SideBAR

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Message from the Chair

An Invitation to Serve, and to Lead

John G. McCarthy

Dear Fellow Section Members,

I am honored with the opportunity to serve you over the next two years as Chair of the Federal Litigation Section. I consider myself lucky to inherit the mantle of the largest and most active section in the FBA. More than twenty percent of FBA members belong to our section. Our section is so successful due in large measure to the dedication and hard work of my predecessors, including Judge Michelle Burns from the Phoenix Chapter and Frank Carroll from the Dallas Chapter. I would be remiss, however, if I failed to give special recognition to our leader of the past three years Rob Kohn from the Los Angeles Chapter. Rob did a tremendous job further elevating the Section from the heights it had already achieved under Frank and Michelle. During the annual meeting in Cleveland it was my honor to express to him the appreciation of our entire Section membership. Rob remains a dedicated member of our Board as Immediate Past Chair. I have no doubt we will see him at some of our events in the years to come as a supportive member of the best FBA section. One of Rob's great achievements was to assemble a good team of leaders from this Section. I want to thank them for their past efforts and look forward to working together with them to build on Rob's legacy.

About a dozen years ago, I increased my personal involvement in the Section in response to Judge Burns' invitation in *SideBAR* for people to become involved in Section leadership and its various committees. Professionally speaking it was one of the most rewarding decisions I have ever made. First and foremost, I have met a tremendous array of attorneys and judges who are dedicated to improving litigation in federal courts and agencies. During that time, I have played a small part in helping this group influence the legislation and rule making process, present great seminars on topics of interest to federal practitioners, contribute to The Federal Lawyer and honor members of our profession in this country and abroad who have exemplified the highest ideals of our profession. I once heard one of our federal judges here in New York tell another judge that she did not know of another bar group that was as active as the FBA relative to its size. That sort of praise is possible only when individuals like you and I work together by taking manageable amounts of responsibility for the FBA's mission "to strengthen the federal legal system and administration of justice by serving the interests and the needs of the federal practitioner, both public and private, the federal judiciary and the public they serve."

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About the Chair • *John McCarthy is a trial attorney and partner in the New York City Office of Smith, Gambrell & Russell, LLP, where he leads the litigation practice and is a member of the firm's Intellectual Property Law Group and its Commercial and Bankruptcy Law Practice. John is a former FBA Circuit Vice President and past Chapter President of the S.D.N.Y. Chapter; John most recently served as Vice Chair of the FBA Federal Litigation Section. He can be reached at jmccarthy@sgrlaw.com or (212) 907-9703.*

Inside this Issue

Federal Litigation Section News

Note from the Editor

Jeffrey T. Cox

This Mid-Winter Report reflects the extraordinary breadth of the Federal Litigation Section efforts. One of the unique aspects of the Federal Bar Association is how nimble and flexible an organization it is. Whether a function of its leadership, its Sections, and Divisions and Chapters structure or its dynamic staff, the FBA is constantly seeking to expand services, program opportunities, networking and engagement for FBA members. Those same motivations hold true for the Federal Litigation Section, as reflected in this edition of *SideBAR*. Both within our Section and in the broader FBA organization, FLS members are actively involved in FBA activities, advancing our profession.

This edition of *SideBAR* chronicles many of the FLS activities and involvements in the last portion of 2016, and also looks ahead to upcoming events and opportunities in 2017. The fourth quarter of 2016 was most notable for the Second Annual Federal Litigation Conference convened in Washington, D.C. in late October. Over 100 judges and attorneys attended, and many FBA and FLS members spoke as part of the several blue-ribbon panel presentations. Please see the conference wrap-up article in this newsletter provided by FLS Board Member Aaron Bulloff.

As reported in this newsletter, once again this year the Federal Litigation Section has also been a lead sponsor and underwriter of various programs and recognizing significant landmarks for our federal courts and federal practices around the country. By my count, FLS leadership representatives hail from 15 different states and the District of Columbia and from all parts of the United States, from some of our nation's largest law firms as well as many small law offices, and includes judges, attorneys, academics and in-house counsel. Indeed, FLS leadership is reflective of our large and diverse Section and the many varied legal practices of our membership.

With this rich diversity in mind, let me encourage you to write and submit an article for publication. Given the breadth of our Section, there are many substantive areas of practice ripe

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About the Editor • *Jeff Cox is a business and complex litigation attorney, and Partner at Faruki Ireland Cox Rhinehart & Dusing P.L.L., a business and complex litigation and white collar criminal defense practices with offices in Dayton and Cincinnati, Ohio. Jeff's practice includes intellectual property and technology disputes, competition-based litigation and professional malpractice and data security matters. A past president of the FBA's Dayton Chapter, Jeff serves on the Federal Litigation Section Board of Directors, as well as the FBA's Government Relations Committee and Professional Ethics Committee. Jeff can be reached at jcox@ficlaw.com or (937) 227-3704.*

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Federal Litigation Section News

2016 Federal Litigation Conference Recap

Aaron Buloff

On Oct. 18, 2016, the Federal Litigation Section held its second Annual Litigation Conference. The Conference took place at the offices of Jones Day in Washington, D. C. The program's agenda was developed jointly with the Federal Bar Association's Qui Tam Section to present dual tracks of more generalized litigation interest and of Federal False Claims Act issues specifically.

With respect to the latter, speakers discussed the evaluation of potential False Claims Act cases, procedural pitfalls and defenses in prosecuting and defending FCA claims, the intersection of health care law and the FCA, and prospective treatment of FCA claims in the aftermath of the seminal Escobar case and its progeny.

General litigation topics included a discussion of The Federal Defend Trade Secrets Act, current issues in patent litigation, a discussion of issues and challenges before the Supreme Court, whistleblowing and retaliation issues faced by in-house counsel, and litigation practice as viewed by the bench. The employment issues were discussed by a panel from Google, Inc.; AOL; Hewlett Packard Enterprise; and Bayer HealthCare LLC. The judicial panel consisted of the Hon. Joel Dubina, U. S. Court of Appeals for the Eleventh Circuit; the Hon. Frank Maas, U. S. District Court for the Southern District of New York; and the Hon. Liam O'Grady, U. S. District Court for the Eastern District of Virginia.

The program's luncheon keynote speaker was Carmen Ortiz, U. S. Attorney for the District of Massachusetts. She discussed the vigorous prosecution of Qui Tam cases by her office that has resulted both in millions of dollars in recoveries by the Government and in millions of dollars of payment to successful plaintiffs and their counsel. Moral: do not violate the False Claims Act in the District of Massachusetts.

Jones Day sponsored a lavish cocktail party the evening before on the outdoor rooftop of its building at the intersection of Louisiana and New Jersey Avenues. The party presented a gracious opportunity on a lovely evening to re-connect with FBA friends and to meet new ones while grazing and gazing at the Capitol and Supreme Court Buildings.

