly, assuming the Cuban government cooperates. Then again, no one is immigrating to Cuba any time soon. Further and more important, the Castro regime has created a dependent class and a resulting culture that views the state as the provider.



Conclusion

The "opening up" of Cuba to U.S. businesses is just the first step on a long road. The forgoing represents our best guesses as to what will happen in Cuba in the business context. Some of our predictions may prove more accurate than others. Nevertheless, we offer these conclusions:

- With some exceptions, Cuba is a risky place for U.S.-style businesses.
- Cuba has an underdeveloped and unreliable legal system.
- There is a pending power vacuum at the top.
- There is money to be made there, but we advise you to stay close to the "miners" and minimize your in-country capital investment until there is more clarity and stability.
- Clarity and stability could be 5-10 years away.

Carlton Fields will continue to monitor developments in this area.

FEDERAL COURT REMANDS ALBANIAN POWER COMPANY'S SUIT

BY JOSHUA WIRTH

In March, a New York federal court remanded an Albanian power company's suit seeking enforcement of an Albanian court's judgment. In *Albaniabeg Ambient Sh.p.k. v. Enel S.P.A.*, the federal court reasoned that, although the award related to an arbitrated matter, subject matter jurisdiction was lacking.

In 1997, BEG obtained a contract with the Republic of Albania to construct and operate a hydroelectric power plant (the "project"). BEG entered into two agreements with Enel and its subsidiary, Enelpower (collectively "Enel defendants") to provide for studies and services related to the project. After disputes arose, BEG initiated arbitration proceedings against the Enel defendants, pursuant to their agreement. The foreign arbitration panel subsequently found the Enel defendants not liable to BEG for any damages.

Albaniabeg, a subsidiary of BEG, filed suit against the Enel defendants in Albania in 2004, asserting unfair competition and other claims related to the project. The Albanian court found for Albaniabeg and awarded damages of about $480.8 million.

In March 2014, Albaniabeg sought to enforce the Albanian court's judgment in New York state court pursuant to Article 53 of the New York Civil Practice Law and Rules, which allows for enforcement of foreign judgments.

The Enel defendants contended that this claim was based on an arbitral award and sought to remove the claim to federal court. Disputes involving foreign arbitration awards may be heard by U.S. courts under Section 203 of the Federal Arbitration Act (FAA), which implements the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention"). Section 205 of the FAA permits removal of claims relating to arbitration agreements or awards.

The court held removal improper because the issue related not to the arbitration agreement or award, but rather to the enforcement of a foreign judgment. The court held that, while certain defenses to the award may involve claims relating to the prior arbitration, the Convention does not provide subject matter jurisdiction over actions to enforce a foreign court's judgment, even where a party contends that the foreign court's judgment is inconsistent with an earlier arbitration award or agreement to arbitrate.

Brazilian Voluntary Disclosure Program: The Cost of The Medicine for Contaminated Funds

BY FERNANDO COLUCCI & GIOVANNI BISCARDI

On January 14, a voluntary disclosure program, the Special Regime for Foreign Exchange and Tax Regularization (RERCT), was enacted in Brazil. It gives Brazilian residents an opportunity to voluntarily disclose unreported funds and assets that originate from legal sources, but which have otherwise been kept outside Brazil or repatriated. More recently, the Brazilian Revenue Service (RFB) issued a normative instruction, providing further details regarding the program's implementation and use.

RERCT is the first step toward getting Brazil enrolled in the global automatic exchange of financial information, *i.e.,* the common reporting standard (CRS) endorsed by the Organisation for Economic Co-operation and Development (OECD). Brazil has committed to making the first exchange of information in 2018, sharing details regarding accounts that existed as of December 31, 2016 as well as regarding accounts opened after January 1, 2017.

Since Brazilian taxpayers' reporting obligations are not limited to income, but also require disclosure of the assets held by the respective legal entity or individual, the program offers a great opportunity to settle non-compliance reporting issues before the RFB starts accessing the relevant CRS information.

It is worth highlighting that Brazil and the United States already implemented a "Model 1" intergovernmental agreement as to the U.S. Foreign Account Tax Compliance Act (FATCA), under which Brazil has had access to certain financial information regarding Brazilian taxpayers (individuals and legal entities) since 2014. Such access, coupled with the exchange of information that will commence in 2018, shall motivate non-complaint taxpayers to follow the program.

