MEET THE MEMBERS

US | MEXICO | CANADA

In the following pages you will hear from our members in the US, Mexico and Canada about the important updates and opportunities available in their jurisdiction. Our member firms featured retain a global support network across 165+ jurisdictions via their IR Global membership, sharing a common vision of working collaboratively to achieve unrivalled results for their clients. **Read more here** www.irglobal.com/publications

IR Global – **Going Beyond Expectations**

IR Global was founded in 2010 and has since grown to become the **largest practice area exclusive network of advisors in the world.** This incredible success story has seen the network awarded Band 1 status by Chamber & Partners, featured in Legal 500 and in publications such as The Financial Times, Lawyer 360 and Practical Law, among many others.

The group's founding philosophy is based on bringing the best of the advisory community into a sharing economy; a system that is ethical, sustainable and provides significant added value to the client.

Businesses today require more than just a traditional lawyer or accountant. IR Global is at the forefront of this transition, with members providing strategic support and working closely alongside management teams to help realise their vision. We believe the archaic 'professional service firm' model is dying due to it being insular, expensive and slow. In IR Global, forward-thinking clients now have a credible alternative, which is open, cost effective and flexible.

Our Founding Philosophies

- **Multi-Disciplinary**

We work alongside legal, accountancy, financial, corporate finance, transaction support and business intelligence firms, ensuring we can offer complete solutions tailored to the client's requirements.

- **Niche Expertise**

In today's marketplace, both local knowledge and specific practice area/sector expertise is needed. We select just one firm, per jurisdiction, per practice area, ensuring the very best experts are on hand to assist.

- **Vetting Process**

Criteria are based on both the quality of the firm and the character of the individuals within it. It's key that all of our members share a common vision towards mutual success.

- **Personal Contact**

The best relationships are built on trust and we take great efforts to bring our members together via regular events and networking activities. The friendships formed are highly valuable to the members and ensure client referrals are handled with great care.

- **Co-Operative Leadership**

In contrast to authoritarian or directive leadership, our group puts teamwork and self-organisation in the centre. The group has steering committees for 12 practice area and regional working groups that focus on network development, quality controls and increasing client value.

- **Ethical Approach**

It is our responsibility to utilise our business network and influence to instigate positive social change. IR Global founded Sinchi, a non-profit that focuses on the preservation of indigenous culture and knowledge and works with different indigenous communities/tribes around the world.

- **Trusted Partners**

Strength comes via our extended network. If we feel a client's need is better handled by someone else, we are able to call on the assistance of our partners. First priority is to always ensure the client has the right representation whether that be with a member of IR Global or someone else.

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FOREWORD

North America: **compelling but complex.**

North America may be one of the most attractive regions in the world to do business, but it's not without complications for those who live, work and establish commercial ventures there.

Comprising the U.S, Canada and Mexico – the first, ninth and fifteenth largest economies in the world – North America continues to stand at the centre of the world's commercial stage. With favourable business conditions, international trade agreements and long-standing developed markets, it's unsurprising that parts of the region continue to top rankings of attractive places to do business.

In the latest Foreign Direct Investment confidence (FID) index, compiled earlier this year, the U.S. took the top spot for the 10th year in a row, with its post-Covid economic rebound of 5.8% and $1.2 billion infrastructure bill further cementing it as an alluring commercial location for overseas investors, entrepreneurs and businesses. Canada followed shortly behind in third place, bolstered by its political and economic stability: as of 2022, the country reported a 90.09% stability ranking from the World Bank. While the third North American nation, Mexico, may not have appeared at the top of the confidence rankings – presenting a more complex commercial landscape – it remains a thriving international economy and exciting opportunity, with an economy projected by the OECD to expand 2.1% in 2023 and newly-reformed trade links with Canada and the U.S.

In July 2020, NAFTA – the trade agreement that had shaped trade between Canada, Mexico and the U.S. for 25 years – was replaced with the USMCA. This new trade agreement was designed to create mutually beneficial trade conditions between the three nations and address some the perceived shortcomings of NAFTA. Two years into the new agreement, there are already signs that it is having a positive impact on commerce for all three countries, with cross-regional trade rising from $166 billion to $267 billion in the first quarter of 2022. Further to the USMCA, Mexico and the U.S. are also engaged in the High Level Economic Dialogue: an ongoing commitment by the two nations to foster prosperity and technological progress.

In a time of so much international uncertainty – political, geographical, and economic – trusted, developed markets like North America are often preferential to more volatile developing markets. Yet they, too, are not without challenges and uncertainties. The rapid pace of technological change continues to reshape the way we live and work worldwide, and North America is no exception. Combined with an ongoing focus on environmental and social factors in the business landscape, as well as increased global mobility, new regulations and expectations are arising as the result of a transforming world: from shifting work from home rules to laws promoting more fairness and equality in society and, specifically, workplaces. The social, cultural and legal impact of these changes are positive, but in some cases need careful legislative navigation and understanding by businesses looking to enter the market.

For individuals looking to live and work in the region, too, all three countries present some attractive prospects – but also come with complications. Mexico's Digital Nomad visas, for instance, are making the region a hot spot for work tourism, which in turn is having an impact on the country's real estate, with rising rents and property prices. In the U.S. and Canada, too, the remote work revolution continues to impact property, particularly commercial real estate, with regional demand and the type of businesses requiring real estate shifting in response to changing demands. This change in workforce locations and uptick in remote working also presents taxation, employment and IP issues, with some regions across the three countries presenting a more friendly prospect for employees and employers alike.

> **"It's unsurprising that parts of the region continue to top rankings of attractive places to do business."**

Overall, the region seems to present a positive opportunity for foreign direct investment, with 69% of respondents to the 2022 FDI survey in the Americas expressing optimism in their market.

In the following publication, IR Global members in the U.S, Canada and Mexico share their expertise on some of the most pressing issues in their jurisdiction. From the broad-sweeping impact of international geopolitical events to specific legislative changes that effect inhabitants on a more personal level, they cover a broad range of topics to provide insight into the commercial landscape of North America.

Editor

Charlotte Delaney

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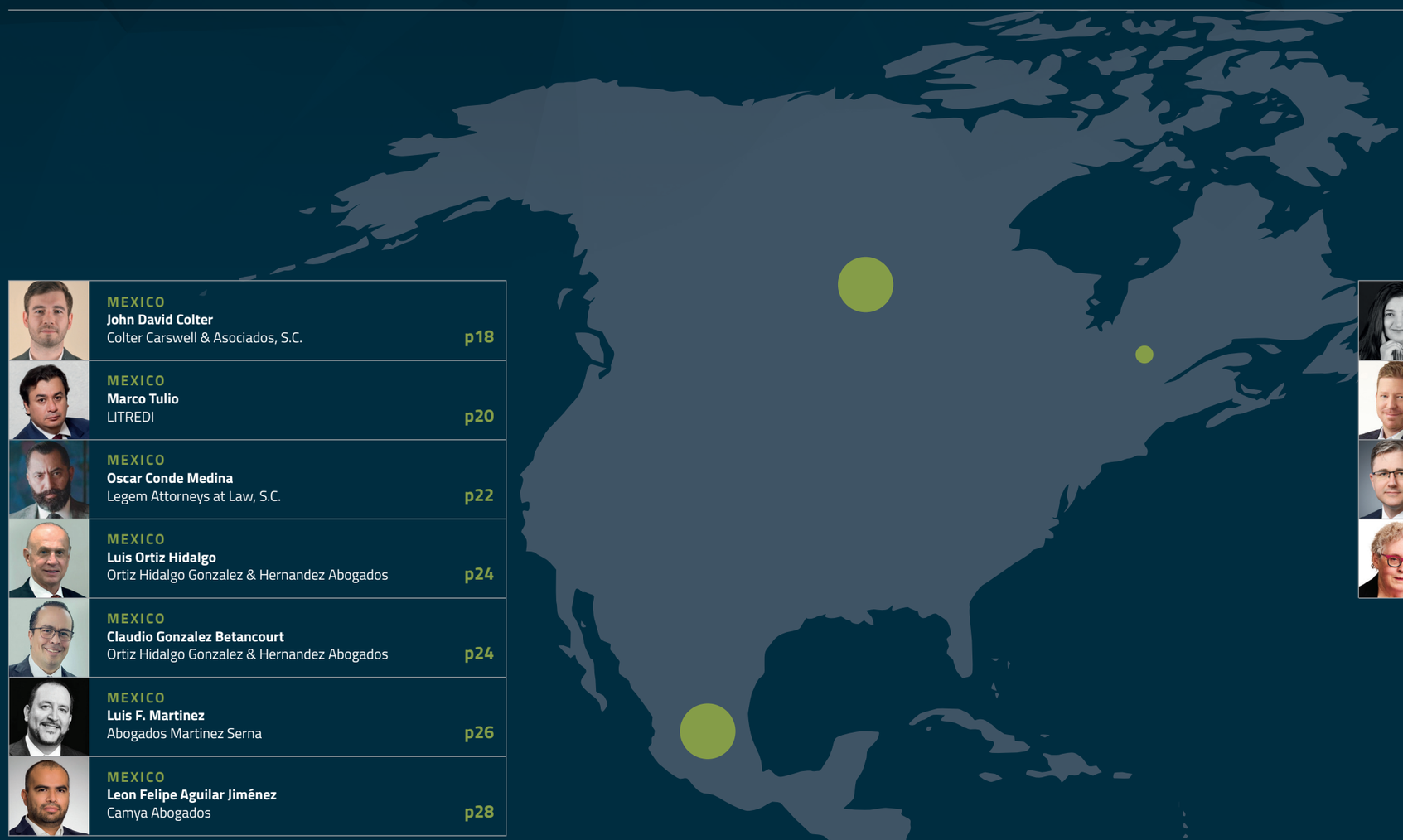
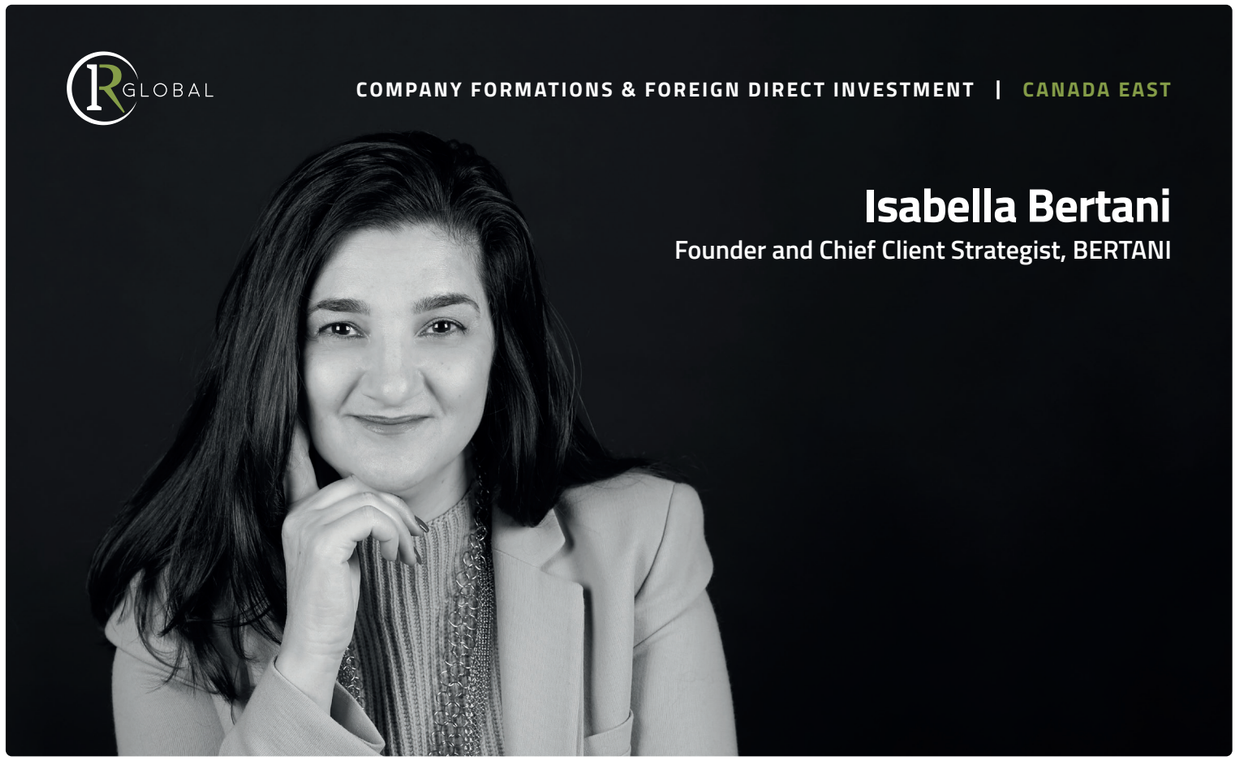
IR Global members have a passion for knowledge sharing and developing professional relationships to support their clients' requirements. They not only network via our global conferences but they also take part in our virtual sessions to keep their presence up and continue to create and build on existing relationships.

MEET THE MEMBERS

Canada & Mexico

IR Global members from the Canada and Mexico represent the world's leading legal, accountancy and financial advisers. These members are recommended exclusively by jurisdiction and practice area and use the network to support any client requirements.





Canada: The Gateway to Global Trade.

With constant new and evolving geo-political impacts from around the world, trade and globalisation is becoming more and more complex. The Russia-Ukraine War is the third such geo-political shock on the globe in the recent past.

Prior to the onset of Covid-19 , protectionism was already on the rise, however the pandemic saw many countries, including Canada, implement protectionist policies over certain industries. In addition, there were significant disruptions to supply chains. Such disruption made supply chain management more and more critical, resulting in inventory management going from "just in time" to "just in case" and a move to looking at new ways to increase efficiencies and improve supply chains, including turning to sustainability measures to make supply chains more efficient. Similarly, the US-China Trade war saw a huge disruption to global trade, resulting in tariffs imposed affecting supply chain costs. In addition, increasing trends towards protectionism resulted in the tightening immigration policies in the US and the imposing of protectionist policies by other countries. The Russia-Ukraine war caused a second major disruption to supply chain in a short period, resulting in further economic uncertainties and hitting the global economy with rising inflation.

How do these events fit into the long-term outlook for global trade? Is globalisation retreating? Organisations must now look to ensuring that their supply chains can withstand future shocks resulting in a trade off between the efficiency of these supply chains and their resilience. Globalisation and global trade will not go away. However, how companies expand, structure, organise, and manage their supply chains is becoming more critical.

"Canada provides an opportunity for access to global markets given its openness to trade."

Companies that take a nationalistic approach in the countries they expand to, moving closer to those markets and immersing themselves in those economies, will be the most successful as they will reduce the stress to their supply chains and manage global threats.

Canada as a Gateway to North America and Global Markets

On June 6, 2017, I sat down for a panel discussion to discuss the benefits and implications of the new updated North American Free Trade Act, or CUSMA or USMCA (depending upon if you're in Canada or the US). This update of the Canada-United States-Mexico Agreement came into force on July 1, 2020, to reflect the changing trade between the new nations. At that time, the word that came to my mind was "Gateway." Gateway because Canada's openness to trade and access to markets makes it a gateway to not only North America, the largest free trade zone in the world, but to many significant global markets.

Canada provides an opportunity for access to global markets given its openness to trade and free trade agreements, immigration, access to highly skilled talent, ease of doing business, and stable banking and political system. Its transportation infrastructure includes 24 international airports, 17 seaports, and 117 border crossings to the US. Canada has been ranked highly for its quality of life, and three of its cities included are ranked in the world's 10 most livable cities: Calgary (4th), Vancouver (5th), and Toronto (8th).[1] In addition, its Universal Healthcare system makes health care available to all.