Special thanks to Conference sponsors Jones Day and Latham & Watkins LLP, and to the Conference planning committee Robert Kohn; John McCarthy, FLS Chair; Charles Molster; Susan Pitchford; John Thomas, Qui Tam Section Chair; and Tara Lynn Zurawski. If you would like a print copy of the Conference program, please contact Melissa Schettler (mschettler@fedbar.org). If you have suggestions for the next Litigation Conference, please contact FLS Chair John McCarthy (jmccarthy@sgrlaw.com) or FLS Chapter Contact Officer Kelly Pate (kpate@balch.com). **SB**

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We have many ways for you to get involved with the Federal Litigation Section. We have five permanent committees dedicated to Rules of Evidence, Rules of Procedure and Trial Practice, Appellate Law, Federal Torts and Federal Law Clerks. If you are interested in joining one of them, contact details for the committee chairs are available on our webpage, www.fedbar.org/Sections/Federal-Litigation-Section/Officers.aspx. You could write an article for this newsletter or assist our editor Jeff Cox with future issues. We are also looking for articles for the June 2017 issue of The Federal Lawyer, which will focus on federal litigation issues. I am looking for people throughout the United States to work with Bob Rowell of The Wagstaffe Group, Andrea Marconi and me over the next two years to co-host a series of CLE events with our local chapters focused on federal civil procedure. If you are interested in assisting any of our other leaders with matters like chapter contact or the Young Lawyers Division, please reach out to those leaders. You can also reach out to me via telephone (212-907-9703) or e-mail (jmccarthy@sgrlaw.com).

I am excited and grateful for the opportunity to lead this Section, work with an amazing board and get to meet and know as many of you as possible between now and Sept. 30, 2018. **SB**

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for both practical and scholarly consideration, and *SideBAR* is a well-read and popular platform. Please take time over the holidays to consider writing for publication in *SideBAR*. This edition features scholarly articles by Zachary Heck, examining the litigation landscape in data breach cases, and the evolving attitude of federal courts on the issue of standing in those data breach cases; and FLS Board Member Nicole Newlon discussing the "Yates Memo"—the memorandum directed to Department of Justice attorneys relating to "Individual Accountability for Corporate Wrongdoing." Also, please see David Hoffman's article regarding Federal Court treatment of international arbitration awards.

Please enjoy this Winter edition of *SideBAR*. **SB**

The Wagstaffe Group & Federal Bar Association: Delivering Compelling Content

Jim Wagstaffe, one of the industry's top experts on all matters relating to federal civil procedure and principal of The Wagstaffe Group (TWG), has teamed up with the Federal Bar Association's Federal Litigation Section to develop and present a national speakers' series which will launch on April 4, 2017 in Washington, D.C. and April 6, 2017 in New York City. Exact times (late afternoon/evening) and locations of both events TBA.

Together, TWG and the FBA will produce 40 national events over the course of 2017 and 2018. Each speaker's series will feature an expert panel of the nation's top legal experts and federal judges engaging in current and relevant discussions with respect to federal litigation.

"Our goal is to deliver current and premium content to FBA members in their respective cities and states across the country," said Jim Wagstaffe. "We are going to assemble local federal judges and top federal practitioners to focus and engage in important discussions that will cover up-to-date issues and create a 'must see' and 'must not miss' program of events for local Federal Bar Association members."

Chair of the Federal Judicial Center Foundation Board and author of the soon-to-be released book and online platform available through LexisNexis – The Wagstaffe Group Practice Guide: Federal Civil Procedure Before Trial (expected to be released April 2017), Mr. Wagstaffe will serve as host and moderator for each event of the series and TWG will work with the FBA to develop the appropriate programs and panelists to participate across each region of the nation.

Each event will be available to members and invited guests and the typical panel size will vary between three and five participants plus the moderator. Speakers' series events will all feature a social mixer component to enable interaction and professional development opportunities to all members.

About The Wagstaffe Group: Led by Jim Wagstaffe, Partner and Co-Founder of Kerr & Wagstaffe LLP, where he leads the San Francisco-based firm's highly successful Federal Practice Group, TWG was launched in 2016 with its primary goal to provide practicing litigators with the 21st Century tools for success as they tackle the complexities of pretrial Federal Civil Procedure (FCP).

TWG has partnered with LexisNexis and plans to launch in April 2017, the industry's most comprehensive and interactive, multi-media online platform designed to guide and assist its users in maneuvering through the intricacies inherent in FCP – all tailored to meet the needs of both trial lawyers and the courts.

Mr. Wagstaffe, is the premier industry expert and authority in the federal civil procedure space. He possesses an inimitable wealth of knowledge, experience and practice as a federal litigator, educator, accomplished author (The Rutter Group Practice Guide: Federal Civil Procedure Before Trial) and lecturer. His passion for federal civil procedure is infectious. He is a skilled teacher of law and possesses a unique ability to present complex topics in a clear, concise and authoritative yet entertaining manner.

As member Chair of the Federal Judicial Center Foundation Board, appointed by the Chief Justice of the United States Supreme Court, Mr. Wagstaffe has been responsible for the past 30 years in the development and delivery of various annual forums, seminars, webinars and workshop sessions directed at educating Federal Judges and their respective clerk staffs on Federal law. **SB**

Raise Your Voice! (on Capitol Hill in April 2017)

Most litigators, being the outgoing sort, rarely need much coaxing when it comes to making their voices heard, but the Federal Litigation Section is urging you to join other FBA members to raise your voices on April 20, 2017 at the FBA's annual Capitol Hill Day in Washington, D.C.

The FBA's Government Relations Committee, headed by FLS member West Allen and FBA Government Relations Counsel Bruce Moyer, does an outstanding job of advocating to Congress on the many and varied legislative issues that bear directly (or, frequently, inadvertently) on the operation of the federal courts and on federal practice. However, the FBA's Government Relations Committee and Mr. Moyer always welcome and appreciate the support of FBA membership on Capitol Hill Day as it expands the number of Members of Congress that can be reached to share the FBA's message! Recent advocacy efforts have been directed at addressing judicial vacancies; funding of federal courts; and weighing in on congressional proposals to amend federal rules and procedures.

Participation in direct advocacy efforts such as the FBA Capitol Hill Day is a fun and rewarding manner in which to participate in the democratic process and to support our profession. Everyone who has participated in past years has expressed how rewarding the experience was and how important it was to contribute to the effort. Raise your voice this Spring!

Greetings from the Vice Chair

Susan Pitchford

Dear Section,

I joined my firm as an experienced associate, but my experience (family law) was largely unrelated to my field at the new firm (intellectual property law). I was grateful for the opportunity and willing to work as hard as any associate could, and I did not want to have my new partners doubt their choice to hire me by displaying the full extent of my ignorance.

And then there was David. A career law clerk with decades of experience, he was a font of wisdom on the substance of IP law. I quickly realized that he knew the answer to most of my questions, or could at least point me in a solid starting direction. He really shone when he was regaling me with "the rest of the story", such as the background of a dispute between two clients, or the evolution of a rule of practice, or the deeper issue lurking in my starting questions. After a while, I realized he had this gift with clients also: they frequently called him to explain their problems, telling him that they didn't want to "bother" the lawyers with their questions. He would patiently explain that their questions were important, and then appear at my door to tell me to call them pronto!

Litigation is often an isolating job, where we grow so accustomed to being adverse to someone or something, and showing a chink in the armor is, frowned upon (I was thinking "fatal", but I'll refrain from too much hyperbole). I am grateful for organizations like the FLS, populated by wise, experienced practitioners who are happy to lend a sympathetic ear to a war story, are quick to offer helpful tips, and not be "bothered" when a rookie question comes up.