RERCT shall allow regularization of three kinds of unreported funds or assets: (i) those remitted outside Brazil; (ii) those originated outside Brazil and never repatriated to Brazil; and, (iii) those remitted or originated outside Brazil and later repatriated to Brazil. Enrollment in RERCT will lead to the extinguishment of the liability for crimes related to the failure to report the funds and/or assets, such as money laundering, evasion of funds, crimes against the tax order, embezzlement, and promotion of outflow of funds without legal authorization.

To enroll, the legal entity or individual shall file a single statement form addressed to the RFB between April 4 and October 31, 2016. The statement form (still to be made available by the RFB) shall contain a detailed description of all funds and/or assets of any nature that were held as of December 31, 2014, with their respective value in Brazilian *Reais* on such date.

Since full disclosure of non-compliant funds or assets held on or before December 2014 is imposed by law, Brazilian taxpayers following the program may not cherry pick the items to include.

The amount of assets disclosed by a taxpayer through the program will be considered "income" and will subject the individual or legal entity to income tax at a 15 percent rate on the value of the funds or assets as of December 31, 2014, as converted into Brazilian Reais (BRL). In addition, a penalty at a 100 percent rate applies on the income tax, resulting in a 30 percent total nominal rate.

For U.S. dollar (USD)-denominated funds or assets, the exchange rate provided by the Central Bank of Brazil on the last business day of December 2014 shall be applied (USD 1.00 = BRL 2.66). Therefore, as the current USD exchange rate floats near BRL 3.90 for USD 1.00, the application of the December 2014 exchange rate reduces the effective rate arising out of the program, from 30 percent to approximately 20 percent.

Fernando Colucci is a member of the Brazilian law firm Machado Meyer Sendacz & Opice.

News and Notes

Carlton Fields' Miami shareholders **Sonia Escobio O'Donnell**, **Michael Pasano** and **Marissel Descalzo**, together with two British lawyers, Stephen Baker and Gary Pons, helped secure an acquittal for American Ann Patton Bender in a homicide trial in Costa Rica. All supported Mrs. Bender's trial counsel, Fabio Oconitrillo, who obtained an acquittal in the first trial, a reversal of the conviction in the second trial, and handled the courtroom presentation in the third trial. This case was the third time Mrs. Bender was tried for the death of her late husband, John Bender, a wealthy Wall Street investor.

Carlton Fields' shareholders **Jin Liu** (Tampa) and **Jay A. Steinman** (Miami) were quoted in the *Daily Business Review* article, "South Florida Developers, Brokers Adapting to Attract Asian Buyers." Steinman said the Chinese have shown intense interest in the real estate investment market in South Florida. Liu explained that the Chinese are cash-rich and willing to put their money into real estate investments. The article highlights Liu, who was educated in China and the United States, and is bi-cultural and bi-lingual. She uses her background and skills to assist Chinese buyers and American sellers navigate through large complex real estate deals and negotiations.

New York shareholder and chair of Carlton Fields's Italian Desk, **Frank J. Cerza**, was elected to the Board of Directors of the Italy-America Chamber of Commerce (IACC). The IACC is an independent, private, not-for-profit U.S. corporation devoted to fostering trade, tourism, investments, and economic cooperation between Italy and the United States.

The Beacon Council, Miami-Dade County's official economic development partnership, has appointed Carlton Fields Miami shareholder **Andrew J. Markus** chair of its International Committee for the 2015-16 fiscal year. The Beacon Council committees include industry leaders, and academic and community partners who examine issues and opportunities that enable or inhibit job growth in target industries. They also assist with lead generation and business expansion, retention, and recruitment.

Carlton Fields New York shareholder **David Rivkin** was quoted in a *Law360* article, "Justices Firm Up Boundaries On US Courts In Austria Case." The article reports on a recent U.S. Supreme Court decision (*OBB Personenverkehr AG v. Sachs*) in which the high court unanimously ruled that an Austrian state-owned railway cannot be sued in the United States for personal injuries abroad. Rivkin told the publication this does not limit exceptions to the Foreign Sovereign Immunities Act. Had the plaintiff's claim been, for example, fraud or breach of contract stemming from the purchase of the ticket in the United States, under the court's reasoning, it is highly likely that the commercial activity exception would apply and subject the railroad to suit in the United States.

Carlton Fields Miami shareholder **Robert Macaulay** was quoted in *American Banker* magazine. The article, "Community Banker of the Year: Stonegate Bank's Dave Seleski," discusses Seleski and his decision to expand Stonegate Bank's services into Cuba, as well as the economy and general business climate as it relates to U.S. President Obama's decision to normalize relations with Cuba.

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