Canada has 15 free trade agreements, providing access to 51 countries and 1.5 billion consumers, including:

- Canada-United States-Mexico Agreement (CUSMA) in force since July 1, 2020, between Canada, U.S., and Mexico.
- Canada-European Union Comprehensive Economic and Trade Agreement (CETA) in force since September 21, 2017, which ensures 98% of pre-existing tariffs are removed if the rules of origin are met.
- Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) which is in force since December 30, 2018, among Canada, Australia, Japan, Mexico, New Zealand, Singapore, and Vietnam (not yet in force for Brunei Darussalam, Chile, Malaysia, Peru).
- Canada-United Kingdom Trade Continuity Agreement (Canada-UK TCA) put in force on April 1, 2021, to provide post-Brexit continuity and stability of trade between Canada and the UK.[2]

By meeting the rules of origin as outlined in the free trade agreements, organisations can take advantage of the tariff-free benefits provided. In our practice we have seen organisations change their production strategy and move their manufacturing into the Canadian market in order take advantage of these agreements.

FDI investment into Canada 2021 was $59,676 million, up from $23,176 million in 2020[3] and surpassing pre-pandemic levels of $50,149 million in 2019.[4] The benefits of access to global markets through these trade agreements has made Canada a popular destination for FDI.

Your global expansion plan: Start with Objectives

When considering global expansion, organisations must always start with objectives. Why do you want to expand and why Canada? Is it a first step to a global footprint? Access to other markets through the advantages of CETA, CUSMA, and other free trade agreements? Are you looking to obtain access to R&D incentives, or Canada's skilled labour? Who are your investors? Will you be transferring employees to operate the new entity?

These objectives will drive the structure of your new entity and how you do business in Canada.

Conclusions

Canada provides many opportunities for organisations to expand their global footprint and access global markets. With its free trade agreements giving tariff-free access when the rules of origin are followed, Canada is a gateway to global markets.

If you're considering expanding into the Canadian market, please reach out to us for a consultation call.

[1] These Are the World's Top 10 Most Liveable Cities in 2022 (globalcitizen.org)
[2] Trade and investment agreements (international.gc.ca)
[3] Global foreign direct investment flows over the last 30 years | UNCTAD
[4] World Investment Report | UNCTAD, 2022

Named by Practice Ignition as one of the Top 50 Women in Accounting globally for two consecutive years in 2021 and 2022, **Isabella Bertani** is the Founder and Chief Client Strategist at BERTANI located in Toronto, Canada.

With over 25 years of experience, Isabella has worked extensively with both private and public companies in numerous industry sectors including manufacturing, food processing, technology, telecommunications, biotech, and retail and distribution.

Isabella's practice focuses on inbound foreign investment and Canadian domestic companies with global interests. A recognized leader in foreign direct investment, Isabella routinely advises global corporations with regards to expansion into the North American market and clients include numerous foreign subsidiaries of significant global entities. Isabella is a frequent speaker on topics relating to globalization including doing business in Canada, trade agreements, global trade and migration, and the impact of geopolitical trends on global foreign direct investment and global trade. She has a particular interest in FDI and its impact on global sustainability.

Isabella is a passionate advocate for women in business and women in economic development and has held several roles in women's leadership. In 2019, she was the recipient of the Joanna Townsend Excellence Award for Leadership in International Trade by the Organization of Women in International Trade in Toronto.

In 2017, Isabella was bestowed the honour of Fellow of the Chartered Professional Accountants of Ontario, the highest distinction conferred on its members that have brought prestige to the profession through significant achievements in their professional careers, volunteer involvement in the affairs of the accounting profession, and contributions to the community.

Isabella is a graduate of York University's prestigious Schulich School of Business holding both a Bachelor of Business Administration in accounting and a Master of Business Administration with a focus in policy and finance.

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BERTANI

BERTANI is a boutique audit, tax, and advisory firm in Toronto, Canada. Founded in 2001, BERTANI specializes in both inbound and outbound foreign direct investment and Canadian companies with global interests. Through our soft-landing program, we routinely advise foreign corporations with their investment into and continuing operations in the North American market.

As a member firm of IR Global, BERTANI is connected to over 1200 collaborative member firms in over 155 countries covering 70 practices areas across the globe, allowing our clients to be ideally positioned for their outward global expansion strategy.

Our firm motto: **GLOBAL BRANDS • LOCAL MARKETS** reflects our goal that our clients, whether foreign or domestic, are able expand their brand globally, yet take a localized approach to the markets they expand to.

Our services include:

Audit and assurance services
Tax compliance and advisory
Business strategy and advisory
Corporate expansion / Foreign direct investment services

The world is changing, and the role of the advisor is becoming more and more important.

Gregory M. Prekupec
Partner, Dipchand LLP

Recession: mitigating the threat of draconian laws.

Canadian franchise law has had a relatively short development life and regulates the obligations and rights of both franchisors and franchisees during the prospective and active franchising periods. Franchise laws are not federal, but within the purview of the provinces; in addition to Ontario, provinces that have enacted franchise disclosure legislation include British Columbia, Alberta, Manitoba, New Brunswick, and Prince Edward Island.

Ontario's Arthur Wishart Act is nearing two decades since enactment; its short jurisprudential history makes proactive strategy the main avenue available to franchisors to mitigate the rescission risks within the act.

Franchisors' significant disclosure obligations under Ontario's Franchise Act

The Franchise Act creates a legal framework that holds franchisors to a higher standard than in other commercial and contractual contexts by mandating the disclosure of specific information to prospective franchisees, with the view to allowing franchisees to make informed decisions about the franchise opportunities presented. Franchisors must (no less than fourteen days before the signing of an agreement and/or payment by a prospective franchisee, with limited exception accurately, clearly, and concisely present the following information

- all material facts
- financial statements
- signed copies of all proposed franchise and other agreements relating to the franchise
- statements to assist the prospective franchisee in making informed investment decisions
- other information and copies of documents as prescribed by the Franchise Act

Franchisors' disclosure must be delivered personally or by registered mail as one package. Franchisors are also obligated to disclose any material changes to the franchisor or franchise operations during the fourteen-day disclosure period by way of a written Statement of Material Change; this statement qualifies as disclosure and must occur before the franchisee signs any binding agreement, or payment in consideration thereof.

Rescission: draconian effects of defective disclosure

Rescission is the revocation, cancellation, or repeal of the associated franchise agreements and commitments; it is the most significant relief available to franchisees where a franchisor is alleged to have breached its disclosure obligations. In essence, the legislation attempts to put the franchisee back in its pre-contractual position where the franchisor's disclosure is deemed defective. This exceptional remedy is unique to the franchisor-franchisee relationship that, where available, entitles the franchisee to a full refund of money paid for the franchise and perhaps for the supplies, equipment and/or inventory bought pursuant to the signed agreement.

The Ontario Courts have broadly established four common grounds entitling franchisees to rescission. Each is related to some aspect of deficiency of the franchisor's disclosure obligations, with the consequences ranging from unactionable immaterial deficiency or insufficiency equating to non-disclosure to actual lack of disclosure. Accordingly, insufficient disclosure has been defined in various terms: "materially deficient," "serious non-compliance," "inadequate and deficient disclosure," or "stark and material deficiencies".

Failure to properly deliver disclosure

Disclosure must be delivered as one document at one time; otherwise, the disclosure is seen as "piecemeal," which can trigger rescission.

Additionally, when the document is delivered may also impact a franchisee's ability to rescind. Electronic service of disclosure was only added to the legislative scheme in 2016 which mandates that sufficient disclosure must be able to be stored, retrieved, and printed, contain no links to external documents or content, contain a file index setting out each file name/subject matter, describing the content; franchisors must receive written acknowledgement disclosure has been received.

Failure to include all material facts

Sufficiency of disclosure will always be fact-specific, and must amount to more than mere imperfection. The failure to include material facts has been seen in some instances as being so "fundamentally deficient in omitting such material facts as to constitute no disclosure."

Failure to include Section 5 information

Pursuant to Section 5 of the Franchise Act, set out the other information required beyond all material facts discussed above. Franchisors should err on the side of caution when choosing what to withhold from franchisees and be especially mindful of the information that was available at the time disclosure was made, but not provided to franchisees, such as available financial information or business plans. Such deficiencies in disclosure make it impossible for the franchisees to make an informed decision.

Failure to notify of material change

While no jurisprudence yet has dealt with failure to notify of a material change, franchisors should keep the obligation in mind throughout the franchising relationship. Under the Act, a material change is defined as any "change in the business, operations, capital or control of the franchisor or franchisor's associate, a change in the franchise system or a change... that would reasonably be expected to have a significant adverse effect on the value or price of the franchise to be granted or on the decision to acquire the franchise." Importantly, deficiencies in disclosure cannot be cured by a subsequent Statement of Material Change; deficient disclosure can only be cured through the service of a new and complete disclosure package.

Considerations upon rescission: supplies, equipment and damages

Where a franchisor provides a late disclosure package, a 60-day rescission period is activated automatically, in which a franchisee may rescind without penalty. Once a franchisor has received the required written notice of rescission, a franchisor will be required to provide the above-mentioned refunds and repurchases, where applicable. Where there is a non-disclosure (as defined above), a franchisee has an automatic two-year right of rescission from the date of the franchise agreement.

Lastly, a party is not necessarily insulated from this obligation simply by stating the relationship is not a franchise. Where on the facts an agreement takes on the characteristics of a franchise, a lack of disclosure can trigger a rescission right.

Rescission is draconian – franchisors would do well to take all necessary steps to avoid the risk by strategically and closely managing all aspects of disclosure.

Gregory M Prekupec is an external general counsel to many of his clients, serving as a lawyer and strategic advisor. Greg's practice focuses primarily on transactional services and assisting Canadian and international franchisors by providing valuable advice on brand protection and the myriad of laws regulating franchising. Greg identifies problems before they arise and has extensive experience developing practical business solutions with an eye on their long-term strategic growth. His clients are drawn from a wide range of industries such as restaurants, retail, hospitality, education, manufacturing, and technology. Clients rely on him for the kind of unfiltered advice they might not otherwise get from their own inner workings.

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Dipchand LLP is a boutique Bay Street law firm nestled in the heart of downtown Toronto, which is the destination for purposeful, innovative and creative legal solutions where transformative relationships catalyse strategic collaborations, proliferating success and excellence in all that we have the privilege to touch. Our shop is focused on serving clients in the areas of Intellectual Property, Corporate Law, Franchise Law and Litigation.

Dipchand LLP's commitment to cultivating strong relationships with our partners and clients results in tailored, strategic advice to guide ventures of all sizes through Canada's dynamic legal landscape. Our value is as trusted advisors of unparalleled calibre in both our legal advice and quality of service. Our shop has earned a rock-solid reputation over years of dependable service, which we constantly strive to maintain.

[1] Arthur Wishart Act (Franchise Disclosure), 2000 S.O., c. 3 (the "Franchise Act")
[2] Arthur Wishart Act, s 5(1)(b)(i)-(iii).
[3] Ibid., s 5(3)-(6).
[4] Payne Environmental Inc v Lord and Partners Ltd, [2006] ONCJ 1770 at para 13. Raibex Canada Ltd. V ASWR Franchising Corp., 2016 ONSC 5575 at paras 46-49.
[5] Ibid., s 6(6).
[6] Mendoza v Active Tire & Auto Inc., 2017 ONCA 471.
[7] 2212886 ON Inc v Obsidian Group, 2017 ONSC 1643.
[8] 6792341 Canada Inc. v Dollar It Limited, 2009 ONCA 385.
[9] 1490664 Ontario Ltd. V Dig This Garden Retailers Ltd, 2005 ONCA 256.
[10] Raibex at para 48; 4297975 Canada Inc. v Imvescor Restaurants Inc., 2009 ONCA 308 at para 37.
[11] Obsidian at para 53.
[12] Supra note 1 at s 1(1).
[13] Stephanie Ruta, "26th East Region Solicitors Conference Virtual Program Part 2: Corporate/Commercial – Franchise Disclosure Common Errors" (23 October 2020) online: CanLii <https://www.canlii.org/en/commentary/doc/2020CanLIIDocs3854?zoupio-debug#!fragment/zoupio-_Toc3Page11/(hash:(chunk:(anchorText:zoupio-_Toc3Page11),notes Query:',scrollChunk:!n,searchQuery:'',searchSortBy:RELEVANCE,tab:toc))>.
[14] Supra note 1 at s 6(3)-(4).
[15] Fyfe v Vardy (Dial a Bottle), 2018 ONSC 5066 at para 33. Factors which favoured the finding of a franchise relationship between two parties to an exclusivity agreement were: the plaintiffs requirement to making continuing payments; the defendant's granted use of their trademark, and exercised "significant control over the plaintiff's method of operation."

Curtis Marble
Partner, Carbert Waite LLP

Where you sit affects the view: how to choose the seat of arbitration.

Commercial lawyers and dispute counsel frequently skim over the dispute resolution clauses in contracts, failing to appreciate the importance of the "place" of arbitration (the "seat"). This brief paper explains why you should not discount this issue. I also make the case that my own jurisdiction – Alberta, Canada – should be at the top of your list to consider as the seat of your next arbitration.

What is the place or seat of arbitration, and why is it important?
The seat or place of arbitration is the legal place of the arbitration. To explain, an arbitration agreement may name London, UK as the seat of the arbitration. This means that, absent an agreement to the contrary, the law applicable to the arbitration procedure will be the law of London, UK. The seat can dictate the relevant law that will govern arbitration procedure:

"For the most part, modern laws of arbitration are content to leave parties and arbitrators free to decide upon their own particular, detailed rules of procedure, so long as the parties are treated equally. Under these modern laws, it is accepted that the courts of law should be slow to intervene in an arbitration, if they intervene at all. *Nevertheless, rules need the sanction of law if they are to be effective and, in this context, the relevant law is the law of the place or seat of the arbitration.* This is referred to as the lex arbitri."[1] (Emphasis mine.)

The seat of the arbitration is not necessarily where the arbitration will physically occur.[2] Parties may hold proceedings elsewhere. Problems might occur if this is done if the parties are not clear as to which law is selected as the "lex arbitri", or the law of the arbitration. Absent agreement to the contrary, the law of the seat becomes the lex arbitri. The lex arbitri may determine fundamental issues, even such issues as the capability of a dispute to be referred to arbitration.[3] Disputes may arise as "the selection of a lex arbitri by the parties is often neglected, sometimes mistaken, and almost always the harbinger of further litigation."[4] Hence, a party should speak with qualified arbitration counsel about this issue.

> "The seat of the arbitration is not necessarily where the arbitration will physically occur."

Different theories of arbitration take a different view as to the importance of the notion of seat.
Admittedly, there are different theories of arbitration, suggesting different levels of importance of the seat. This depends on whether the arbitrator's authority is viewed as stemming from (for example) the jurisdiction that serves as seat, the agreement of the parties, or some combination of the two. The debate in lecture halls on this point is lively. Irrespective of which academic theory you might find convincing, the practical reality for clients is that the law of the seat remains essential. This is because the local courts of that jurisdiction will assist in determining specific issues that may arise during the arbitration or in taking to steps to enforce a decision following the arbitration.[5] These issues may be fundamental to the arbitration. They can extend even to the appointment of an arbitral panel in the absence of agreement between the parties. Suppose you do not address this issue at the outset: you might find yourself with a very disappointed client who thinks they had a great arbitration clause in their commercial agreement, but who then finds it puts them at a disadvantage, or that is is, in practical terms, unenforceable. Clients may even find that they have chosen a seat in which the local courts are unwilling to enforce an arbitration clause, or are otherwise unable or unwilling to assist in the conduct of the arbitration.

How can counsel protect their clients?
A key attraction of international arbitration is the ability of the litigants to choose their own process and set the terms for that, and avoid such risks.[6] Wise counsel can help by considering the issue of the seat of arbitration at the outset of a commercial relationship or at the onset of the resulting dispute. This choice should be made early. It must ensure that the client chooses an appropriate arbitration-friendly seat and governing law to govern the dispute. Some factors to look at include:

- Whether the law of the jurisdiction respects private international arbitration
- Whether local courts have experience in facilitating private arbitration. A review of local case law may be useful in this regard
- Whether qualified arbitrators and counsel are available
- Whether local court judgments enforcing the arbitration decision are, in turn, recognised by courts in other jurisdictions where enforcement is necessary.