I urge you to remember that we all have much to learn from those around us. I look forward to meeting you and continuing the dialog at a future FLS event! **SB**

Kind regards,
Susan

About the Vice Chair • *Susan D. Pitchford is a Partner at Chernoff Vilhauer LLP in Portland, Oregon, where she practices intellectual property litigation. In addition to her leadership role with the Federal Litigation Section of the FBA, Susan served as FBA Oregon Chapter President from May 2011-May 2012, and is on the Board of Directors for Oregon Women Lawyers. Susan can be reached at sdp@chernofflaw.com or (503) 227-5631.*

Sixth Circuit Honors R. Guy Cole, Jr.: First African-American Chief Judge of the Sixth Circuit Court of Appeals

Several months ago, over 300 attorneys and judges, including almost all members of the Sixth Circuit Court of Appeals, and the judges of the U.S. District Court for the Southern District of Ohio, gathered in Cincinnati, Ohio at a reception honoring Chief Judge Guy Cole, the Sixth Circuit's first African-American Chief Judge. The Federal Litigation Section was a lead sponsor of this historic event; co-sponsors included the Dayton, Columbus and Cincinnati/Northern Kentucky FBA chapters; the Greater Cincinnati Minority Counsel Program; the Black Lawyers Association of Cincinnati, and the Cincinnati Bar Association.

Held at the Potter Stewart U.S. Courthouse, the evening's festivities included comments from FBA 2015-16 National President Mark Vincent; Judge Edmund Sargus, Chief Judge of the U.S. District Court for the Southern District of Ohio; and a keynote address from Judge Nathaniel Jones of the U.S. Court of Appeals for the Sixth Circuit (Ret.). FBA National President U.S. Magistrate Judge Michael Newman (S.D. Ohio) also greeted the gathered masses and extended greetings from the Federal Litigation Section and invited Section participation.

Federal Litigation Section FACT:

Did you know that over 4,000 FBA members belong to the Federal Litigation Section? That's almost one in every four FBA members! Writing an article for this *SideBAR* newsletter is a great way to introduce yourself and to network with colleagues across the United States! **SB**

2016 Art Law Conference Recap

The FBA's First Annual Art Law Conference was held in Miami, Florida on Nov. 29-30, 2016 to coincide with the Art Basel Miami art fair. Art Basel is one of twenty contemporary art fairs in Miami at that time making it the world's largest annual contemporary art event. The event was a great success thanks to the support of the Federal Litigation Section and the participation of Past Litigation Section Chair Rob Kohn. Our two keynotes were Judge Gerald Rosen of the EDNY who spoke on Detroit's bankruptcy and the role of the Detroit Institute of the Arts and Judge Loretta Preska who spoke on copyright, parody and the First Amendment. Conference attendees came from twelve states: CA, FL, GA, IL, LA, MA, MD, MI, NY, OH, SC, TX. The conference video will be available on MyLaw. Special thanks to AIG Insurance for its kind sponsorship. **SB**

SideBAR is published by the Federal Litigation Section of the Federal Bar Association; the views expressed herein do not necessarily represent those of the FBA. Send all articles or other contributions to Jeffrey T. Cox, 937-227-3704 or jcox@ficlaw.com.

HEAR Act Extends Statutes of Limitations On Nazi-Era Artwork Claims

Raymond J. Dowd

Nazi looted art litigation may soon be active in your local federal court. On December 16, 2016 President Barack Obama signed into law the "Holocaust Expropriated Art Recovery Act of 2016" known as the HEAR Act, effective January 1, 2017 providing that that "*a civil claim or cause of action against a defendant to recover any artwork or other property that was lost during the covered period because of Nazi persecution may be commenced not later than 6 years after the actual discovery by the claimant or the agent of the claimant of— (1) the identity and location of the artwork or other property; and (2) a possessory interest of the claimant in the artwork or other property."*[1] The "covered period" is 1933-1945, the twelve years of Nazi terror.

The Federal Bar Association supported this important legislation and its support is noted in the HEAR Act's legislative history contained in the Senate Judiciary Committee's report.[2]

Congress determined that the enactment of a Federal law was necessary to ensure that claims to Nazi-confiscated art are adjudicated in accordance with United States policy as expressed in the Washington Conference Principles on Nazi-Confiscated Art, the Holocaust Victims Redress Act, and the Terezin Declaration. As described in Congressional findings cited in the legislation, it is estimated that the Nazis confiscated or otherwise misappropriated hundreds of thousands of works of art and other property throughout Europe as part of their genocidal campaign against the Jewish people and other persecuted groups. This has been described as the "greatest displacement of art in human history".[3]

Following World War II, the United States and its allies attempted to return the stolen artworks to their countries of origin. Despite these efforts, many works of art were never reunited with their owners. Some of the art has since been discovered in the United States.[4]

In 1998, the United States convened a conference with 43 other nations in Washington, DC, known as the Washington Conference, which produced Principles on Nazi-Confiscated Art. One of these principles is that "steps should be taken expeditiously to achieve a just and fair solution" to claims involving such art that has not been restituted if the owners or their heirs can be identified.[5] In 1998, Congress also enacted the Holocaust Victims Redress Act (Public Law 105–158; 112 Stat. 15), which expressed the sense of Congress that "all governments should undertake good faith efforts to facilitate the return of private and public property, such as works of art, to the rightful owners in cases where assets were confiscated from the claimant during the period of Nazi rule and there is reasonable proof that the claimant is the rightful owner."[6]

In 2009, the United States participated in a Holocaust Era Assets Conference in Prague, Czech Republic, with 45 other nations. At the conclusion of this conference, the participating nations issued the Terezin Declaration, which reaffirmed the 1998 Washington Conference Principles on Nazi-Confiscated Art and urged all participants "to ensure that their legal systems or alternative processes, while taking into account the different legal traditions, facilitate just and fair solutions with regard to Nazi-confiscated and looted art, and to make certain that claims to recover such art are resolved expeditiously and based on the facts and merits of the claims and all the relevant documents submitted by all parties." The Declaration also urged participants to "consider all relevant issues when applying various legal provisions that may impede the restitution of art and cultural property, in order to achieve just and fair solutions, as well as alternative dispute resolution, where appropriate under law."[7]

In enacting the HEAR Act, Congress found that victims of Nazi persecution and their heirs have taken legal action in the United States to recover Nazi-confiscated art. These lawsuits face significant procedural obstacles partly due to State statutes of limitations, which typically bar claims within some limited number of years from either the date of the loss or the date that the claim should have been discovered. In some cases, this means that the claims expired before World War II even ended. (*See, e.g., Detroit Institute of Arts v. Ullin*, No. 06–10333, 2007 WL 1016996 (E.D. Mich. Mar. 31, 2007)). Congress further determined that the unique and horrific circumstances of World War II and the Holocaust make statutes of limitations especially burdensome to the victims and their heirs and noted that seeking recovery of Nazi-confiscated art must painstakingly piece together their cases from a fragmentary historical record ravaged by persecution, war, and genocide.[8] Congress concluded that this costly process often cannot be done within the time constraints imposed by existing law.

Congress found the extension of the statute of limitation to be necessary because the only court that has considered the question held that the Constitution prohibits States from making exceptions to their statutes of limitations to accommodate claims involving the recovery of Nazi-confiscated art. In *Von Saher v. Norton Simon Museum of Art*, 592 F.3d 954 (9th Cir. 2009), the United States Court of Appeals for the Ninth Circuit invalidated a California law that extended the State statute of limitations for claims seeking recovery of Holocaust-era artwork. The Court held that the law was an unconstitutional infringement of the Federal Government's exclusive authority over foreign affairs, which includes the resolution of war-related disputes. In light of this precedent, Congress found the HEAR Act to be necessary to ensure that claims to Nazi-confiscated art are adjudicated in accordance with United States policy as expressed in the Washington Conference Principles on Nazi-Confiscated Art, the Holocaust Victims Redress Act, and the Terezin Declaration.[9]

Although Congress extended the statute of limitation to permit litigation to be used to resolve claims to recover Nazi-confiscated art, Congress expressed the sense that the private resolution of claims by parties involved, on the merits and through the use of alternative dispute resolution such as mediation panels established for this purpose with the aid of experts in provenance research and history, would yield just and fair resolutions in a more efficient and predictable manner.[10]

The Federal Bar Association's issues agenda includes support for the formation of a U.S. Commission to deal with the difficult issues posed by litigation over Nazi looted art.[11] The HEAR Act is the most important act of Congress in this area since World

War II and is an important step in recovering unlawful Nazi spoils that have eluded victims for so long. **SB**

Raymond J. Dowd is a partner at Dunnington Bartholow & Miller LLP in New York, New York, where he is a member of DBM's litigation and arbitration, intellectual property and art law and international practice areas. Mr. Dowd is deeply involved with the Federal Bar Association, serving as the FBA's General Counsel (2010-2011); FBA Vice President for the Second Circuit (2006-2012); FBA Board of Directors (2011-2016); The Federal Lawyer Magazine Editorial Board; FBA Government Relations Committee; and FBA President of Southern District of New York Chapter (2006-2008). Ray can be reached at rdowd@dunnington.com.

Endnotes

[1]S.2763 (114th Cong. 2d Session) Full text at https://www.congress.gov/bill/114th-congress/senate-bill/2763/text; H.R. 6130, 114th Congress (2016)

[2]Hon. Chuck Grassley, Holocaust Expropriated Art Recovery Act of 2016, S. Rep. No. 114-394 (2016) https://www.congress.gov/congressional-report/114th-congress/senate-report/394/1

[3]S.2763 §2(1)

[4]S.2763 §2(2)

[5]S.2763 §2(3)

[6]S.2763 §2(4)

[7]S.2763 §2(5)

[8]S.2763 §2(6)

[9]S.2763 §2(7)

[10]S.2763 §2(8)

[11]www.fedbar.org/Advocacy/Issues-Agendas.aspx

DOJ Emphasizes Need for Individual Accountability for Corporate Crimes and Abuses

Nicole Newlon

It has been over a year since the Department of Justice ("DOJ") issued what has now been commonly referred to as the Yates Memo,[1] after its author, Deputy Attorney General Sally Q. Yates. In June of 2016, Acting Associate Attorney General Bill Baer stated that the memo was "designed to change certain practices."[2] He further noted that, "even though many of the concepts underlying the policy have long been part of the department's approach to white-collar law enforcement, we thought they needed a new emphasis."[3] Mr. Baer's remarks make clear that the DOJ remains committed to individual accountability, in all cases, including civil enforcement actions, as "[c]ivil wrongs can have damaging consequences, from the significant waste of taxpayer funds, to the loss of jobs, homes and financial security, to consumer overcharges, to fundamental market dislocations and economic crises."[4]

The Yates Memo placed an increased focus on holding individuals accountable for corporate misconduct in both the criminal and civil context, and sets forth six principles for DOJ attorneys to follow in their investigations of corporate wrongdoing. The six principles include:

- To be eligible for cooperation credit, corporations must provide the DOJ with "all relevant facts" about the individuals involved in the misconduct, irrespective of the positions these individuals hold within the company. Corporations are charged with investigating and identifying responsible persons, and providing this information to the DOJ (even after the execution of corporate plea and settlement agreements).
- Corporate investigations by the DOJ should focus on the culpability of individuals from the outset. Moreover, all investigations should proceed in tandem.
- DOJ attorneys – on both the criminal and civil side - should communicate throughout their respective investigations, from inception through conclusion, and the attorneys should make independent assessments on whether to proceed with action(s).
- Resolutions of corporate wrongdoing should not serve to release, protect, or otherwise immunize individuals absent "extraordinary circumstances."
- Any resolution of corporate wrongdoing should also include a "clear plan" to resolve "related individual cases." Actions against individuals should be resolved in conjunction with actions against the corporations, and delays should not impact the pursuit of other ongoing actions.
- An individual's ability to pay a civil judgment should be only one factor, and not the sole factor, in evaluating whether to pursue actions against culpable individuals.

The Yates Memo, a reaction to allegations and criticism that the DOJ failed to punish culpable corporate executives involved in the 2008 economic crisis, is the latest in the long line of guidance relating to the DOJ's policy to hold individual wrongdoers accountable. The Yates Memo follows the Filip Memo from 2008,[5] the McNulty Memo from 2006,[6] the McCallum Memo from 2005,[7] the Thompson Memo from 2003,[8] and the Holder Memo from 1999,[9] as codified in the United States Attorney's Manual as the "Principles of Federal Prosecution of Business Organizations".[10]

Whether the Yates Memo sets forth new policy, constitutes a shift in stated policy, or otherwise extends existing policy has been the subject of much scrutiny since its pronouncement. The guidelines have been incorporated within the United States Attorney's Manual, and the DOJ intends to pursue individuals and hold them accountable for corporate wrongdoing, irrespective of the impact this might have on the extent and nature of corporate cooperation, potential corporate settlements, and the number of individual guilty pleas. These principles, upon which DOJ attorneys are now expected to rely in charging and filing decisions, simultaneously serve to set forth factors for corporations and their counsel to consider in evaluating whether to cooperate, and the nature, scope, and extent of any internal investigation of alleged or potential corporate wrongdoing.

The expansiveness of the policy directive is likely to have a significant impact on both criminal and civil litigators, as well as transactional attorneys, representing clients in a variety of industries and in many different areas of the law. Commercial and civil litigators will likely face questions surrounding the application of the work product doctrine and attorney-client privilege to materials and facts learned and obtained through internal investigations. Voluntarily producing those facts learned during the course of an internal investigation, and conducting internal investigations with the knowledge that all such information may be disclosed to obtain leniency, may subject this information to compelled disclosure in other lawsuits and proceedings.

Insurance, employment, and corporate litigators may face inquiries regarding the sufficiency and adequacy of insurance coverage, the advancement and indemnification of defense costs, and the terms of any insurance coverage exclusions. The potential for conflicts in representing multiple individuals is valid, and must be carefully considered before accepting any engagement. Lawyers should pay special attention to the terms of Directors and Officers insurance policies, including whether the insurer is required to provide a defense or simply pay for the defense. If there are multiple individuals, with separate counsel, covered by the same "wasting" insurance policy,[11] the lawyers have to cooperate to preserve the policy for potential resolutions as well as continued defense costs.

For commercial, corporate, and white-collar litigators, the identification of individuals within the corporation with either knowledge of relevant facts, or of those with responsibility for the wrongdoing, will necessarily create an additional need for experienced counsel. Irrespective of conflict issues, employees may seek outside counsel earlier in the proceeding and more frequently if they believe themselves a potential target of a government inquiry. These individuals may also have claims against their current and/or former employers, such as defamation, indemnification, employment related claims relating to termination and/or the disclosure of protected, private information,

and/or breach of employment contracts.