Parties should consider, for example, having their commercial disputes "seated" in Alberta, Canada. As a result of its robust energy, technology and natural resources sectors, Alberta law (with its roots in the English common law system) is well-advanced in terms of the governance of arbitration proceedings. Alberta also offers other key benefits as a physical location for the arbitration, such as having numerous counsel experienced in commercial arbitrations and a sophisticated judiciary respectful of private arbitrations. To make the arbitration experience just a bit more pleasant, there are also numerous venues in Alberta appropriate to host arbitrations either in person or remotely. Many of these destinations are internationally recognised (such as Banff or Jasper), and travel from any international destination is straightforward.

Alberta is also suitable for the economically-minded client: prices for experienced counsel and arbitrators based in Alberta are highly competitive compared to European or US-based counterparts, and many lawyers in Alberta are internationally qualified in major jurisdictions such as the United Kingdom or the United States.

Conclusion
While there are different theories surrounding the importance of the seat, the practical reality is that the law of the seat may dictate the lex arbitri. The arbitrator will use it to determine procedural issues in the arbitration. For this reason, counsel should consider the issue early. Wise counsel should consider an arbitration-friendly jurisdiction such as Alberta as the "seat" of the arbitration.

[1] Blackaby Nigel, Constatntien Partasides, et al., Redfern and Hunger on International Arbitration (6th ed.) Oxford University Press, 2015 at 3.05 (Redfern & Hunter).
[2] Redfern & Hunter, at 3.53 to 3.57.
[3] Redfern & Hunter, supra note 1, at 3.46.
[4] Kanaga Dharmananda, 'The Unconscious Choice - Reflections on Determining the Lex Arbitri', Journal of International Arbitration, Volume 19 Issue 2 pp. 151 – 162 at 151.
[5] See, for example, the International Commercial Arbitration Act, RSA 2000 c. I-5 at s. 3 with respect to the recognition of arbitral awards in the jurisdiction.
[6] International Arbitration Practice Guideline, Managing Arbitrations and Procedural Orders, Chartered Institute of Arbitrators, https://www.ciarb.org/media/4198/guideline-6-managing-arbitrations-and-procedural-orders-2015.pdf at pages 1 - 2.

Curtis Marble is a partner at Carbert Waite LLP, Fellow of the Chartered Institute of Arbitrators, and Co-Chair of the firm's Commercial Litigation Practice. Mr Marble has extensive experience in various domestic and international arbitration and commercial litigation matters. His clients include multinational corporations, energy companies, construction companies, family-run businesses, and individuals. He also acts for US and foreign law firms as local counsel.

Mr Marble acted in a complex multi-party international arbitration involving commodity prices. He represented a construction client in a domestic arbitration concerning construction deficiencies. Recently, Mr Marble acted in a notable high-value mediation related to corporate assets and privately held Alberta ranch lands.

In his commercial litigation practice, Mr Marble acts for international and domestic companies and for individuals in a wide variety of disputes, including contracts, construction projects, and environmental remediation.

Mr Marble recently enjoyed acting as a volunteer arbitrator in the Vienna-based Vis Moot competition and loves outdoor adventures in Alberta's many spectacular wilderness parks.

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Barbara R.C. Doherty
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Transparency: an introduction to businesses' obligations under the Canada Business Corporations Act.

What is Transparency?
The Canadian and provincial governments have taken steps to ensure that Canada is an attractive place to do business while protecting the safety and economic interests of Canadians through measures against illicit activities such as money laundering, terrorist financing, tax evasion and tax avoidance. One of the main tools in the government's arsenal is to enact amendments to corporate statutes to enhance transparency around the ultimate ownership and control of corporations. These amendments to the CBCA are part of the federal government's long-term objective to create a national, public and searchable beneficial ownership registry.

The Current Federal Requirement
The Canada Business Corporations Act ("CBCA") requires federally incorporated, privately held corporations to prepare and maintain a register disclosing individuals with significant control over the Corporation ("ISC Register"). The ISC Register is required to be updated regularly, and maintained at the registered office or other location in Canada.

Who is an "Individual with significant control"?
An individual with significant control is someone who: owns a "significant number" of shares of the corporation (number of shares that represents at least 25% of the voting rights attached to the corporation's shares, or 25% of the fair market value of the corporation's shares; controls or directs a significant number of shares; has "significant influence" over the corporation, without necessarily owning a significant number of shares; or has a combination of any of these factors.

Considerations
Creating and maintaining the ISC Register requires corporations to consider not only whether the threshold of share ownership is met, but whether there are individuals who, despite not holding a significant number of shares, are in a position to exercise "significant influence" over the corporation, a term which is not defined.

Information included in the ISC Register
The information required to be recorded in the ISC Register includes: name, date of birth, and latest known address; the jurisdiction of residence for tax purposes; the date the individual acquired significant control; the date the individual ceased to have significant control; a description of how each individual has significant control; and a description of the steps taken by the corporation to identify individuals with significant control and to update that information.

Who has access to the ISC Register?
The ISC Register is not required to be provided to Corporations Canada, and it is not generally available to the public. It does however have to be made available on request to Corporations Canada, to police, tax and other regulatory authorities and to shareholders and creditors if they provide an affidavit stating that the information is required for the "affairs of the corporation" (such as efforts to influence a vote or to acquire shares).

Requirement to update the ISC Register
A corporation is required, at least annually, to take reasonable steps to

"A corporation is required, at least annually, to take reasonable steps to ensure that it has identified all individuals with significant control."

ensure that it has identified all individuals with significant control over the corporation and that the information in the register is accurate, complete and up to date. Corporations are also required to update their ISC Register within 15 days of becoming aware of any information that must be declared in the register.

Penalties for Non-Compliance
The offences for non-compliance carry serious penalties – a fine of up to $200,000 and/or six months' imprisonment – and corporations and their directors, officers or shareholders can be charged if they knowingly contravene the requirements.

Where do the Provinces Stand?
Transparency rules similar to those found in the CBCA exist or are expected to come into force in various provinces. In Ontario, for example, amendments to the Business Corporations Act adopting similar transparency rules will come into force on January 1, 2023.

Mandatory Reporting Requirements on Corporate Beneficial Ownership
Amendments to the CBCA received Royal Assent on June 23, 2022 which, when enacted, will require private federal business corporations to submit beneficial ownership information directly to the federal government. They will be required to report the information in their ISC Register to Corporations Canada on an annual basis and within 15 days of any change to the information contained in their ISC Register. Corporations Canada will also have the authority to provide all or part of this information to investigative bodies and other entities.

The Future
It is intended that these reports will form the foundation of the national, public and searchable beneficial ownership registry planned by the federal government. The full implementation of such a searchable registry will require significant advancement by and cooperation of the provinces.

Barbara has a broad corporate/commercial practice with specialities in securities, capital markets, corporate finance, and mergers and acquisitions. She is actively involved in dispute resolution, settling, and providing support in prosecuting litigious matters. She works with both Canadian and international clients.

Barbara has acted for issuers, controlling shareholders, independent committees, and registrants. She has experience with transactions relating to corporate acquisitions, divestitures, and reorganisations with securities, regulatory, competition, and Investment Canada implications.

Barbara has a wealth of experience in mergers and acquisitions. Barb's strength is her ability to help clients plan, orchestrate, and successfully implement complex transactions within time-sensitive, regulated environments.

Barbara has acted on private placements and prospectus offerings for both foreign and domestic registrants and issuers including investment funds and government agencies. These offerings consist of various equity and debt instruments. She has also acted on exempt and non-exempt takeover bids for offerors, targets, controlling shareholders, and dealers.

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Providing Canadians with over 90 years of legal expertise, Gardiner Roberts knows what works best. It's why we prefer to remain a mid-sized, fiercely independent powerhouse, enabling us to provide you with timely, custom-tailored solutions to address your legal needs while propelling your business forward.

Mexico: a sound legislation for business.

Mexico has acquired a significant place among the most powerful economies as a Foreign Direct Investment recipient, ranking within the top 10 countries who received the most investment in 2020. Thus, despite the pandemic crisis around the world, the Mexican economy has stayed strong by providing an extremely attractive climate for investors derived from factors such as its participation in the USMCA, important tax incentives, modern infrastructure, sophisticated manufacturing industry, qualified labour force, competitive wages, and many others, all backed up by a harmonised set of commercial rules that allow foreigners to enter the market as a final destination or to produce and export good to the neighbours up north.

The USMCA effect

Besides its solid domestic market, Mexico holds a broad network of International Trade Agreements with over 50 different countries, but its major step towards globalisation in history has been indisputably the signing of the NAFTA (North American Free Trade Agreement) in the early 90s with our neighbours USA and Canada, which turned the country into an open economy by reducing tariffs, eliminating several restrictions for foreign companies to set-up in the country and facilitating exports, providing outstanding effects towards the development of such economy. But in order to comply with modern economic trends, policies and regulations, United States, Canada and Mexico decided to renegotiate its terms and a new version of the NAFTA was issued two years ago under the name of USMCA, which has resulted in a total success. Just in these couple of years, the North American region trade exchange went from $166 billion in 2019, to $267 billion within the first quarter of 2022.

> "The Mexican economy has stayed strong by providing an extremely attractive climate for investors ."

The implementation of the USMCA has also served as a great aid for Mexico during the pandemic. As the global supply chain got disrupted due to the shift in demand of many goods and services, international trade severely plunged, prioritising the need for shorter and more reliable shipping routes. Hence, nearshoring became one of the primary solutions, and Mexico's proximity with the USA and Canada fitted in just great.

We cannot continue to emphasise enough the beneficial effects the USMCA has brought to the Mexican economy, and even though this treaty is occasionally subject of political debate, it's true that these three economies are enthusiastic to continue trading under its rules as long as it keeps being profitable and beneficial to the North American population as a whole.

Entering the Mexican market

In order to comply and execute the terms established in the USMCA and other International Treaties, Mexican legislators have been given the task of amending domestic law to comply with them. Therefore, a several update in the federal commerce-related normativity has been done to relax the restrictive measures imposed to foreigners to participate in the Mexican market in several industries that where reserved to nationals or the government. Nowadays, foreigners who seek to invest this territory are able to possess the 100% of the capital of a Mexican corporation in most of the industries except some like local transportation, development banks, professional services and the ones reserved to the government such as oil and gas and some others. Moreover, additional incentives have been made available to attract investment, being the IMMEX program perhaps the most demanded one, allowing manufacturing companies to temporary import certain goods and export them without having to pay for the VAT.

> "Personal interaction and close relationship to interested parties is encouraged while doing business in Mexico."

And even though the foreigner can set up and operate a Mexican company or subsidiary from abroad by merely appointing one or more legal representatives, one must be aware that its legal incorporation can take several months due to the bureaucratic process involved and authorities' deep scrutiny in the incorporation documents, shareholders' information and other information. In that sense, good legal advice is fundamental to increase the chances of a quick start in company operations, as any minor mistake could lead to a serious delay.

There are some routes to take in order to start doing business. The investor will have to decide between setting up a new company or acquiring an existing one to function as a subsidiary, by registering a foreign branch before the Ministry of Commerce, or by simply distributing their product by celebrating contracts with local companies solely with a registered trademark; hence, a legal counselor must be able to assess the investor according to their specific needs to determine the most favourable approach. Personal interaction and close relationship to interested parties is encouraged while doing business in Mexico.

Other aspects to consider

In addition to the foregoing, there are certain other key elements to consider before the set-up of the company, not only to maximise the advantages of investing in Mexico, but also to avoid risk and unnecessary liabilities. Examples of this can be choosing the right location for the company according to their industry, an adequate application of the labour laws when hiring your employees, intellectual property matters, a simple but challenging tax system and many others.

At Colter Carswell & Associates, we are able to share our expertise with each of our clients and serve as a trusted partner in a foreign territory. Our range of services cover and advise on most of the legal scenarios a company could face during their commercial ventures in Mexico. Feel free to contact us anytime.

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Colter Carswell & Associates is a full-service Monterrey, Mexico-based law firm specialising in Corporate and Commercial Law. With several years providing high-quality legal advice to the most demanding national and foreign clients, the firm has accomplished an outstanding reputation among its competitors by following the principles of ethics and quality.

With offices in Monterrey and Guanajuato, the firm is able to cover the most important industrial regions in the country through our attorneys who are vastly prepared to advise on innovative and complex legal matters, always following the most responsible and accurate course of action.

The sophistication of our practice and the expertise of our lawyers are the equal of any other firm, because our international support strategy allows us to provide immediate and greater personal attention, staffing continuity and cost efficiency that are often encountered by clients dealing with larger legal organisations. We work closely with our clients to eliminate inefficiencies and use legal assistants to perform specific functions.

Our law firm acts as global general counsel to certain national and multinational clients for all aspects of their business, including assistance in their operational matters, but also offering a variety of non-legal services intended to provide client support in the establishment or expansion of their endeavours by doing business in Mexico.

Bad energy: electricity arbitration in Mexico.

In the past four years and due to drastic changes in the regulatory environment governing the manner in which the private companies provide electricity into the public grid, there has been an important increase in the number, amount and complexity of disputes in Mexico.

The main cause of the regulatory changes could be found in the attempt of the Mexican government to reconfigure the electricity market and strengthen the state-run public utility (CFE). Basically, the government has tried to reverse the constitutional reform of the prior administration which opened the participation of national and foreign private investment in the sector, eliminated the monopoly of the CFE in the production of electricity and set the rules for the development of a market in which the CFE and the private companies would concur. The new bill of the Mexican government: (1) limits private participation in the power generation market to a 46 percent threshold; (2) eliminates power purchase agreements (PPAs); (3) abolishes independent energy sector regulators; and (4) merges the independent system operator CENACE into the structure of the state-run public utility (CFE).

Putting aside the debate about the manner in which the Mexican government has implemented this counter-reform in the electricity market, the reality is that the legal amendments implemented, as well as the de facto reluctance to issue new authorisations or renew the existing permits, has caused a lot of stress and uncertainty in the sector. The reaction of many companies against these modifications has manifested in filing of constitutional lawsuits (amparos) aimed to obtain from Mexican Courts provisional injunctions against them and ultimately a potential declaration about their unconstitutionality.

Another strategy, mainly of US and Canadian companies, has been to seek the support of their governments triggering a consultation proceeding between the US and Mexican government under the USMCA. Regardless, and in addition to this consultation proceeding, the US and Canadian companies may also have the opportunity to directly file investment-treaty arbitrations against Mexico. A similar opportunity is available for many European and even Asian companies whose countries have entered into Investment Treaties with Mexico. Of course, the complexity and length of this type of arbitration does not necessarily imply that the private investors would obtain favourable rulings or that the large indemnifications they would be seeking could be easily obtained.

Notwithstanding, the legal amendments of the electricity regime in Mexico are not limited to potential disputes with the Mexican government or authorities. The disruption have led to other practical and business consequences. Particularly, some projects which were in the middle of their construction or about to end are facing the real possibility of never starting their operation. Other projects are not quite optimistic about the return of their investment within the expected time and/or afraid of future control fixing by the government of the price of the electricity.

To further complicate the above-described scenario, energy projects are usually designed in the industry following a multilayered structure. They usually involve construction contracts, administration contracts, maintenance contracts, development contracts and even purchase and sale or share participation agreements involving the companies owning the projects, between several investors. All these components may work well in a friendly environment, however, once the economic and profit premises change, the companies involved are turning against each other causing a perfect storm.

“There are cases in which one or several contracts have jurisdictional clauses, and the others have arbitration clauses.”