There are a multitude of other scenarios that commentators, law firms, and other writers have prognosticated might occur as a result of these new directives, including an increase in the number of "lower-level" personnel cooperating, potentially even providing false information to avoid being targeted, less cooperation among corporations or alternatively, more investigations proceeding without corporate assistance. Several authors have commented on the substantial increase in the number of cooperation clauses included in corporate resolutions requiring the settling party to fully cooperate and to make associated persons available for interviews and testimony, reflecting the impact and response to the Yates memo and the likely trend moving forward.

Whatever the end result, the stated objective is an increased focus on the pursuit of all culpable parties, whether corporate or individual, and both criminally and civilly. The purpose appears twofold: to provide a "powerful deterrent against future misconduct" and to ensure "that the public has continued confidence in our justice system".[12] The true impact of the Yates Memo will be ascertainable in time when we are able to fully review the nature, extent, and amount of corporate cooperation in light of these policy directives. **SB**

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Endnotes

[1]The Memorandum entitled "Individual Accountability for Corporate Wrongdoing" was issued by Sally Quillian Yates, Deputy Attorney General for the DOJ, on September 9, 2015. It can be located at www.justice.gov/dag/file/769036/download, last accessed December 20, 2016.

[2]Acting Associate Attorney General Bill Baer's Remarks on Individual Accountability at the American Bar Association's 11th National Institute on Civil False Claims Act and Qui Tam Enforcement. The file is located at https://www.justice.gov/opa/speech/acting-associate-attorney-general-bill-baer-delivers-remarks-individual-accountability, last accessed December 20, 2016.

[3]*Id.*

[4]*Id.*

[5]The Filip Memo, entitled "Principles of Federal Prosecution of Business Organizations", authored by Mark Filip, Deputy Attorney General, is dated August 28, 2008. The file is located at www.justice.gov/sites/default/files/dag/legacy/2008/11/03/dag-memo-08282008.pdf, last accessed December 20, 2016.

[6]The McNulty Memo, authored by Deputy Attorney General Paul J. McNulty, is titled "Principles of Federal Prosecution of Business Organizations". The document is located at www.justice.gov/sites/default/files/dag/legacy/2007/07/05/mcnulty_memo.pdf, last accessed December 20, 2016.

[7]The McCallum Memo, authored by Acting Deputy Attorney General Robert D. McCallum, Jr., is entitled "Waiver of Corporate Attorney-Client and Work Product Protection" is dated October 21, 20015. The document is located at federal-evidence.com/pdf/Corp_Prosec/McCallum_Memo_10_21_05.pdf, last accessed December 20, 2016.

[8]The Thompson Memo, authored by Deputy Attorney General Larry D. Thompson, is dated January 20, 20013 and is entitled "Principles of Federal Prosecution of Business Organizations". The file is located at www.americanbar.org/content/dam/aba/migrated/poladv/priorities/privilegewaiver/2003jan20_privwaiv_dojthomp.authcheckdam.pdf, last accessed December 20, 2016.

[9]The Holder Memo, authored by Deputy Attorney General Eric Holder, is dated June 16, 1999 and is entitled "Bringing Criminal Charges Against Corporations." The document is located at www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/charging-corps.PDF, last accessed December 20, 2016.

[10]United States Attorney's Manual ("USAM") § 9-28.000.

[11]The indemnity benefit of a wasting insurance policy is reduced by the fees and costs expended in the defense of claims.

[12]*See* supra note 2.

Cybersecurity Litigation: Searching for a Leg to Stand On

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One in every four Americans has been victimized by some sort of information security breach.[1] In the past five years we have witnessed cyber-attacks directed at universities[2], government agencies,[3] large corporations,[4] and health organizations.[5] Although security breaches affect many Americans, victims often find difficulty seeking redress through the courts. Perpetrators of cyber-attacks are often difficult to identify, lack financial resources to pay judgments against them, and are sometimes suspected to be state actors, such as China, Russia, or North Korea. Unsurprisingly, cyber-attack victims look to other entities to find redress and sue employers, merchants, technology firms, and entities with access to a company's data. Regardless of whichever route a plaintiff takes to become whole, each cyber-attack victim must surmount a common hurdle: standing.

To obtain Article III standing, a requirement for federal litigation, a plaintiff must "show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."[6] To avoid dismissal, a plaintiff must show that she has already suffered some actual harm due to the defendant, and that the court has power to redress that harm.

Data breach and cybersecurity litigation succeeds or fails primarily on the answer to a single question: Do plaintiffs whose personally identifiable information has been accessed, but not as of yet misused, have standing based solely upon the increased risk of identity theft?

Courts generally find that standing does not exist in cyber-attack or data breach cases because the alleged harm is speculative, rather than certainly impending. The leading case cited in the first wave of cyber-attack cases is *Clapper v. Amnesty International USA*.[7] *Clapper* centered on application of the newly enacted Foreign Intelligence Surveillance Act during a time when some of the largest cyber-attacks (and subsequent lawsuits) were taking place. The *Clapper* court held that to establish Article III standing, "the injury must be certainly impending in fact, and that the allegations of possible future injury are not sufficient." Since the United States Supreme Court decision in *Clapper v. Amnesty, Int'l,* plaintiffs in privacy litigation have been educated time and again that they must be careful to explicitly plead a concrete and particularized actual injury.

Most courts, in the wake of *Clapper*, have held that the threat of fraudulent activity does not establish standing. In other words, just because someone has your data and could steal your identity, does not mean you have been injured. In 2012, for example, Barnes & Noble announced sixty-three of its stores in nine states were attacked by hackers. Over a six week period, hackers skimmed credit and debit card information from register PIN pads. A consolidated class action was filed in the Northern District of Illinois after Barnes & Noble delayed notifying the public (and potential affected victims) of the breach. The court dismissed the case because plaintiffs did not meet the *Clapper* standing standard. Specifically, "[n]othing in the Complaint indicates [p]laintiffs have suffered either a 'certainly impending' injury or a 'substantial risk' of an injury, and therefore, the increased risk is insufficient to establish standing." Similarly, Paytime, Inc. suffered a cyber-attack where over 230,000 client files containing personally identifying information was "misappropriated."[8] The trial court dismissed the suit after confirming that Third Circuit decisions "require its district courts to dismiss data breach cases for lack of standing unless plaintiffs allege actual misuse of the hacked data or specifically allege how such misuse is certainly impending. Allegations of increased risk of identity theft are insufficient to allege harm."[9]

Trial courts have frequently utilized the *Clapper* standing to confer dismissal in data breach cases. First, the United States District Court for the District of New Jersey found a lack of standing and dismissed *In re Horizon Healthcare Services Inc. Data Breach Litigation.*[10] Horizon Healthcare suffered theft of two encrypted laptops, which led to misappropriation of personal health information belonging to over 800,000 clients. Horizon investigated the incident and notified authorities and potential victims within days of the theft. The court found that plaintiffs failed to establish imminent injury and "[had] not alleged any post-breach misuse of compromised data," and the alleged "future injuries stem from conjectural conduct of a third party and are therefore inadequate to confer standing." Second, in *Green v. eBay Inc.,* the United States Court for the Eastern District of Louisiana dismissed a matter involving the potential compromise of names, encrypted passwords, email addresses, phone numbers, and dates of birth of over 120 million eBay customers.[11] The court explained that "[i]n most data breach cases, the Complaint alleges sensitive information was stolen…. In such cases, courts nonetheless have found that the mere risk of identity theft is insufficient to confer standing, even in cases where there were actual attempts to use the stolen information."

Although the mere threat of identity theft has been too speculative to establish standing for many courts, the Seventh Circuit is signaling a change. On July 20, 2015, the Seventh Circuit issued a ruling permitting a data breach class action to proceed against Neiman Marcus, the luxury retailer that suffered a breach of 350,000 consumer credit cards.[12] In *Remijas v. Neiman Marcus,* the Seventh Circuit became the first Circuit Court to find the following: (1) Customers "should not have to wait until hackers commit identity theft or credit-card fraud in order to give the class standing, because there is an 'objectively reasonable likelihood' that such an injury will occur;" (2) Plaintiffs who have not yet suffered actual fraud or identity theft are nonetheless injured because they must spend money, time, and attention to canceling and replacing cards, monitoring their credit score, and otherwise "sorting things out;" (3) a retailer's offer of credit monitoring and identity-theft protection to customers following the data breach was "telling" evidence that risk of harm was not "ephemeral."

The Court further remarked "[a]t this stage in the litigation, it is plausible to infer that the plaintiffs have shown a substantial risk of harm from the Neiman Marcus data breach. Why else would hackers break into a store's database and steal consum-

ers' private information? Presumably, the purpose of the hack is, sooner or later, to make fraudulent charges or assume those consumers' identities." The Seventh Circuit cited the *Neiman Marcus* decision in April 2016, when it reversed a lower court's dismissal for lack of standing in *Lewert v. P.F. Chang's China Bistro, Inc.,* Case No. 14-3700 (7th Cir., Apr. 14, 2016).

The Neiman Marcus case was a watershed decision for any company regularly compiling or retaining customer data. For years, *Clapper* was the insurmountable hurdle hindering class action suits because it found Article III standing for possible future injuries only when the threatened injury was "certainly impending." In other words, plaintiffs needed to show some evidence that, without doubt, their identity would be stolen imminently. But the "objectively reasonable likelihood" standard set forth by the Seventh Circuit lowers the crucial standing bar. This new standard assumes that the mere act of having your data stolen demonstrates a likelihood that identity theft and fraud are soon to follow. Further, this decision creates a circuit split with the Third Circuit, which relied upon *Clapper* in its dismissal of similar data breach class actions.

Last May, the Supreme Court complicated the standing issue. In *Spokeo, Inc. v. Robins,*[13] a 6-2 majority, led by Justice Alito, found that plaintiffs seeking redress for statutory violations must show a "concrete injury" as opposed to a purely procedural violation. Specifically, the Court held that a plaintiff does not "automatically [satisfy] the injury-in fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." But, the Court also held that some intangible injuries may constitute a concrete injury for Article III purposes. Without identifying an example of an intangible concrete injury, the Court held that "both history and the judgment of Congress play important roles" in determining whether such an injury is sufficient for Article III standing. In other words, trial courts must determine whether the alleged intangible concrete injury at issue is of the type historically considered a legitimate basis for a suit.

Because of the split between the Third and Seventh Circuits, and the *Spokeo* court's failure to provide guidance beyond the traditional "concrete injury" requirement, standing in cyber-attack cases could be one of the most nascent legal issues of 2017. The Seventh Circuit will likely see an increase in plaintiffs filing class action claims in data breach matters within the jurisdiction in hopes of a better chance at surviving dismissal. Only time and caselaw development will tell whether the cyber-attack litigation landscape becomes more favorable for plaintiffs, but right now victims of data breaches appear to have at least one leg to stand on. **SB**

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[6]*Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.,* 528 U.S. 167, 180-81 (2000).

[7]133 S.Ct. 1138 (2013).

[8]*Storm v. Paytime, Inc.,* No. 14-cv-1138 (M.D. Pa. March 13, 2015).

[9]*Id.* at 12 (citing *Reilly v. Ceridian Corp.,* 664 F.3d 38, 43 (3d Cir. 2011)).

[10]No. 2:2013cv07418 (D.N.J. March 31, 2015).

[11]2:14-cv-01688 (E.D. La. May 4, 2015).

[12]*Remijas v. Neiman Marcus Group, LLC,* No. 14-3122 (7th Cir. Jul. 20, 2015).

[13]No. 13-1339 (May 17, 2016).

Losing the Home Court Advantage? Second Circuit Recognizes Mexican Arbitral Award In Spite of Mexican Supreme Court Invalidation

David J. Hoffman

In a groundbreaking decision[1], the United States Court of Appeals for the Second Circuit recognized a vacated international arbitration award increasing the possibility that the United States federal courts may be open to the enforcement of other such awards. Petitions to confirm such awards are likely to be brought in the federal courts. While the Federal Arbitration Act ("FAA"), 9 USC §§1 et seq, does not generally confer an independent basis for federal jurisdiction,[2] the Chapter 2 of the FAA, 9 USC §§201-208, grants the federal courts jurisdiction to entertain petitions to confirm international awards.[3] International arbitrations are subject to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, also referred to as the "New York Convention."

Practitioners of international arbitration and litigation have long-awaited the decision in Corporación Mexicana De Mantenimiento Integral, S. De R.L. De C.V (or "COMMISA", a subsidiary of the American corporation KBR, Inc.) v. PemexExploración Y Producción (or "PEP" a subsidiary of the Mexican state oil company Petroleos Mexicanos, commonly known as "Pemex"). The case promised to address an issue of great interest to many practitioners: whether United States courts may enter judgment on an international arbitral award that had been vacated at its seat. The courts of other countries have addressed this question and adopted different approaches, as have many commentators, but precedent from United States courts has been scant. This question is of interest as it may affect the choice of situs for the arbitration and enforcement strategies for rendered awards.

By decision dated August 2, 2016, the Second Circuit found that the United States District Court for the Southern District of New York (Hellerstein, J.) did not abuse its discretion in entering judgment on the award, the result of an arbitration proceeding with its seat in Mexico, despite the fact that Mexican courts had annulled the award. The court's reasoning was that the annulment was based on certain changes in Mexican law that rendered the dispute non-arbitrable and ultimately without a forum in which it could be heard. In upholding the entry of judgment, the court found that it would offend basic principles of fairness embedded in United States law to deny enforcement to the award. The reasoning of the court is notable because it analyzed the question relying heavily on purely domestic doctrines and did not situate its decision among the spectrum of international approaches. In doing so, the court eschewed an arbitration-specific approach and applied standards that may be applicable to foreign judgments and evaluating comity-based arguments in favor of foreign court decisions.

Facts

COMMISA and PEP entered into contracts in 1997 and 2003 related to the construction of oil platforms. Each contract contained a substantially identical arbitration clause:

> 23.3 Arbitration. Any controversy, claim, difference, or dispute that may arise from or that is related to, or associated with, the present Contract or any instance of breach with the present Contract, shall be definitively settled through arbitration conducted in Mexico City, D.F., in accordance with the Conciliation and Arbitration Regulations of the International Chamber of Commerce that are in effect at that time. The arbitrators shall be three in number, and the language in which the arbitration shall be conducted shall be Spanish.

At the times the parties entered into the contracts, Mexican law provided that Pemex and its affiliates (such as PEP) could enter into valid arbitration agreements. The latter contract did not resolve the difficulties between the parties, and in 2004, PEP seized the completed work, ejected COMMISA, and gave notice that it intended to administratively rescind the contracts. In December 2004, COMMISA filed a demand for arbitration with the ICC. Shortly thereafter, PEP did administratively rescind the contracts, which resulted in COMMISA filing a so-called amparo proceeding in the Mexican court.[4] COMMISA lost on all counts.