“The legal amendments of the electricity regime in Mexico are not limited to potential disputes with the Mexican government or authorities.”

The multi-contract and multi-party structure of the energy projects, paired with the financial and expectation stress, has provoked in several cases the clash of economic interests between the private companies involved, leading to disputes whose resolution has become very difficult. In this regard, many different scenarios have been on display in the disputes arising during the past years. The complexities faced by the companies in dispute refer to several factors going from the forum, language, interdependence of the contracts, etc. For instance, in some cases, and although the contracts could be deemed as part of one single project, the dispute resolution clauses contained in them are not identical. There are cases in which one or several contracts have jurisdictional clauses, and the others have arbitration clauses. Other scenarios include incompatible arbitration clauses, with different arbitration institutions, number of arbitrators, languages or even applicable laws. These differences have caused the undesired effect of having parallel litigations and arbitrations or arbitrations with different arbitral tribunal hearing disputes with the same or similar factual background.

Whatever the challenges produced by this new landscape of disputes in the energy sector in Mexico are, it has become clear that many companies are not necessarily ready to safely navigate through it. Indeed, unfortunately, we have seen many companies with deficient legal counsels which are lacking a strategic approach increasing the risks and entangling the disputes with no visible end in sight. For this reason, the need of having an experienced team of in-house counsels, a government relations department, as well as specialised attorneys not only in arbitration, but also in complex contractual and regulatory topics, has become imperative to assess the legal and financial risks of a dispute, design a comprehensive strategy and take the best decision for the business.

Marco Tulio Venegas is Founding Partner of LITREDI, S.C. with 25 years of international experience. He is one of the most recognised attorneys in Mexico in the field of international commercial arbitration. He pairs his expertise in arbitration with a wide range of experience in administrative, commercial litigation and constitutional (amparo) litigation.

He has saved his clients billions of dollars and has acted as counsel in several of the most complex litigation and arbitration matters, for both multinational clients and governments around the world. His experience includes the successful participation as counsel in two of the largest commercial arbitrations in Mexican history, worth more than US$1.7 billion, as well as the most important infrastructure disputes ever with governmental entities.

He has international experience in the United States and France and has worked at law firms abroad as well as with the ICC Court in Paris. Mr Venegas is the chair of the ICC National Committee on infrastructure disputes.

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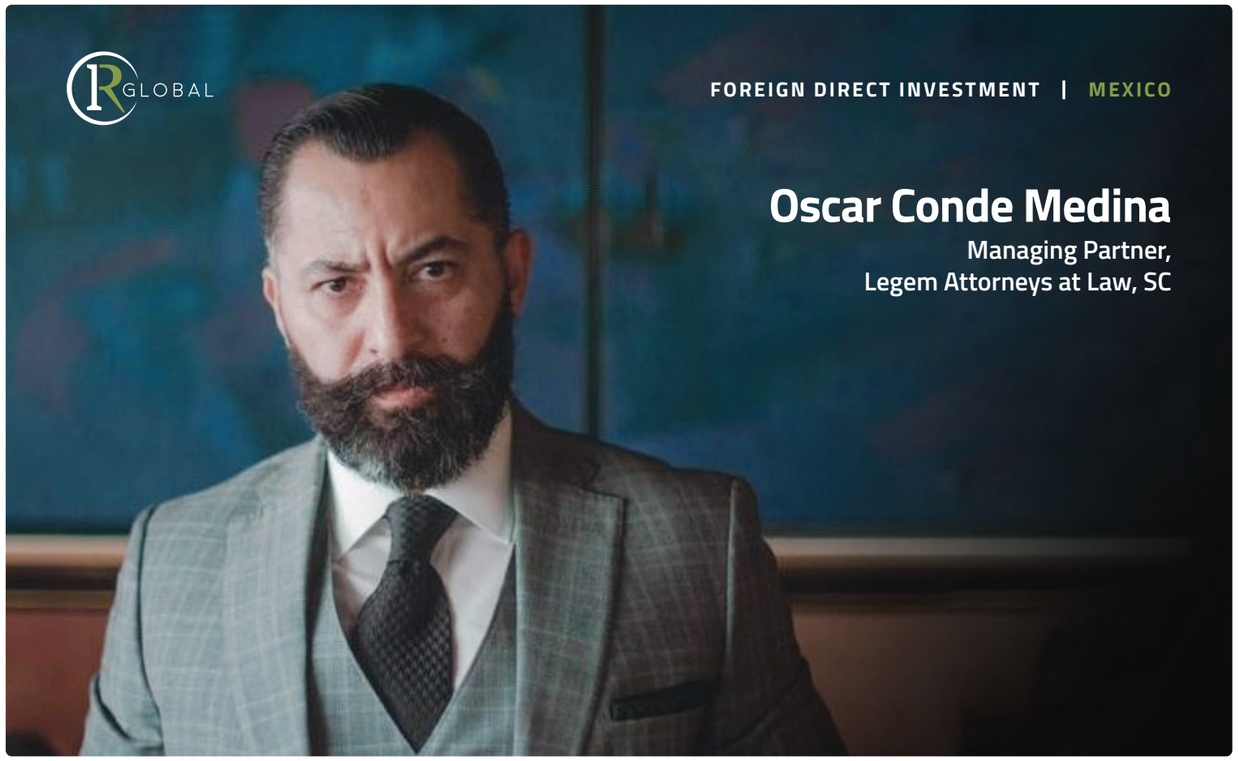
LITREDI

LITREDI is a boutique law firm formed by three partners, specialising in arbitration, litigation, and dispute resolution in general. It provides legal services, in all stages of a controversy, including, of course, any potential settlement, to national and international clients including corporations, governments, state-owned entities, private individuals, organisations and vulnerable groups.

LITREDI members together have more than 58 years of experience and throughout their professional careers have been successful in 91% of their cases. Our team has represented and advised in arbitration, administrative, and commercial litigation proceedings related to disputes in matters such as conflicts between shareholders, joint ventures, distribution and supply agreements, franchises, energy, construction and infrastructure, and financial services, among other topics.

The firm seeks to make a positive difference and provides clients with the highest level of support and personal involvement at every stage, invariably, under elevated ethical and trustworthiness guidelines that are intended to reinforce the honour and integrity of the legal profession.



Trading in Mexico: the reforms you need to know.

For the last decade the United Mexican States (Mexico) has been seen as a country to invest par excellence, due to foreign trade programs and tax incentives, which jointly allow for businesses to lower the costs of their supply chain and operation of subsidiaries in Mexico. From 2016 to 2021, Mexican legislation has been subject to various enactments and reforms that directly impact companies established in Mexico.

The following is an executive summary of the content of such enactments and reforms.

Anti-corruption reform

In 2016, the most important public policy in the fight against corruption in Mexico was undertaken: the National Anticorruption System (SNA, from its Spanish acronym). As part of the SNA, the General Law of Administrative Liabilities was enacted, which makes reference to the obligations imposed on companies established in Mexico in anti-corruption matters.

The SNA included constitutional reforms, created new laws, amended existing laws, and created specialised prosecutors and judges to address the matter.

The SNA caused high impact in the private sector, due to the obligations it imposes regarding: (1) Compliance & Anti-bribery; (2) Anti-Corruption; and (3) establishment of new behaviours that can be administratively and criminally sanctioned.

The applicable sanctions include fines of up to 35 million pesos; payment of indemnifications to the government; disqualification to conduct business with the government at its three levels; suspension to carry out the economic activity of the company for up to three years; legal dissolution of the company; and detention for up to 14 years for public officers, businessmen, employees, managers, and individuals who provide services to all types of persons.

Legitimisation of colletive bargaining agreements

As consequence of NAFTA, on November 23, 2018, the Government of Mexico approved and ratified the right to unionise and collective bargaining Convention of 1949, better known as “Convention No. 98”. As consequence, in 2019, several provisions of the Federal Labor Law were amended regarding labour justice, freedom of association, and collective bargaining.

Such amendments included the obligation to legitimise collective bargaining agreements in accordance with the applicable regulations before May 2, 2022 to ensure that employees are aware of their collective bargaining agreement and are represented by their union(s).

The legitimisation process consists of 4 steps: (1) filing of a consultation notice; (2) election day, where certain formalities are required; (3) filing of notice of results; and (4) obtainment of legitimacy certificate issued by labour authorities.

In the event of non-compliance with the obligation to legitimise the collective bargaining agreement within the established term, the collective bargaining agreement will cease to have legal effect and the union or unions that obtain the minimum required representation of the company’s employees may claim title of such collective bargaining agreement.

Telework reform

On January 11, 2021, a Decree was published in the Federal Official Gazette, amending and adding several provisions to the Federal Labor Law to regulate labour relations under the telework modality, some which became effective as of January 12, 2021.

Telework is a type of employment relationship consisting of the personal performance of paid activities in places other than the employer’s establishments primarily using information and communication technologies.

In case of opting for this modality, the change from in-office work to teleworking must be voluntary and agreed in writing, except in cases of force majeure. It is possible to agree to return to the in-office modality.

In addition to what was already established by law, the corresponding contracts for this modality must indicate the conditions agreed by the parties, including, among others, the indication of the materials delivered by the employer to the employee and the contact and supervision mechanisms.

Special obligations for the employer are established, which may be supervised by Labor Inspectors and include to provide, install, maintain, and keep a record of the materials delivered for teleworking.

Subcontracting prohibition

In 2021 the Federal Government issued a Decree by which the Federal Labor Law was amended, prohibiting subcontracting of personnel.

The reform prohibits personnel subcontracting, which is understood as providing or making one’s employees available for the benefit of a third party.

> “The Government of Mexico approved and ratified the right to unionise and collective bargaining Convention of 1949.”

> “The change from in-office work to teleworking must be voluntary and agreed in writing.”

The reform allows: 1) subcontracting of specialised services or execution of specialised works that are not part of the corporate purpose or the main economic activity of the beneficiary of such services; and 2) subcontracting of specialised services between companies of the same corporate group, provided that such services or works are complementary or shared between such companies and that they are not part of the corporate purpose or the main economic activity of the beneficiary.

It also imposes several obligations regarding subcontracting of specialised services or execution of specialised works, including the registration of contractors before the Ministry of Labor and Social Welfare and the formalisation of the services provision through a written contract, indicating, among others, the approximate number of employees that will participate in the performance of such contract.

The consequences for non-compliance include joint and several liability with respect to the employees used and fines applicable to both parties.

This prohibition does not eliminate the legal figure of provision of independent services, so the obligations imposed by the reform are only applicable in those cases in which, for the purpose of providing a service, the company’s employees are under the instructions of a third party for the performance of the latter’s own activities.

Oscar Conde Medina was born in Mexico City in 1973. He has a Law Degree (1994). He is bilingual (Spanish and English). In 2009 he participated in the special program (ACE) at Georgetown University in Washington, DC.

Oscar Conde Medina has more than 20 years of experience dedicated to attracting, consulting and assisting the direct foreign investment in Mexico with the highest ethical, professional and commercial standards. From 1998 to 2005 he was part of the experts that supported and participated in the acquisitions of financial institutions in Mexico, as well as participated in the most relevant credit restructuring operations in the north of Mexico, including the merger and the public stock sale of the Coca-Cola bottling company (Arca). From 2005 as of today, Oscar Conde Medina has been implementing strategies of business expansion in Mexico, helping the clients grow by providing them with opportune legal services oriented towards protecting the clients’ personal, economic and commercial interests.

He is the founder and Managing Director of Legem Attorneys at Law, SC, a law firm that assists clients from all over the globe.

In 2019 Oscar Conde Medina was awarded as the Foreign Direct Investment Lawyer of the year in Mexico by ACQ5 and recently he has been awarded as the Foreign Direct Investment Expert of the year in Mexico (2020 Global Award) by Leaders in Law.

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Legem Attorneys at Law, SC is a law firm comprised of professionals who specialise in a variety of legal disciplines with offices in the north, Bajío and central Mexico, ensuring the highest ethical, professional and commercial standards are maintained.

Our commitment is to help our clients grow by providing them with opportune legal services oriented towards protecting the clients’ personal, economic and commercial interests.

The firm’s areas of practice include litigation in civil, commercial, criminal, family, administrative, amparo law and tax law; counseling which includes corporate, banking, immigration and real estate law, among others; as well as compliance covering topics such as money laundering prevention, protection of personal data, anticorruption, evaluation and management of legal and regulatory risks programs, among others.

We are a dedicated law firm to support the growth of foreign investment in Mexico. We have years of experience implementing strategies of businesses expansion in Mexico. We have national and international business alliances with legal and accounting firms that allow us to offer an integral service to our clients. Our immediacy and the excellence in our services distinguish us.

Double trouble: permanent establishment and tax in Mexico.

In recent years, the Mexican tax authority has strengthened its tax and collection practices, which in my opinion is very pertinent, provided that such practices are grounded in the legal framework.

However, it has been noted the denaturalisation of some legal concepts, such as permanent establishment (PE), gives cause to re-assess government charges to taxpayers, or to deny them tax refunds to which they are entitled.

According to our professional experience, it has been observed that the federal tax authorities sometimes consider that non-residents have a PE in our country, due to the entering into a commission agency agreement whereby Mexican residents provide services to such non-residents.

For the purposes of having greater legal certainty in the execution of this kind of legal action, it is important to consider the following aspects:

1. Applicable law

The first aspect to analyse in this type of case is that the tax authority deems that a PE of a non-resident company should be analysed under domestic law.

Unfortunately, in these kind of cases, the Federal Supreme Court of Justice[1] principle is no longer taken into consideration, which states that when a non-resident proves to reside for tax purposes in a country that is party to a treaty to avoid double taxation (treaties) in effect, in the first instance, the treaty should be deemed as the applicable law, since treaties are agreements hierarchically above the domestic law.

The above is important, since in Mexican law the concept of PE, particularly an independent agent, is broader compared to the one contained in the treaties.

> "The first requirement for a PE is that a non-resident company has a fixed place of business in the country "

2. Permanent establishment

Under Mexican law and the treaties, the first requirement for a PE is that a non-resident company has a fixed place of business in the country to carry out its business activities, either in whole or in part.

If there is not a fixed place of business, the second point to analyse consists of verifying whether the non-resident company acts in the country, through an independent agent, which means to confirm if such agent depends economically or legally on such non-resident.

2.1 Agent of independent status

Domestic law and treaties regulate in a very similar way the concept of the independent agent.

Thus, it is considered that a non-resident has a permanent establishment in the country, with respect to all the activities that the agent carries out for such non-resident, if the person customarily closes the agreements or continuously plays the main role leading to the closing thereof.

2.2 Independent agent

Domestic law considers that a non-resident has a permanent establishment in the country when doing business in the national territory through an individual or business entity acting as an independent agent, if such individual or entity does not act within the ordinary framework of their activity. For these purposes, it is deemed that an independent agent does not act within the ordinary framework of its activities, among others, when such an agent (1) acts subject to detailed instructions or the general control of a non-resident; or (2) carries out transactions with such non-resident using prices or considerations other than the ones that may have been used in arm's-length transactions.

The treaties state that any non-resident doing business in the national territory through an individual or business entity acting as an independent agent will be considered to have a PE, if such an agent does not act within the ordinary framework of its activity and the consideration is other than the one that should have been used in arm's-length transactions.

In some cases, the tax authorities have confused these concepts, since both state that at the time of being subject to detailed instructions, there is a fixed place of business which, based on their own nature, are mutually exclusive, since one case is the physical presence (fixed place of business) and the other does not require physical presence that necessarily involves the activity of a third party (an independent agent).

Also, the authorities have considered that anyone acting in the name and on behalf of a foreigner, automatically implies that such person is subject to detailed instructions or the general control of the foreigner.

In this regard, it is important to take into account that as in any commission agency agreement, obligations are determined for each of the parties, which, based on their complexity, purpose and uniqueness, may be more or less detailed.