Arbitration proceedings commenced in Mexico City in May 2005 and the Tribunal issued an interim award in November 2006 finding that it had jurisdiction and enjoining PEP from attempting to collect on enforcement bonds.

While the arbitration was underway, in December 2007, the Mexican Congress vested exclusive jurisdiction for claims arising out of public contracts (such as COMMISA's) in the Tax and Administrative Court. The Mexican Congress also shortened the limitations period from ten years to 45 days. In addition, the Mexican Congress enacted Section 98 of the Law of Public Works and Related Services which declared that certain disputes (like COMMISA's) involving administrative rescission could not be subject to arbitration. After the issuance of the preliminary award, PEP argued to the Tribunal that Section 98 barred arbitration of COMMISA's claims. That claim was rejected by the Tribunal in its final award in December 2009.

The December 2009 final award awarded COMMISA approximately $300 million in damages. COMMISA promptly sought confirmation of that award in the Southern District, which confirmed the award in December 2010. PEP initiated proceedings in Mexico that resulted in the Eleventh Collegiate Court (analog to the D.C. Circuit Court of Appeals) holding that COMMISA's claims were not arbitrable under Section 98 and annulled the award. PEP had appealed the original judgment of the Southern District confirming the award. After the decision of the Eleventh Collegiate Court, PEP moved for a remand in order to give the Southern District an opportunity to consider the Mexican legal development.

The Southern District held hearings focusing on the meaning of the Mexican legal developments. After that hearing, the Southern District declined to defer to the Eleventh Collegiate Court and entered judgment on the arbitration award.

Decision in the Second Circuit

In addition to the arbitration issues presented, the Second Circuit also considered extensive arguments as to personal jurisdiction and venue in the Southern District. These issues are beyond the scope of this note, as the Court did find that the Southern District had personal jurisdiction and was a proper venue.

With respect to recognition and enforcement of the award, the Second Circuit noted that the proceedings in this case were governed by both the Panama Convention[5] and the New York Convention[6]. The Second Circuit began its analysis by no ing that there "is no substantive difference between the two" and that both exhibit a "pro-enforcement bias".[7] The Second Circuit followed the language of the Panama Convention in conducting its analysis.

Application of the Panama Convention

The Second Circuit noted that an award may only be refused recognition under the Panama Convention if the resisting party proves one of seven enumerated defenses set forth in Article V of the Convention. These enumerated defenses are the "exclusive grounds"[8] for denying recognition and enforcement to an award subject to the Convention. Under its interpretation of the Convention, the Second Circuit held that: "a district court *must* enforce an arbitral award rendered abroad unless a litigant satisfies one of the seven enumerated defenses; if one of the defenses is established, the district court *may* choose to refuse recognition of the award."[9]

While the language of the Convention suggests "the unfettered discretion of a district court to enforce an arbitral award annulled in the awarding jurisdiction", the Second Circuit held that such discretion is "constrained by the prudential concern of international comity", which is "vital". Relying on its precedent regarding the recognition of foreign judgments, the court found that such judgments must be recognized unless they "would offend the public policy of the state in which enforcement is sought"[10] or would be "repugnant to fundamental notions of what is decent and just in the State where enforcement is sought."[11]

The Scope of the Public Policy Exception

Emphasizing that this public policy standard is "high[] and infrequently met", the court would extend the public policy exception only to those judgments that "tend[] clearly to undermine the public interest, the public confidence in the administration of the law, or security for individual rights of personal liberty or of private property."[12] Synthesizing the public policy exception to the recognition of foreign judgments and the provisions of the Panama Convention, the court found that "although the Panama Convention affords discretion in enforcing a foreign arbitral award that has been annulled in the awarding jurisdiction, and thereby advances the Convention's pro-enforcement aim, the exercise of that discretion here is appropriate only to vindicate 'fundamental notions of what is decent and just' in the United States."[13]

Failure to Recognize the Award would Offend Fundamental Notions of Justice

The Second Circuit found four ways in which the failure to recognize the award would offend those fundamental notions: "(1) the vindication of contractual undertakings and the waiver of sovereign immunity; (2) the repugnancy of retroactive legislation that disrupts contractual expectations; (3) the need to ensure legal claims find a forum; and (4) the prohibition against government expropriation without compensation." The court found that the Mexican Congress' effective withdrawal of sovereign immunity in rendering COMMISA's claims non-arbitrable offended both domestic and international notions of fairness. The Mexican Congress' actions offended not only domestic notions of fair play, which uphold the validity of waivers of sovereign immunity, but also international. As the court noted, NAFTA recognized that arbitration affords a "mechanism for the settlement of investment disputes that assures both equal treatment among investors of the Parties in accordance with the principle of international reciprocity and due process before an impartial tribunal."[14] The fact that PEP asserted these defenses which arose after the fact ran afoul of the basic principle of contract enforcement that courts are to enforce the parties' expectations at the time of contracting.[15]

The retroactive application of the law also militated against the Mexican court's decision to annul the award. The Second Circuit found that "[r]etroactive legislation that cancels existing contract rights is repugnant to United States law." The court found that this was a deeply-rooted concept, older than the United States and also reflected in several clauses of the United States Constitution.[16] Despite arguments to the contrary, and the Mexican court's explicit determination that it was not retroactively applying the law, the Second Circuit determined that it was a retroactive determination as a matter of United States law.

The third offending factor was that the new Mexican legal regime would have deprived COMMISA of a forum for its dispute. The Second Circuit found that "[t]he imperative of having cases heard somewhere is firmly embedded in legal doctrine." This determination was supported by the following widely recognized legal doctrines: the availability of forum non conveniens presumes a competent forum, the federal doctrine relaxing mootness requirements where a wrong is "capable of repetition, yet evading review" because otherwise parties would be left "without a chance of redress"[17], and federal habeas corpus procedures. The fact that the Mexican courts barred COMMISA's claims made outside of the arbitration meant that "COMMISA was thus twice the victim of unforseen changes in the law [and that s]uch a result offends basic domestic principles of claim preclusion."

As to the fourth factor, the Second Circuit determined that PEP's actions, as an arm of the government, had they taken place in the United States, would have offended the takings clause of the Constitution. The court also noted that a similar bar on government taking without compensation was incorporated into NAFTA.[18]

In upholding the Southern District's entry of judgment on the award, the Second Circuit found that the Southern District had not "second-guessed" the Mexican court with respect to their domestic law, but rather merely utilized the discretion afforded by the Panama Convention to enforce the award.

Commentary

Although the Second Circuit upheld the enforcement of the award the decision suggests that in the future the court will apply a high bar to enforcement of those vacated at their seat. The decision was heavily reliant on case-specific aspects in that a very strong actor closely aligned with the government, Pemex, apparently effected changes in the law to avoid the unfavorable outcome of an arbitration. The timing of these machinations appeared to be designed with the intended goal of derailing a specific arbitration to the detriment of a United States party. Whether foreign legal

changes that might be less identifiable with a powerful state-aligned entity and a specific proceeding would offend the basic notions of fair play remains to be seen.