From a legal point of view, the obligations of the parties cannot be confused with detailed instructions, since obligations are the object or framework of an agreement being determined by both parties, whilst the instructions are a set of rules or warnings to satisfy along with the assumed obligations and are unilaterally given by the contracting party to the service provider.

It is important to make the distinction between obligations and instructions, through a clear wording of the agreements, which allows to prove this distinction and thus avoid confusion among the tax authorities.

3. Participation of the non-resident

The tax authorities have stated that non-resident companies may have a PE in Mexico just by having equity interest in a Mexican company.

The fact that a non-resident company has equity interest in a resident of our country does not imply that such a non-resident company has a subordinate relationship with the resident thereby creating a PE.

The commentaries on the Model Tax Convention on Income and On Equity of the Organisation for Economic Cooperation and Development state that the status of shareholder is not relevant to determine the dependence or independence of one company to another.

Therefore, it is neither relevant nor an indication of a PE the fact that a non-resident has equity interest in a Mexican company.

Conclusion

The commercial nature of this type of agreement ensures that both parties maintain their independence and, therefore, contribute their own resources and are responsible for their own obligations, which means that there are no detailed instructions, much less a dependence due to the fact that a non-resident has equity interest in a Mexican resident.

In conclusion, although it is true that in any act or activity to be carried out, legal advice is necessary. Currently, it is essential that any agreement with non-residents be analysed by a lawyer specialising in tax matters, merely to avoid problems and tax contingencies.

[1] For the purpose of this article, the Treaty with the United States of America will be considered.

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Claudio Gonzalez Betancourt's expertise focuses on tax investigations and analysis with respect to mergers, spin-offs, transfers of shares, and in general, any type corporate reorganisations, both national and international, based on domestic tax law and preparation of tax audits, meetings with tax authorities, federal and local, discussions and settlement of potential disputes, and preparation of tax opinions and strategies.

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Origin story: rules of origin under USMCA.

Trade of goods among North American countries must contain a predetermined threshold of North American value for duty-free treatment. The amount of North American value required is contained in the rules of origin of the new treaty (USMCA). Once compliance with the rule of origin is verified, the producer of the product, the exporter or the importer must issue a certification attesting that the origin is North American. This certification can be printed on the invoice, or any other document attached to the entry.

Most rules of origin in the USMCA are the same as NAFTA, however some products do require more North American value. Most rules of origin are easy to understand, but others require complex value calculations to verify they meet the threshold. Verifying compliance with rules of origin is mainly done by trade attorneys, customs brokers, and/or accountants. But defending your compliance before government authorities and courts should be headed by a trade attorney.

International audits to verify compliance with rules of origin are called “Origin Verifications”. This essay will focus on origin verifications done by the Mexican government. In Mexico, the authority in charge of doing these investigations is the Tax Administration Service (SAT for its acronym in Spanish). SAT may physically visit facilities in the U.S. and Canada, while American and Canadian officials may do likewise. An optimal scenario is to have a trade attorney in the United States or Canada working with a trade attorney in Mexico.

How do origin verifications begin?

They may start with a written request or a questionnaire asking the importer, exporter or producer for information, or with a visit to the facilities by government officials. SAT typically begins with a questionnaire sent via courier and in some cases via email. If the producer or exporter do not reply, the investigating authority will continue the process and will make a determination of the origin without the assistance of the American or Canadian company. As a result, it is important to review what is in your mailbox, attend government requests on time and look for professional advice quickly. Although most of the time questionnaires sent by SAT to Canadian and American companies are in English, questionnaires may be in Spanish or French, and not knowing any one of these languages is not a legal defense.

Documents proving origin

An exporter or an importer may have a certification of origin from the producer attesting that the product complies with the rules of origin, but eventually the producer will need to prove this assertion. Origin verifications are commonly started against the three companies, either in the same procedure or against each individually.

To assist in proving this, we recommend the producer keeps records relating to (1) government authorisations and permits to operate the facility, (2) purchase orders to suppliers, (3) material receipts, (4) invoices, (5) proof of payment to suppliers, (6) production records [such as balances, production process including made components or intermediate goods, charges and discharges of inventory], (7) BOMs, (8) tariff classification of raw materials, (9) data sheets of the raw materials, (10) bank records, (11) import and export records, (12) origin analysis from qualified professional, (13) list of suppliers and their contact information, (14) evidence of having an inventory control system license, (15) origin analysis of the finished product, etc. The volume of the documentation will vary mostly depending on how many components the goods being verified have. We also recommend that clauses are drafted in your purchasing contracts obligating assistance from you supplier to prove origin and that they will in turn keep records. Although this information is required by the treaty to be kept for 5 years, we recommend keeping it for longer, and include this obligation in your purchasing contracts.

> “Although most of the time questionnaires are in English, they may be in Spanish or French. Not knowing these languages is not a legal defense.”

Denial of preferential duty treatment

In the event SAT believes the importer, exporter or producer did not provide sufficient evidence to prove the goods complied with the rules of origin, then the government will collect import duties at the normal rate, plus adjustment for inflation and interest, plus fines of 130% to 100% of duties not paid, from the importer, and the importer in turn may try and collect from the exporter and/or producer.

The companies that are subject to the origin verification have the right to an administrative appeal called a motion for reconsideration. It is important to keep in mind that all of the evidence will have to be filed in Spanish at this first tier of litigation and that the time to do so is very short. Also, some pieces of evidence may need to comply with certain formalities (for example, having notarial certification and apostille). If the result of this appeal is not favourable, then the interested party may file a defense before the Federal Tax Court. Finally, if not satisfied with the ruling from the Tax Court the company may file a constitutional challenge before the Federal Judicial Branch.

In the case of Mexico, we strongly recommend getting assistance from a Mexican trade attorney during the investigation phase of an origin verification procedure and not waiting until the matter is litigated. This is because the Mexican Supreme Court decided that new evidence may not be filed during the litigation before the Federal Tax Court and before the Judicial Tribunals. This means that only evidence filed during the investigation phase and during the Motion for Reconsideration may be used in the trial.

Takeaways

- To obtain preferential duty rate, producers must comply with rules of origin under the USMCA.
- After complying with rules of origin, a certification of origin must be issued.
- Rule of origin compliance can be audited via an origin verification.
- Origin verifications may be initiated against the importer, exporter and/or producer.
- Origin verifications may begin with a questionnaire sent via courier or even email.
- Proper paper trail proving origin compliance is critical.
- Keep records for more than five years.
- Hire a trade attorney during the investigation phase.

Luis F. Martinez has over 20 years of experience advising clients on the application of trade and customs laws, application of international trade agreements of the World Trade Organization, NAFTA, USMCA, the European Union, Colombia, Chile, Israel and others. His practice covers trade and customs compliance, IMMEX regulations, import and export controls, compliance with non-tariff restrictions, international commercial transactions and foreign investment.

Luis received his Law Degree from the Faculty of Law at Tec de Monterrey in 1997 and his LL.M. in International Trade Law from the University of Arizona in 1999.

Before going into private practice, Luis worked as a legal researcher on international trade, investment and customs matters at the National Law Center for Inter-American Free Trade in Tucson Arizona and at Centro Jurídico para el Comercio Internacional at the Tec de Monterrey.

Luis has taught at public and private universities in northern Mexico. Courses include regulation of international trade, comparative trade law, NAFTA and customs law at both undergraduate and graduate levels. He has published several papers and articles on international trade, NAFTA, investment and Maquila compliance in various legal and business journals in the U.S., Mexico and Canada and has participated as speaker at national and international conferences on similar topics matters.

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Dynamic: burdens of proof in Mexican civil and commercial law.

Mexico is a country based in civil law institutions: in this sense, when referring to a civil or commercial trial the applicable regulations are consistently rigid, this has been aggravated by the strict application of the procedural institutions by the competent Courts. In addition, when referring to the means to obtain or produce evidence in a civil or commercial lawsuit, Mexico does not regulate discovery as a pretrial proceeding.

For this reason, the plaintiff was constrained to gather (mainly by himself) all the evidence that could be useful to prove its assertions, with no exception rather than some documents that may be held by the counterpart or a third party.

In addition, for so many years, one of the topics considered as an "unquestionable belief" in a trial was the probatory principle set forth in any civil or commercial procedural regulation about the fact that "the one who affirms has the burden to prove its assertion" (Section 1194 of the Commercial Code & Section 81 of the Federal Code of Civil Procedures).

Even though such principle is still valid and enforceable, nowadays its understanding is more flexible since through diverse binding precedents (jurisprudence) delivered by Constitutional Courts, the burden of proof has been modified, and for this reason, not in every case the claimant will be fully constrained to demonstrate or deliver by itself the evidence about the facts that support its petitions.

For that purpose, the Constitutional Courts introduced the theory of the "dynamic burden of proof" which in general terms implies that in some situations, the burden of proof will be reverted when, in accordance with the particular circumstances of the case, the following occurs:

- The plaintiff is impeded or has difficult access to the probatory means requested to demonstrate the facts or assertions in which the case is supported; and
- The defendant has more availability to the evidence or can easily provide evidence into the trial.[1]

This theory was constructed among two main ideas (1) availability of the evidence (for which of the parties in a trial the evidence needed is easily reachable), and (2) procedural solidarity (meaning that claimant and defendant should guide its participation in the trial under the principle of good faith).

As a consequence of the "dynamic burden of proof" the Courts started to accept, as a general rule, that given the particularities of the case, the burden of proof may be modified or even reverted to the person that has the knowledge or the necessary means to produce the evidence needed to demonstrate a fact.

Under this new scenario, the defendant will be forced to deliver the evidence that, in the previous understanding of civil and commercial trials, the plaintiff was constrained to obtain or produce by itself (even though the petitioner has limited or no access to the evidence).

As result of this new notion, Courts developed a diverse approximation to cases were the damages and loss profits are claimed as consequence of unlawful acts (precisely in these cases we can find most of the situations where the "dynamic burden of proof" is applied). Among the cases where we can verify the use of this theory are:

- Medical malpractice.
- Product liability.
- Torts.
- Consumer protection (regulated under the Federal Consumer Protection Law).
- Banking transactions made through debit or credit cards.
- Banking transactions made via internet.
- Patents.

In these cases, in order to comply with the "dynamic burden of proof" the Courts must require the defendant to deliver the evidence needed to verify the authenticity of the facts that supports the reliefs sought by the petitioner. This will occur if the defendant is considered as the "strong part" in the original relation, or if it is easier for that part to provide the proof requested (i.e. a bank may be considered as the strong part of the relation with its clients – also in a case where some internet transactions are disputed, the Bank will be constrained to demonstrate that its computer systems were not vulnerable at the time of the transaction).

Regarding how this idea will affect commercial entities within a trial, entities dealing with a claim of such nature will have to foresee the evidence that may be requested by a Court in trial (i.e. to preserve video or digital recordings, to maintain access to computer systems to be analysed by experts, among others). The failure to provide information or to assist the Court with materials requested may result in the presumption of existence and certainty of the facts argued by the counterpart.

Because of the above, a defendant in a civil or commercial claim cannot limit itself to deny the facts referred to in the claim to impose on the petitioner an inflexible burden of proof (as it was previously considered). The Court is now entitled to require, or even to compel the defendant, to provide the evidence needed to verify the facts that constitute the base of the claim. For this reason, defendants should adopt active behaviors in case of a lawsuit, guiding its actions on the principle of good faith.

In addition, entities should adopt a policy to prevent and mitigate any damage arising from their acts, since that policies will help the defendant to reduce exposure and contingencies. Failure to adopt some of these measures – in addition to increasing the exposure of the defendant – will make it difficult to establish a strong defense strategy in the trial.

> "The Court is now entitled to require, or even to compel the defendant, to provide the evidence needed to verify the facts that constitute the base of the claim. For this reason, defendants should adopt active behaviors in case of a lawsuit, guiding its actions on the principle of good faith"

[1] These elements were recognised by the First Chamber of the Mexican Supreme Court of Justice in the Constitutional Claim 5505/2017, under the precedent "DYNAMIC BURDEN OF PROOF. ITS CONCEPT AND JUSTIFICATION." which can be verified in the following link: https://sjf2.scjn.gob.mx/detalle/tesis/2019351

Leon Felipe Aguilar Jiménez's professional practice has focused for over 20 years on the areas of civil, commercial, administrative, agrarian and amparo litigation. He has participated in matters related to conflicts between shareholders, nullity of shareholders and board resolutions, compliance, and enforcement of civil and commercial contracts, as well as several commercial insolvency proceedings.

Some of the matters in which he develops his professional activity are special commercial trials (bonds, execution of guarantees, commercial bankruptcy, among others), as well as controversies related to civil liability derived from the performance of commercial activities. Likewise, he has participated in litigation related to the ownership and possession of land subject to the agrarian property regime, as well as in matters related to land limits.

Mr. Aguilar began his professional practice at the Pro Bono Clinic of the Universidad Panamericana, where he participated for five years in the attention and follow-up of several civil and commercial lawsuits. From August 2008 to July 2014, he worked as an associate at Barrera, Siqueiros y Torres Landa, S.C. (currently Hogan Lovells), in civil and commercial litigation, where he represented several national and international companies in strategic litigation. In July 2014, he founded CAMYA Abogados.

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CAMYA is committed to thoroughly understand its clients' industries and lines of business to offer them personalised legal services, with due and timely attention to their needs, and with a clear business vision that adds value to their activities.

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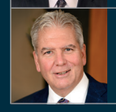

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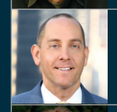

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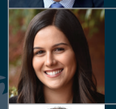

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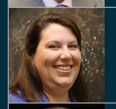

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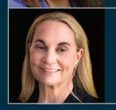

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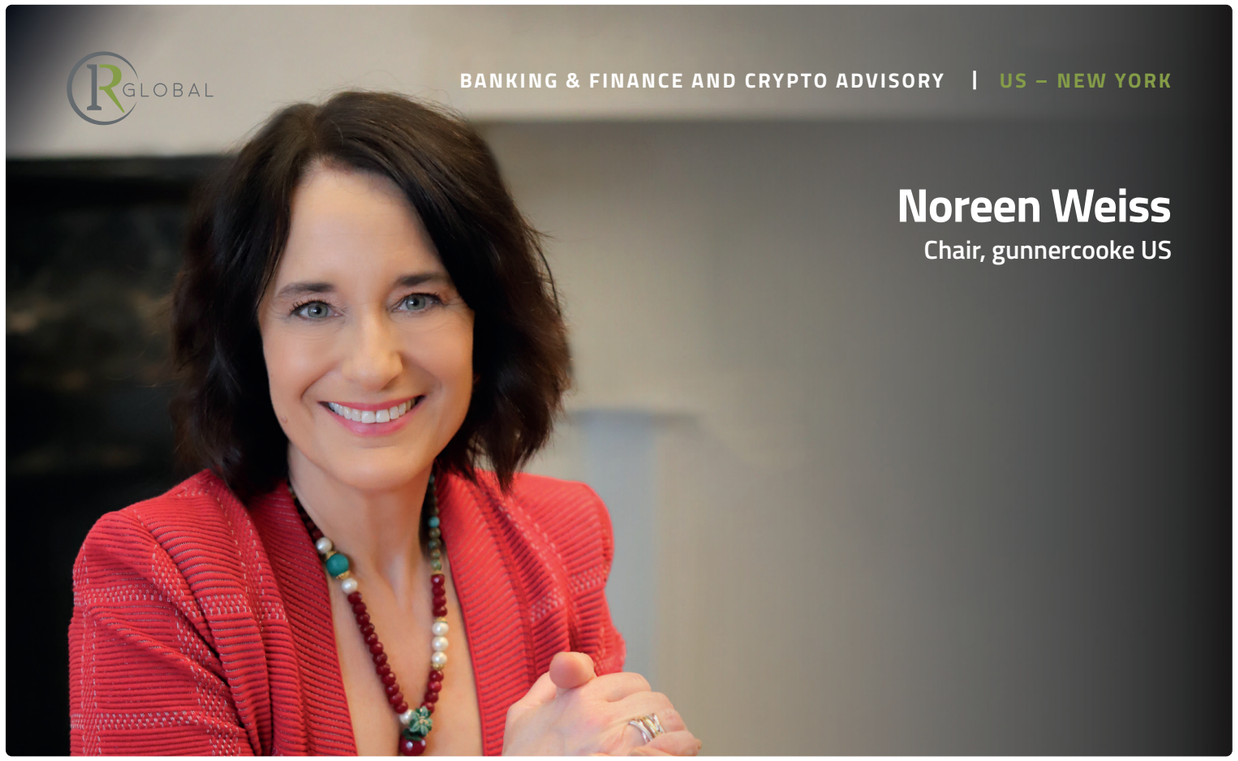

Intersections: banking, fintech, and crypto.