Certain elements in the court's reasoning may not hold up to extended scrutiny. For example, examining the corpus of United States Supreme Court jurisprudence reveals that the retroactive modification of contracts is not "repugnant" to our jurisprudence. The entire New Deal revolution in economic regulation overthrowing the former Lochner regime upheld the right of the legislature to retroactively abrogate contracts. What may have been driving the court's reasoning here was not a simple retroactive modification of contracts, which might occur any time the state regulates commerce, but in the way that these legal changes appeared to be aimed at a specific proceeding and at disadvantaging a specific non-Mexican party based in the United States. The fact that these legal changes rendered COMMISA without a forum for hearing its claims could likely be credited as a determining factor, rather than retroactivity alone.

Furthermore, the opinion is notable for its nearly exclusive reliance on its own precedents and other domestic legal authorities. It did not engage the broader international arbitration law as it exists in other countries or as it has been addressed by learned commentators. Professor Christopher Drahozal [19] identified five approaches to the question: (1) the "traditional approach", i.e. that a vacated award is not enforceable, (2) the "French approach", where a vacated award is enforceable so long as it satisfies French standards, (3) the "Chromalloy approach" where a vacated award is enforceable so long as it meets American standards and that the parties agreed to exclude the possibility of an appeal, (4) the "LSA approach", attributed to Jan Paulsson, where the award may be enforced provided that it was vacated on internationally recognized grounds, not local standards (called "LSAs"), and (5) the "comity approach", attributed to William Park, which would bar the enforcement of vacated awards unless "the vacatur resulted in procedural unfairness or were contrary to notions of fundamental justice".

The Second Circuit did not explicitly engage any of these particular schools of thought. Yet, that the court's decision may be consistent with several of them. The decision might best fit with the approaches advocated by Jan Paulsson and Prof. Park. The Mexican annulment only met international standards under Article V of the Panama (or New York) Convention in that it was annulled at the seat, but the Mexican court decisions were based on local factors (i.e., changes in the extent of sovereign immunity, shortening of the limitations period) that are not internationally recognized factors. The court then addressed the aspects of comity, and held that it would offend our domestic notions of justice to deny enforcement of the award.

In conclusion, the Second Circuit broke new ground in disregarding the Mexican Supreme Court's invalidation of an arbitral award. It remains to be seen whether this case will be limited to its facts or will signal a significant step toward the "French approach" of discounting the significance of foreign judicial authority. Likewise, where other foreign judicial decisions are concerned, the federal courts have generally been deferential to their decisions. It remains to be seen if the Second Circuit's decision here foreshadows a new, skeptical eye on the actions of the foreign courts.

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Endnotes

[1]*Corporación Mexicana De Mantenimiento Integral, S. De R.L. De C.V. v. Pemex–Exploración Y Producción,* 832 F.3d 92 (2d Cir. August 2, 2016)

[2]The Federal Arbitration Act "bestow[s] no federal jurisdiction." *Vaden v. Discover Bank,* 556 U.S. 49, 59, 129 S. Ct. 1262, 1271, 173 L. Ed. 2d 206 (2009).

[3]Chapter 2 of the FAA, which governs arbitrations conducted pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, at 9 USC §203 provides that "[a]n action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States." The courts have taken an expansive view of which arbitrations are subject to the Convention, excluding only arbitrations "between two United States citizens, involves property located in the United States, [with] has no reasonable relationship with one or more foreign states, falls under the Convention.' "

Stone & Webster, Inc. v. Triplefine Int'l Corp., 118 F. App'x 546, 549 (2d Cir. 2004)(quotes and cites omitted).

[4]The amparo proceeding was filed in the District Court on Administrative Matters for the Federal District. It is a proceeding in which the constitutionality of governmental acts can be challenged.

[5]The Inter-American Convention on International Commercial Arbitration, codified at 9 USC §301 et seq.

[6]The Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

[7]Quoting *Yusuf Ahmed Alghanim & Sons v. Toys 'R' US, Inc.,* 126 F.3d 15, 20 (2d. Cir. 1997).

[8]Quoting id. at 20.

[9]Emphasis in original.

[10]Quoting *Ackermann v. Levine,* 788 F.2d 830, 837 (2d. Cir 1986).

[11]Quoting *Ackermann,* 788 F.2d at 841 quoting *Tahan v. Hodgson,* 662 F.2d 862, 864 (D.C. Cir 1981).

[12]Quoting *Ackermann,* 788 F.2d at 841 (internal quotes omitted).

[13]Quoting *Ackermann,* 788 F.2d at 841.

[14]Quoting NAFTA, art. 1115, Jan 1, 1994.

[15]Citing *Hunt Constr. Grp., Inc. v. Brennan Beer Gorman/ Architects, P.C.,* 607 F.3d 10, 14 (2d Cir. 2010)

[16]The Court cited the following clauses: the ex post facto clause, the prohibition on states' interference with contract, the prohibition on Bills of Attainder, and the Due Process Clause.

[17]Quoting *S. Pac. Terminal Co. v. InterstateCommerce Comm'n,* 219 U.S. 498, 515 (1911).

[18]Citing NAFTA art. 1110 Jan. 1, 1994.

[19]Christopher R. Drahozal, Enforcing Vacated International Arbitration Awards: An Economic Approach, *American Review of International Arbitration*, Vol. 11, p. 451, (2000).

Federal Bar Association

CAPITOL HILL DAY

Thursday, April 20, 2017

Plan to participate in this acclaimed event as FBA leaders from across the country meet with House and Senate offices to discuss important FBA legislative issues that impact the administration of justice and the federal courts. During meetings on Capitol Hill, FBA participants will discuss issues most critical to our Third Branch of government, including: adequate funding for the federal courts, filling judicial vacancies promptly, and sufficient judgeships to render justice.

FBA Capitol Hill Day is becoming more popular each year. Don't miss out on this opportunity to help broaden the FBA's visibility and influence in Congress.

Training and materials will be provided to Capitol Hill Day participants in advance of the event to provide issues understanding and advocacy effectiveness on the Hill. Participants also are responsible for scheduling their meetings with their Senate and House offices.

Between meetings, participants will have the opportunity to visit the Senate and House galleries, as well as the Capitol Visitors Center.

Capitol Hill Day is held in conjunction with the 2017 Leadership Training Program (April 21-22, 2017). All chapters, sections, and divisions are encouraged to send a representative to this event.

Because reimbursement is available for chapter representative attendees of the Leadership Training Program, these attendees will only need to incur the cost of one additional night of lodging. Section and Division representatives should follow National Policy No. 9-5 guidelines regarding reimbursement and receive approval from the Chair and Treasurer of their Section/Division. A discounted block of rooms has been reserved for attendees at the Capital Hilton. Reservations must be made by Friday, March 31, 2017 to receive the discounted rate. Call 1-202-393-1000 and refer to the "FBA Leadership Meeting" to reserve your room.

Participants of Capitol Hill Day are responsible for their booking travel and lodging in connection with this event.

Program

9:00 a.m.
Continental Breakfast Kickoff and Group Photo

10:00 a.m.
Participant meetings with Senate and House offices begin and continue into the afternoon

Lunch
On Your Own

4:00 p.m.
Group debriefing on Hill meetings

Registrant Information

Name _____ Title _____

Firm/Agency _____

Address _____

City _____ State _____ Zip _____

Phone _____ Fax _____

Email Address _____

Please email the completed registration form to Debbie Smith, chapters coordinator, at dsmith@fedbar.org. Visit www.fedbar.org/CapitolHill17 for additional information and to register online today!

Federal Bar Association

Side BAR

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