Crypto Making Inroads - Technology development in the fintech and crypto space, which has been accelerating since the start of the COVID pandemic, pushes the limits of banking and securities regulations. Currently, non-state issued digital assets exceed $3 trillion. Eleven nations have already launched central bank digital currencies (CBDCs), with another 14 considering pilot programs, 26 in development phase, and 47 (including the US) in the research phase. Governments and regulators have scrambled to keep up with the changes, but have gained their footing in the last year as more policy directives and regulations have been forthcoming globally.

Biden's Executive Order

In March 2022, President Biden issued an Executive Order that acknowledged that advances in digital and distributed ledger technology for financial services have led to dramatic growth in markets for digital assets, with profound implications for the protection of consumers, investors, and businesses, including in the areas of data privacy and security; financial stability and systemic risk; crime; national security; the ability to exercise human rights; financial inclusion and equity; and energy demand and climate change." The Order outlined the first ever whole-of-government approach to addressing the risks, and harnessing the potential benefits, of digital assets and their underlying technology. The Order lays out a national policy for digital assets across six key priorities: consumer and investor protection; financial stability; illicit finance; U.S. leadership in the global financial system and economic competitiveness; financial inclusion; and responsible innovation. Some of the specific directives include exploring a US CBDC, mitigating the risk of illicit finance and the national security risks posed by illicit use of digital assets, addressing the need for equitable access to financial services as digital asset innovation develops, and supporting technological advances in the responsible development, design, and implementation of digital asset systems while prioritising privacy, security, combating illicit exploitation, and reducing negative climate impacts. Lofty goals, but it falls upon the regulators to address issues on a granular basis.

Recent regulatory action

Recently the FDIC (Federal Deposit Insurance Company), the OCC (Office of the Comptroller of the Currency), and the Federal Reserve Board (FRB) have issued various guidance pertaining to the banking sector.

- **The OCC**

The OCC had been addressing issues related to cryptocurrencies since 2020. Its November 2021 Interpretive Letter #1179 confirmed that it is legally permissible for a bank to provide cryptocurrency custody services, hold dollar deposits serving as reserves-backing stablecoin in certain circumstances, act as nodes on an independent node verification network (i.e., distributed ledger) to verify customer payments, and engage in certain stablecoin activities to facilitate payment transactions on a distributed ledger, provided that the bank can demonstrate, to the satisfaction of its supervisory office, that it has controls in place to conduct the activity in a safe and sound manner. The bank need not obtain a formal supervisory non-objection.

- **The FDIC**

The FDIC, on April 7, 2022, issued a Financial Institution Letter (FIL) related to crypto activities, similar to the OCC's aforementioned interpretive letter, specifying that an FDIC-supervised institution that engages, or intends to engage in, any crypto-related activities should notify the FDIC and provide any information requested by the FDIC that will allow the agency to assess the safety and soundness, consumer protection, and financial stability implications of such activities." The FDIC further defined "crypto asset" to mean "any digital asset implemented using cryptographic techniques." The term "crypto-related activities" for the purposes of this FIL includes acting as crypto-asset custodians; maintaining stablecoin reserves; issuing

"President Biden's Executive Order outlined the first ever whole-of-government approach to addressing the risks and harnessing the potential benefits of digital assets ."

crypto and other digital assets; acting as market makers or exchange or redemption agents; participating in blockchain and distributed ledger-based settlement or payment systems, including performing node functions; as well as related activities such as finder activities and lending." However, the FDIC noted further that the inclusion of an activity within this listing should not be interpreted to mean that the activity is permissible for FDIC-supervised institutions."

- **The FRB**

In August the FRB issued two sets of guidelines regarding the criteria for an institution to access Federal Reserve Board accounts, and addressing crypto-assets.

FRB Account access. On August 15, 2022 the FRB's guidelines on account access acknowledged that the payments landscape is evolving rapidly as technological progress and other factors are leading to both the introduction of new financial products and services and to different ways of providing traditional banking services (i.e., payments, deposit-taking, and lending). In recognition of the uptick in novel charter types being authorised or considered across the country and an increasing number of inquiries and requests for access to accounts and services from novel institutions, the FRB laid out a plan for a more transparent and consistent approach to such requests. It adopted a three-tier framework for the review process for different types of institutions.

- Tier 1 review would generally be less intensive and more streamlined, only available to eligible institutions that are federally insured.
- Tier 2 review would generally be an intermediate level of review. It would apply to eligible institutions that are not federally insured but (i) are subject (by statute) to prudential supervision by a federal banking agency, and (ii) any holding company subject to Federal Reserve oversight (by statute or by commitments).
- Tier 3 review would generally be the strictest level of review. Tier 3 institutions consist of eligible institutions that are not federally insured and not subject to prudential supervision by a federal banking agency at the institution or holding company level.

Crypto assets. On August 16, 2022, the FRB issued a Supervisory Letter providing guidance regarding engagement in crypto-asset-related activities by Federal Reserve-Supervised Banking Organizations. Consistent with the approach taken by the FDIC and the OCC, the FRB will also require FRB-supervised organisations to "notify its lead supervisory point of contact at the Federal Reserve prior to engaging in any crypto-asset-related activity."

In conclusion, we are beginning to see a coalescing and consistency around regulatory action that attempts to put safeguards around banking services in connection with crypto assets without stifling innovation.

Noreen Weiss is an accomplished corporate and transactional lawyer and management advisor, with over 25 years' experience advising the C-Suite, Boards of Directors, and investors on all manner of finance, commercial and transactional matters.

As a practising lawyer in London, Tokyo and New York, Noreen has spent her career focused on international work at the highest level of business and finance, with deep expertise in domestic and cross-border finance and business structuring, corporate finance deals from seed and angel investments through to late-state venture capital investments and Regulation D private offerings and IPOs, capital markets (global debt and equity offerings) and cross-border business development transactions such as M&A and joint ventures. She frequently represents start-ups and emerging companies, on an array of commercial and operational issues including governance, product licensing, product and materials acquisition and distribution, in addition to raising capital from angel investors and venture capital firms.

Noreen's industry expertise includes fintech, crypto and the space where blockchain and tech intersects with banking and securities law.

She also has a particular expertise assisting non-US businesses expand into the United States through subsidiaries, divisions or branch offices, and US businesses expanding abroad, and in representing private and family office, venture capital, and private equity investors.

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The firm has been recognised for 44 industry awards and currently employs over 330 legal professionals and management consultants across offices in London, Manchester, Leeds, Birmingham, Edinburgh, Glasgow, Berlin and New York.

What effect has the #metoo movement had on workplace culture?

I am often asked what lasting impact the #metoo movement has had in California and the United States, where I practise employment law. The global social protest and media flurry that stemmed from disclosures about Harvey Weinstein have receded in light of many other workplace challenges that emerged during the pandemic. These include talent retention and wage inflation, structuring hybrid or work-from-home arrangements, the effect of the gig economy on worker classification, workplace safety and pandemic readiness, as well as renewed efforts to address persistent racism. People wonder whether #metoo was another trend or something more impactful.

When I began practising law, sexual harassment was rampant. My first professional experience, as a summer intern at a large law firm, was an eye-opener that affected my own career choices. While a general awareness of the issues developed over time and the law gradually became more employee protective, not much changed for decades in terms of workplace norms.

With the alarming disclosures and widespread negative publicity of the #metoo movement came a stream of new employment laws and regulations that have had a more significant, recent impact. One early change on a national level, part of the federal income tax overhaul effective December 2017, was the elimination of a federal income tax deduction for settlements or payments made for sexual harassment or assault claims that include a nondisclosure obligation.

California legislators likewise responded by enacting a series of laws over the next several years that have had a significant impact on the handling of workplace harassment incidents nationwide. In 2018, California enacted a law requiring employers with five or more employees to provide biennial harassment prevention training to their full workforce and train new employees within six months of hire. In 2019, the statute of limitation for filing civil court claims of sexual assault was increased to ten years or three years from discovery, whichever is later. Effective 2020, the California legislature also extended the deadline to three years (from one year) to file administrative claims for harassment, discrimination, and retaliation pursuant to the Fair Employment and Housing Act (FEHA), the state analog to the federal anti-discrimination law, Title VII. With the required two step process of filing claims initially with an administration agency before filing court claims, a person who experiences harassment has much longer to decide to speak up, particularly if the claim involves sexual assault.

Effective 2019, the California Legislature enacted a law that prohibits the use of nondisclosure provisions in agreements, including agreements to settle sexual harassment and assault claims, except under limited circumstances and at the discretion of the employee. This was intended to expose serial harassers and limit the ability to cover up harassment scandals with a settlement.

In 2021, California enacted a law requiring employment arbitration agreements to expressly exclude claims for sexual harassment and assault to be enforceable. Congress followed by amending the Federal Arbitration Action in July 2022 to invalidate arbitration agreements altogether as to sexual harassment and assault claims, thereby allowing individuals subject to employment arbitration the choice to decide later whether to arbitrate or litigate their claims. Going forward, these changes in the law allow people who experience harassment to select whether to challenge their employers and alleged harassers confidentially through arbitration or in the public forum of a courthouse.

> "People wonder whether #metoo was another trend or something more impactful."

> "There is a remarkable shift in attitude among corporate leaders concerning workplace harassment."

Have these structural changes in the law and the awareness raising of the #metoo movement made any difference in the workplace? I believe they have, and will continue to have, a positive effect in curtailing workplace harassment. There is a remarkable shift in attitude among corporate leaders concerning workplace harassment. Management teams and boards have become more sensitised to the cultural stigma that accompanies unaddressed sexual misconduct in the workplace. Executives overseeing remedial action following a complaint consider more readily the likelihood that claims will become public one way or another, whether through social media or legal action. As well-known companies over the past several years faced bad press, talent loss and a flurry of copycat litigation due to internal cultures in which harassment allegedly ran rampant, the adverse publicity they suffered was a learning opportunity for other employers. In business acquisitions, risky practices and prior harassment claims uncovered in due diligence have delayed closings, adjusted financial terms and affected investor interest. While people worry that the number of internal complaints may trivialise the issues and overwhelm the system, complaint channels are working better than ever before.

I hear anecdotes that impress me, the kind of disclosures I rarely heard before the #metoo movement. It is now common for executives to share their awareness derived from the harassment experiences of their family members, especially wives and daughters, bringing a recommitment on their part to address the culture of their companies. Young people making choices about their own work conduct understand more instinctively how a career may stall if they don't take care. Perhaps the most significant effect of the #metoo movement has been to encourage a wide variety of people to speak up about their own experiences, sharing what they faced and gleaned through the process. These conscious shifts in human behavior all help shed light on workplace conduct that everyone should aim to avoid.

Rebecca represents companies in litigation in federal and state courts nationwide. She is an across-the-board employment lawyer with significant trial experience representing management in bet-the-company cases involving wage and hour and fair credit class actions, trade secret, wrongful termination, discrimination, and fair pay claims.

Rebecca provides strategic advice to companies aimed towards aligning personnel practices with an employer's culture, values and priorities and minimising legal risk. She is committed to developing a client's understanding of the law to improve human resources practices and guide business forward. A frequent speaker and writer on key developments and cutting-edge legal issues, Rebecca is known for pragmatic, out-of-the-box solutions that support strategic growth.

Rebecca's clients include healthcare companies, professional services firms, entertainment, digital media and technology innovators, manufacturers and recyclers, and tax-exempt organisations, operating both domestically and internationally. She has been ranked by ChambersUSA multiple times, is honoured by her peers as one of the Best Lawyers in America and recognised for her trial successes as a Fellow of the Litigation Counsel in America. Selected by the professional services network IR Global as its exclusive California employment practitioner, Rebecca contributes thought leadership and provides guidance on developing areas of employment law to professionals around the world.

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New York trade secrets.

Recently, the Second Circuit Court of Appeals provided its first detailed treatment of the definition of trade secrets under the Defend Trade Secrets Act of 2016 (DTSA) in Turret Labs USA, Inc. v. CargoSprint, LLC, No. 21-952, 2022 WL 701161 (2d Cir. Mar. 9, 2022).

By way of background, the DTSA is modeled upon the Uniform Trade Secrets Act (UTSA), which has a two-prong test for identifying trade secrets that has been adopted in 49 states. Turret Labs is particularly significant for New York courts because New York is the only state that has not adopted the UTSA trade secret definition. As a result, New York courts have scant precedential authority when called upon to define trade secrets under the DTSA and many resorted to New York common law for guidance. See Zirvi v. Flatley, 433 F. Supp. 3d 448, 464 (S.D.N.Y.), aff'd, 838 F. App'x 582 (2d Cir. 2020), cert. denied, 142 S. Ct. 311, 211 L. Ed. 2d 147 (2021) ("Courts in the Southern District of New York often use New York state law cases when discussing misappropriation claims under the DTSA because the Second Circuit Court of Appeals has not yet addressed the DTSA...").

Turret Labs has two significant takeaways.
The first is its interpretation of "what constitutes 'reasonable measures' to keep information secret" – such "reasonable measures" are required under the second prong of the DTSA's trade secret definition. Turret Labs at *2. On that point, the court held that "what measures are 'reasonable' must depend in significant part on the nature of the trade secret at issue." Id. That holding heralds a new era of scrutiny toward the nature of trade secrets when evaluating the measures taken to protect them. It is also telling that the cases cited by Turret Labs on this issue were all federal cases less than three years old – both emblematic of how rapidly this area of law is evolving and a subtle signal that courts in New York should wean themselves off state common law when addressing the DTSA. The second significant takeaway comes from how the court addressed the alleged trade secret which "consists primarily... of a computer software's functionality... that is made apparent to all users of the program." Id. While the Plaintiff had provided an "extensive list of security measures" which included "servers kept in monitored cages within a data centre with restricted access" and "access to the software [being] limited to those with usernames and passwords," such security measures were held to be irrelevant because end-users of the Plaintiff's software could view and replicate the software's functionality free of any non-disclosure agreement or confidentiality agreement. Id.

The court affirmed the dismissal of the misappropriation of trade secrets claim and drove the lesson home: physical, digital, and legal protection forms the chain that gets you from confidential information to trade secret, and a chain is only as strong as its weakest link.

"The court held that "what measures are 'reasonable' must depend in significant part on the nature of the trade secret at issue."

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He is also a member of the American Bar Association Section of Dispute Resolution, participating in the Arbitration Committee and Ethics Committee.

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Our practice focuses on a range of key areas, including franchise law, commercial litigation, real estate law, business law, fashion law, restaurant law, trusts and estates. This range of highly diverse but interrelated areas of focus represent an array of proficiencies that our firm utilises to conceive unique, interdisciplinary strategies – the likes of which larger firms lack the versatility to employ – which are finely tuned to the individual needs of each client. Our years of experience in the areas in which we practice make us a recognised authority in many areas, such as franchising. Although our attorneys routinely and successfully work with and against the largest law firms, Einbinder & Dunn's size translates into one of its distinguishing hallmarks: unique, consistent access to our partners, who have the flexibility to offer individualised attention to clients at affordable rates.

Family law and relocation in the age of 'CalExodus'.

The practice of family law can be both rewarding and emotionally trying. I often ask my peers what cases and situations are the most difficult and challenging and without a doubt everyone agrees that relocation cases can be the most difficult and stressful of them all. Mediators and attorneys do not like relocation cases because there is no room for negotiation. Judges do not like relocation cases because it is often impossible to choose between two good parents who are both acting in good faith. Whether the Court allows or denies the move, one parent is left emotionally devastated.

This is not to mention the enormous burdens that fall on the children in relocation cases, the largest burden being the burden of travel. The children are often the ones having to travel the distance between one parent and the other. Then there is also the burden associated with having less contact with a parent. Most children find electronic access via Skype, email, and telephone to be less satisfactory than visiting with a parent in person.

California experienced an exodus of its residents beginning in 2020 and lasting throughout 2021. This widely termed "CalExodus" saw more than 20% of the population leaving in one year. One consequence of this was an increase in relocation cases.

Understanding California law on relocation requests

Prior to 1980, when California became the first state to authorise "Joint Custody", move away requests were not complicated at all. At that time custodial parents could move with children, usually without restriction. At most, they might have to give notice of the move, but there were rarely provisions that interfered with this move. This would result in the non-custodial parent having to disengage and become marginally involved in their child's life following the move.

With joint custody and the notion of shared parenting came the influx of relocation cases. California family law pertaining to relocation requests is essentially dependent on the type of custody and visitation the parties share. In an initial custody determination, the Court has the widest discretion to choose the parenting plan that is in the "best interest of the child", and this includes determining whether a move away would be in the child's best interests. However, this standard changes if the move away contest comes after a final (permanent) custody order is already in place, i.e. in a custody modification proceeding. In that case, the standard shifts to the "changed circumstances" rule: the noncustodial (nonmoving) parent has the "substantial burden" of demonstrating a material change of circumstances of a kind that renders it "essential or expedient" for the welfare of the children that custody be modified.

California Family Code § 7501 has always stated, in essence, that the custodial parent has a presumptive right to move the child, absent a showing of harm to the child. This means that by statute, the parent with sole physical custody of the children has the presumptive right to change the children's residence. Courts will not interfere with this move unless the move is detrimental to the child. However, to have this "presumptive right" to move, the parent must have been awarded custody by way of a final judicial custody determination.

"California Family Code § 7501 has always stated, in essence, that the custodial parent has a presumptive right to move the child, absent a showing of harm to the child."

In 1996, the California Supreme Court held in the In re Marriage of Burgess case that "a parent seeking to relocate after dissolution of marriage is not required to establish that the move is "necessary" in order to be awarded physical custody of a minor child." Similarly, a parent who has been awarded physical custody of a child under an existing custody order also is not required to show that a proposed move is "necessary" and instead "has the right to change the residence of the child, subject to the power of the court to restrain a removal that would prejudice the rights or welfare of the child."

In 2001 in California's landmark relocation case, In re Marriage of LaMusga, the Supreme Court stated that the "noncustodial parent has the burden of showing that the planned move will cause detriment to the child in order for the court to reevaluate an existing custody order." The Supreme Court reaffirmed that, according to California law, the noncustodial parent has the initial burden of showing that there is detriment in the proposed move. This substantial change in California case law created a two- part test: the noncustodial parent must first show detriment associated with the move of the child. Then, if that showing is accomplished, the court needs to determine whether a change of custody is in the best interests of the child. This two-part test has been key in court decisions after LaMusga.

LaMusga also included a variety of factors that Courts must consider before deciding whether to modify a custody order in light of the custodial parent's proposal to change the residence of the child. These factors include:

- the children's interest in stability and continuity in the custodial arrangement;
- the distance of the move and the age of the children;
- the children's relationship with both parents;
- the relationship between the parents including, but not limited to, their ability to communicate and cooperate effectively and their willingness to put the interests of the children above their individual interests;
- the wishes of the children if they are mature enough for such an inquiry to be appropriate and the reasons for the proposed move and
- the extent to which the parents currently share custody.

Addressing international move away requests

International relocation cases bring with them an entirely new host of considerations. A proposed relocation of minors to a foreign country raises special issues. In addition to the factors affecting a domestic move-away, courts must also consider:

- Cultural conditions and practices in the foreign country
- Visitation difficulties
- Jurisdictional issues with enforceability of the California custody/ visitation order

One crucial factor is whether the country to which the moving parent wants to take the child is a partner with the United States on the International Hague Convention on Private International Law. The Convention is designed to help host countries obtain the return of children who have been removed to another Hague Convention country, but non-signing countries will not participate. The thought — and hope — is that if a child is moved legally to a Hague Convention country, the country to which the child has moved will support court orders and enforce access promised in orders from the original country. Furthermore, courts are authorised to impose restrictions associated with international moves including the ordering of bonds to help ensure that funds are available if the orders are not followed.

Conclusion

Relocation cases can be difficult and emotionally trying for everyone involved. The adverse effects of divorce are further exacerbated by today's increasingly mobile society. Today, more than ever, multiple moves by each parent are common as people seek better employment, remarriage, or just a fresh start in life. California courts have attempted to minimise the adverse consequences of relocation by keeping the best interests of the children paramount.

Tenny Amin is a Co-owner/Partner in the firm's Irvine, California office. She focuses her practice exclusively on Family Law and Family Law Mediation.

Well-known for her effective and assertive representation, Tenny has extensive experience in handling all aspects of family law cases ranging from mediation to trials involving child custody and child support, spousal support, and division of property. Committed to the intelligent and effective representation of her clients, Tenny focuses her practice on intricate custody disputes as well as cases involving the characterisation and division of high-asset and complex marital estates.

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Adrienne Braumiller
Partner, Braumiller Law Group

An introduction to forced labour laws and enforcement for imported merchandise.

The U.S. law prohibiting imports of goods made with forced labour is Section 1307 under Title 19 of the United States Code. Since the Trade Facilitation and Trade Enforcement Act in 2016 that repealed the statutory exception that allowed many products made using forced labour to enter the U.S., CBP has ramped up enforcement of products made using forced labour, which are primarily from China.[1] Since then, CBP has issued over 50 Withhold Release Orders (WROs), assessed millions in civil penalties associated with forced labour products, and detained over 900 shipments under the authority of those WROs and Findings. The major industry areas that are targeted for U.S. forced labour enforcement include cotton and other textiles, cell phones, computers, electronics, foodstuffs and seafood.

Defining forced labour
Although forced labour is defined under U.S. law under 19 U.S.C. 1307, much of the terminology surrounding forced labour is defined by international law in the Forced Labor Conventions administered by the International Labor Organization (ILO).[2] The term "forced labour" is defined as all work or service which is exacted from any person under the menace of any penalty for its nonperformance and for which the worker does not offer himself voluntarily.[3] The term "forced labour" includes slave labour, but also includes forced or indentured child labour and indentured servitude. As defined by the ILO , the phrase "menace of any penalty" refers to a wide range of penalties used to compel someone to work. The phrase "offered voluntarily" means the free and informed consent of a worker to take a job and his or her freedom to leave at any time.

The ILO has published several indicators that forced labour is occurring, including debt bondage, abuse of worker vulnerabilities or disabilities, withholding of identity documents and wages, restriction of movement, intimidation and threats, physical and sexual violence, abusive working and living conditions, and excessive overtime. However, certain types of nonconsensual labour do not fall under the ILO's definition of "Forced Labor," such as community service imposed by a court of law, work in an emergency (such as war, fire, flood, famine, or earthquake), prison labour under supervision and control of a public authority, and normal civic obligations (such as compulsory military service).

Penalties and forced labour enforcement
Under U.S. law, penalties for importing goods made using forced labour are severe and can include issuance of new import restrictions (such as WROs and Findings), the detention/seizure/forfeiture of violative merchandise, civil penalties for entering merchandise contrary to law under 19 U.S.C. 1595a(b), up to 20 years of imprisonment for individuals under 18 U.S.C. 1589, and revocation of import privileges, such as bond or CTPAT privileges.

For an example of penalties for importing goods made using forced labour, in 2020, CBP collected $575,000 in penalties under 19 U.S.C. 1595a(b) from Pure Circle U.S.A., Inc., which was found to have violated a WRO targeting a Chinese company named Inner Mongolia Hengzheng Group Baoanzhao Agricultural and Trade LLC ("Baoanzhao") after an investigation into twenty of Pure Circle's stevia shipments. Another example includes a seizure at the port of New York/Newark of 13 tons of hair products worth over $800,000 in 2020 that were imported in violation of a WRO on hair products from Chinese company Lop County Meixin Hair Product Co. Ltd.

Withhold Release Orders (WROs) and Findings.
CBP can issue WROs and Findings after investigating[4] foreign companies that use forced labour, which prohibit the goods made by those companies

"When CBP determines that there is a reasonable suspicion that a company is using forced labour in its foreign factory, supply chain, or geographic region, the agency may issue a WRO."

to enter the U.S. The goods that are subject to a WRO or Finding are subject to detention, seizure, and forfeiture by CBP if the goods are imported into the U.S.

Withhold Release Orders (WROs)
When CBP determines that there is a reasonable suspicion that a company is using forced labour in its foreign factory, supply chain, or geographic region, the agency may issue a WRO. The WROs will list the foreign company that is using forced labour, provide a product description of the prohibited goods, and provide the ILO indicators of forced labour present. WROs are posted to the forced labour page on CBP's website at https://www.cbp.gov/trade/programs-administration/forced-labour. At the request of an interested petitioner, WROs and Findings can be modified (suspended) if the forced labour indicators are remediated at the foreign company, and revoked if there is proof the foreign company is no longer engaged in forced labour.

The most notable[5] and comprehensive WRO in effect is the Hoshine Silicon Supply Chain WRO, which applies to "silica-based products made by Hoshine Silicon Industry Co. (Hoshine) and its subsidiaries as well as to materials and final goods derived from or produced using those silica-based products, regardless of where the materials and final goods are produced." The WRO further specifies that the prohibition applies to all products in the company's supply chain, including component materials (including metallurgic grade silicon, silicon oxide and certain silicones in primary forms), intermediate goods (such as additives for aluminium alloys and concrete, integrated circuits, and semiconductor devices), and finished Hoshine goods (such as adhesives, electronics, lubricants, photovoltaic cells, solar generators, solar panels, and parts thereof). The most guidance on forced labour compliance comes from this WRO, including a highly detailed WRO description, frequently updated FAQs, and a detailed importer guidance document.

To continue reading about Forced Labour, please click here.

[1] Prior to 2016, Section 1307 contained an exception that allowed for the importation of merchandise produced with forced labour if the goods were not produced in sufficient quantities in the United States to meet the consumptive demand of the United States.
[2] https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C029.
[3] https://www.ilo.org/global/topics/forced-labour/definition/lang–en/index.htm
[4] For more on the investigation timeline and process for WROs and Findings, visit CBP's at https://www.cbp.gov/sites/default/files/assets/documents/2021-Sep/Slicksheet_Forced_Labor_timelines_investigative_benchmarks_508Compliant_Pub_2.pdf.
[5] The UFLPA superseded the WROs related to XUAR for goods imported after June 21, 2022.

Adrienne Braumiller is the founder of Braumiller Law Group PLLC and an innovative force in the international trade law arena. With more than 30 years of experience, she is widely recognised as a leading authority in Customs, import, export, foreign-trade zones, free trade agreements and ITAR compliance.

Adrienne has been involved in every aspect of import and export compliance, from developing compliance programs to conducting audits and assessments, representing clients who are under investigation, preparing and submitting voluntary disclosures, preparing and filing classification requests and licenses, analysing whether specific transactions should be pursued, providing tailored training on specific import/export topics, addressing penalty assessments, and serving as an expert witness in a number of trade cases.

In addition, Adrienne has made presentations as a distinguished lecturer for such groups as the American Bar Association, the American Association of Exporters and Importers, the International Compliance Professionals Association, the National Association of Customs Brokers and Forwarders of America, the American Conference Institute, the American Petroleum Institute, and the National Association of Foreign Trade Zones and Practising Law Institute. She is also a frequent speaker at non-Association sponsored events, such as Advanced Topics in Customs Compliance and Partnering for Compliance.

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How to make large savings by reducing dutiable values on imported goods.

Most of the duty rates applied to goods being imported into the United States are ad valorem duty rates. This means that duties are calculated as a percentage of dutiable value. Duty rates on goods imported to the U.S. can be high on goods from China, or on steel, apparel, and footwear, with rates as high as 37.5% of value. However, import transactions can be structured to reduce customs duties, sometimes saving hundreds of thousands of dollars for a medium size importer. No one wants to pay more customs duty than necessary, and any duty savings that are achieved can have a major impact on the gross profit of your importing clients.

Most countries have signed on to the International Valuation Code so we all use the same basic formulas to arrive at dutiable value. However, each importing country applies their own interpretation of the code, so different valuations can be achieved in different jurisdictions. The most often used formula to determine value is Transaction Value which is equal to "the price paid to the seller when the goods are sold for exportation [in our case] to the United States". In the United States, dutiable value does not include payments for international freight and insurance or other sums paid for U.S. installations or post-entry services if properly documented. In addition, amounts paid for trademark royalties should not be dutiable when they are paid to a party other than the seller, and they are not paid as a condition of the sale for exportation to the United States. Finally, payments for buying commissions should also be non-dutiable if they are paid to a bona fide agent.

> "The first sale rule of appraisement is the most notable of our opportunities to reduce dutiable value."

But the first sale rule of appraisement is the most notable of our opportunities to reduce dutiable value. This rule can apply when there are at least two back-to-back sales to the U.S. The first sale is usually from a factory to a trading company, and the second sale will be from the trading company to a U.S. customer. Under the U.S. interpretation of the law, the sale from a factory to a trading company, which is the "first sale" for exportation, can be used as the Transaction Value. This duty savings program works where the non-resident company is the importer of record and sells to their customers on a delivered duty paid basis, or where the U.S. customer is the importer of record. Here is a simple example of the duty savings: F sells to TC at 100 and TC sells to the USC at 120. If this is not set up correctly, duty at 10% would apply to 120; under the first sale rule duty would be applied at 100. Add some zeros and the saving really add up.

Implementing the first sale rule is not terribly burdensome, but it does require the cooperation of the trading company. That is, the trading company has to be willing to share the name of the factory (which mostly, buyers already know) and has to be willing to share the price that they pay to the factory. Some companies are vertically integrated so this is not an issue. Where the trading company is not related to the factory there are two selling points to reluctant trading companies: one, If the importer can lower its dutiable value they can buy more goods from the trading company; two, we only need the markup by the trading company, not the profit of the trading company, so the U.S. importer recognises that the trading company profit is lower than its mark-up and agrees that they will not use this information as leverage in future price negotiations.

> "Implementing the first sale rule is not terribly burdensome, but it does require the cooperation of the trading company."

If the trading company will participate, we have to make sure that it is clear that the sale from the factory to the trading company is a sale for exportation to the U.S. As a general rule, the factory knows where the goods are to be shipped when the trading company places its order. Often there are U.S. trademarks, sizing, or labelling. But if none of those factors exist, then we can make it clear on the orders and invoices exchanged between the trading company and the factory that the goods that are ordered are being sold for exportation to the U.S. Once we know that we have back-to-back sales for exportation to the U.S. we make sure that other requirements have been met and that the prices from the factory to the trading company are arms' length prices.

The first sale program in the U.S. does not have the limitations that are imposed on this structure in other jurisdictions. It doesn't matter if the U.S. customer places their order before the goods are imported, or pays for the goods before they arrive. It doesn't matter that value will be determined based on a sale between two foreign entities. What we need are two back-to-back sales for exportation to the U.S. and we can put the program in place. The first sale program has been approved by the U.S. Customs Courts and has been used by US importers for decades. It is a program that can provide significant benefits and should be considered by international traders who import into the U.S.

Robert B. Silverman is one of the Firm's founding members and heads the litigation group.

Mr. Silverman routinely assists clients across a wide variety of industries in structuring import transactions to minimise customs duties, ensure regulatory compliance and eliminate penalty exposure. He represents companies during audits involving classification, valuation and eligibility under Free Trade Agreements such as NAFTA, CAFTA, AGOA, GSP, etc. He also counsels clients in connection with Customs investigations, seizures, exclusions, penalty and liquidated damages assessments. Mr. Silverman is also regarded as one of the foremost footwear classification experts in the United States and has been involved in all major footwear controversies affecting imports for over 30 years.

Prior to entering into private practice, Mr. Silverman served as a trial attorney in the Customs Section of the Civil Division of the US Department of Justice where he represented US Customs in proceedings before the Court of International Trade, Federal District Courts, and the Court of Appeals for the Federal Circuit.

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Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP is one of the nation's largest law firms devoted exclusively to international trade and customs matters.

The firm represents a wide variety of clients, ranging from privately held companies to Fortune 100 corporations engaged in the manufacture and distribution of textiles, consumer electronics, foodstuffs, computer and telecommunications equipment, pharmaceuticals, chemicals, automotive products, steel, wearing apparel, agricultural products and a host of other consumer and industrial products. Our clients include domestic and foreign manufacturers, importers, exporters, trading companies, customs brokers, trade associations and foreign trade associations.

The firm's lawyers have substantial experience practising before the government agencies responsible for the administration and enforcement of our international trade and customs laws. Many of our lawyers gained experience with US Customs & Border Protection, the Department of Commerce, the International Trade Commission, the Court of International Trade and the Department of Justice. Several of our attorneys are also licensed customs brokers and are uniquely qualified to understand issues relating to the delivery and clearance of imported/exported merchandise.

Resurgence: antitrust enforcement under the new administration.

Antitrust enforcement in California and the United States is a mix of private and government enforcement, but the priorities of the U.S. federal antitrust enforcers usually set the tone for all antitrust enforcement. That trend has remained true in the Biden Administration. The Administration's promises of changed and more vigorous enforcement have not yet resulted in the drastic overhaul of antitrust policy desired by some of its supporters; however, the Administration's moves and private lawsuits have meant clients doing business anywhere in the United States must be prepared for an aggressive new antitrust climate.

Biden administration personnel and policy

President Biden filled the antitrust enforcement roles in his new Administration with people highly critical of what they viewed as prior timid enforcement. Both Jonathan Kanter, new head of the Justice Department Antitrust Division, and Lina Khan, new Chair of the Federal Trade Commission, came to office with significant writings and actions urging greater antitrust enforcement, especially against Big Tech companies. Tim Wu, a special assistant to the President on competition and technology, called recent antitrust enforcement a "failed 40-year experiment."

In mid-2021, the Administration announced a "whole of government" approach to competition in which all agencies, not just the antitrust enforcers, act to promote competition across the economy. Some of the actions taken by the antitrust enforcers made antitrust reviews of proposed mergers more difficult for the parties, including by no longer granting early terminations of the initial 30-day waiting period; tweaking regulatory interpretations to require more premerger filings; and issuing form letters at the end of merger reviews hinting of possible delayed challenges of reviewed and consummated mergers.

The two agencies also announced a wholesale review of the merger guidelines that explain to parties, and courts, how the agencies will evaluate mergers. Those guidelines have incrementally evolved over the years to accommodate new economic thinking, but the agencies' announcement of the process promised a drastic rethinking of merger antitrust enforcement. To date, the agencies have not issued a draft.

The FTC also is considering rulemaking on competition issues. Instead of bringing an antitrust case against an individual defendant, the FTC might issue blanket rules like it sometimes does under its consumer protection mission. The initiative is controversial for several reasons, including because the FTC's power to issue such rules is unclear, though the practice would offer the FTC a quicker way to change antitrust enforcement.

Early administration wins and losses

The Administration also brought several enforcement actions in its first year and a half. Like its predecessors, the Administration is focused on conduct in healthcare industries that might affect competition, especially proposed hospital mergers. In June 2022, for example, the FTC challenged two proposed hospital mergers and both deals were abandoned shortly thereafter.

> "Some of the actions taken by the antitrust enforcers made antitrust reviews of proposed mergers more difficult for the parties."

> "The actions of U.S. businesses big and small generate numerous lawsuits, and even more threats of litigation, each year."

The FTC also approved two acquisitions of veterinary clinic groups by a private equity-owned clinic buyer, but only after the buyer agreed to divest business units in multiple geographic markets. The buyer also agreed to provide the FTC with notice of future acquisitions, even if too small to trigger the usual premerger notifications. While the FTC commissioners agreed on the particular enforcement actions, they disagreed on the need for and scope of such prior approval provisions. The commissioners also debated whether the FTC was inappropriately singling out private equity deals for greater antitrust scrutiny.

Not all the Administration's early enforcement actions were winners. The Justice Department three times attempted to prosecute several chicken industry executives for bid-rigging. The first two trials ended in mistrials and the third ended in a complete acquittal. The Justice Department also lost two criminal trials in different industries alleging agreements on wages or non-solicitation of other companies' employees. These losses show that enforcers pledging tougher antitrust enforcement still will need to convince courts that the actions are illegal under current law.

New law aimed at Big Tech?

In the meantime, both state and federal legislators proposed changes to the antitrust laws. One of the bills that attracted media attention is the federal American Innovation and Choice Online Act (AICOA). This proposed legislation targets certain large online platforms and would prohibit as anticompetitive particular actions like self-preferencing and alleged discrimination against potential rivals. The bill — and all others that would expand antitrust liability — has faced vigorous opposition.

Private litigation continues apace

Even without changes in the law, private antitrust litigation in California and the United States continues to be a fact of life for companies doing business here. Whether alleged agreements among competitors or aggressive acts by alleged monopolists, the actions of U.S. businesses big and small generate numerous lawsuits, and even more threats of litigation, each year. For instance, Amazon faces multiple suits alleging that its past and present requirements that suppliers provide Amazon customers the lowest prices effectively set a price floor and block the development of platform rivals.

Companies doing business in California or elsewhere in the United States have always needed to keep in mind potentially huge antitrust risks, including treble damages, expensive trials, or long merger reviews. Those considerations have only grown larger with the actual and proposed policies of the historically aggressive new Administration. Even if the courts or others scale back the wishes of the most aggressive enforcers, antitrust law will remain a hot and important consideration for your clients for the foreseeable future.

Steve Cernak is a respected leader in the international antitrust and competition law community. He served as in-house antitrust attorney at General Motors for more than 20 years, ultimately responsible for global antitrust compliance, merger reviews and litigation. Steve now assists clients big and small on a wide array of competition and consumer protection matters.

Steve has served in the leadership of the Antitrust Section of the American Bar Association for more than 20 years, and is currently the Section Vice Chair.

Steve is a prolific writer for The Antitrust Lawyer Blog and other online publications. He has written two antitrust books: Antitrust Simulations 2nd edition published in 2019 by West Academic, and Antitrust in Distribution and Franchising, updated annually for LexisNexis.

Steve regularly teaches at both the University of Michigan Law School and the Thomas M. Cooley Law School Corporate & Finance LLM program.

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Bona Law is an antitrust boutique focused on antitrust and competition law in the U.S. and abroad. We bring together some of the best legal minds with big-law, government, and senior in-house experience to solve our clients' problems. Headquartered in California, Bona Law has offices and professionals across the U.S. to better serve our client's needs.

Our attorneys regularly litigate high-stakes complex litigation in California and beyond. We have worked with companies, policy groups, and others to file amicus briefs in the U.S. Supreme Court and elsewhere on today's hottest competition issues.

We work with other firms to advise merging parties on the intricacies of merger regulation in the U.S. and elsewhere, including making U.S. premerger filings. We advise manufacturers and retailers on all state and federal antitrust aspects of product distribution, whether online or physical. In short, we help solve our clients' competition problems.

Franchise agreement changes and the impact on the franchisee.

Franchise agreements are drafted by the franchisor and often franchisees do not, or cannot, negotiate modifications. Frequently, franchisors include provisions that reserve certain distribution rights to themselves or affiliates, often through e-commerce, wholesale, and retail stores. By doing so, franchisors guard against claims by franchisees for encroachment or breach of contract.

Franchisors also retain the right to modify their system, usually to ensure they can modify and protect intellectual property associated with their systems and adapt to meet market demands. Franchisees are usually required to promptly comply with changes implemented by the franchisor, which can be very expensive for franchisees.

Before signing a franchise agreement, prospective franchisees should understand the potential impacts on their businesses when franchisors opt to distribute products or modify the system.

Competition

In the 1980s, Haagen-Dazs ice cream shop franchisees experienced a decline in sales after the franchisor began selling its ice cream in supermarkets and convenience stores.[1] Franchisees sued for breach of contract and breach of the implied covenant of good faith and fair dealing, among other claims.[2] The franchise agreement provided:

- Franchisee acknowledges and agrees that the Franchisor and the Haagen–Dazs trademark owner has the right and may distribute products identified by the Haagen–Dazs trademarks through not only Haagen–Dazs shops but through any other distribution method which may from time to time be established.[3]

The court determined that the franchisor operated within the purview of its contractual rights and dismissed franchisees' claims that mass distribution of ice cream products through other channels breached the implied covenant of good faith and fair dealing in their franchise agreements.[4]

Carvel, a U.S.-based ice cream company that calls itself "America's first ice cream franchise,"[5] experienced a different outcome. In 1992 Carvel began selling its ice cream products out of supermarkets.[6] It quickly expanded its supermarket sales program and ultimately, the franchisor advertised, marketed, promoted and subsidised the sale of its products in supermarkets, sometimes at much lower prices than franchisees charged for the same products.[7] Aware of its franchisees' objections to its supermarket program, Carvel brought suit seeking a declaration that the program did not breach its franchise agreements.[8] Franchisees counterclaimed to enjoin Carvel from selling ice cream products in supermarkets because the practice directly competed with their businesses.[9] The franchisees argued that they would not have purchased Carvel franchises if they expected Carvel would compete with them for sales and revenue by selling Carvel products in supermarkets and at wholesale.[10] Carvel argued that the supermarket program was necessary.[11] The court examined two versions of the Carvel franchise agreement and held that the supermarket program did violate any express terms of one version.[12] But, the court denied Carvel's motion for summary judgment in all other respects.[13] The court held that while the franchisees were "not entitled to abrogate Carvel's right to 'sell or license to sell products under Carvel trademarks...through the same or different delivery systems," the implied covenant of good faith in the franchise agreements "entitled" the franchisees "to expect that Carvel will not act to destroy the right of the [franchisees] to enjoy the fruits of the contract."[14]

> "Franchisees should understand the potential impacts on their businesses when franchisors opt to distribute products."

System changes

Franchisors usually maintain the right to institute changes through their operations manuals. Common changes typically executed through franchisors' operations manuals include changes to the computer or point-of-sale system. With the exponential growth of technology, change makes sense, but can be disruptive and costly to franchisees.

Courts are looking to the franchise agreements when ruling on claims related to system change.

- In *La Quinta Corp. v. Heartland Properties LLC*, the hotel franchisor instituted changes to its reservation system expected to cost each franchisee $35,000 over a 10-year period.[15] The court determined that the cost was permitted under the franchise agreement. The franchise agreement required the franchisee to, at its sole expense, comply with all system standards and expressly gave the franchisor the right to add, amend and/or delete system standards including for technology and the reservation system.

- In *Bird Hotel Corp. v. Super 8 Motels, Inc.*, the franchisor attempted to make changes to its customer loyalty program, which would result in imposing an additional 5% fee on gross room sales to certain customers.[16] The court found that the franchise agreement specified a 2% fee and the franchisor could not unilaterally impose a fee for the program's operation greater than what was provided in the franchise agreement. Thus, the franchisor breached the agreement by requiring franchisees to pay a total fee of 7% for participation in the loyalty program.

Presently, franchisors and franchisees are divided regarding mandated use of third-party delivery services, like Uber Eats and Door Dash. Courts will likely continue to examine the specific applicable contract provisions to determine the parties' rights and obligations.

Adhering to the terms of the franchise agreement and acting in good faith are important for franchisors. Reading and understanding the franchise agreement is crucial for franchisees.

[1] Carlock v. Pillsbury Co., 719 F. Supp. 791, 798 (D. Minn. 1989) superseded by Minn. Stat. Ann. § 80C.21 (choice of law provisions in franchise agreements).
[2] Id.
[3] Id. at 802-803.
[4] Id. at 816, 817, 820.
[5] https://www.carvel.com/about-us (last visited Sept. 5, 2022).
[6] Carvel Corp. v. Baker, 79 F. Supp. 2d 53, 56 (D. Conn. 1997).
[7] Id. at 57.
[8] See Id. at 56.
[9] Id. at 59.
[10] Id. at 57.
[11] Id.
[12] Id. at 66.
[13] Id.
[14] Id.
[15] 603 F.3d 327 (6th Cir. 2010).
[16] 2010 WL 572741 (D.S.D. Feb. 16, 2010).

Nicole Liguori Micklich is an internationally recognised franchise lawyer whose commitment to her clients and to the field of franchise law leads to enviable results. She represents franchisees in a variety of sectors at every step of the franchise relationship and in litigation. Nicole has successfully represented clients in cases regarding compliance, royalty payments, termination and non-renewal, transfers, torts, and violations of state and federal laws, including disclosure laws, and has favourably settled numerous cases for clients involved in such disputes.

Nicole regularly advises clients regarding the purchase and transfer of franchise agreements, including drafting and negotiating transfer agreements as well as termination agreements and releases.

Nicole is a frequent author and lecturer on franchise law. She is co-author of Annual Developments in Franchise and Distribution Law, 2021.

Nicole is admitted in the State and Federal Courts of Rhode Island and Connecticut and the U.S. Court of Appeals, Second Circuit.

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ATTORNEYS AT LAW

Urso, Liguori & Micklich, P.C. is distinguished by its deep foundation of strategically and successfully meeting the technological, business, and civil litigation needs of its clients. Extraordinary legal advocacy is our tradition.

We provide a full spectrum of legal services for franchisees and prospective franchisees. Our reputable attorneys have authoritative knowledge in franchise law, real estate, construction law, land use, planning and zoning, complex commercial development, contracts and business law, probate and estate planning.

Our objective is always to resolve our clients' matters successfully and efficiently.

The hallmark of our practice is decades of achieving favourable outcomes for our clients. Our attorneys have a well-respected reputation for our efficient strategies. We offer legal advocacy from intelligent counsel, experienced in negotiation, skilled in mediation, and when necessary, aggressive in litigation. We are trusted and highly skilled advisers, respected by our peers and the judiciary.

Best for business: an introduction to commercial law and trade in the state of Georgia.

During the American Civil War, Georgia's capital city was burned to the ground by Union General William T. Sherman, prompting city leaders to adopt the Phoenix as a symbol of the city's rebirth, hope and healing. Atlanta was indeed reborn and has today grown to become a city of more than six million inhabitants, constituting some 57% of Georgia's entire population.

The International Emergence of Atlanta

During the mid-20th century, one of Atlanta's native sons, the Rev. Martin Luther King, Jr., emerged as a major civil rights icon. While America was contending with riots and demonstrations precipitated by racial disharmony in the 1960s, Atlanta earned a reputation as "the city too busy to hate." Possessed with constructive city leadership, Atlanta took affirmative steps to desegregate, lobby for establishment of the South's most important airport facility, and build a major league baseball stadium. A close associate of Dr. King, Rev. Andrew Young, was elected in 1972 to represent Georgia in Congress and later appointed by President Jimmy Carter to become the U.S. Ambassador to the United Nations.

In the 1980's, Mr. Young served two terms as Mayor of the City of Atlanta, helping the city emerge as a center for international business. Leveraging Mr. Young's then extensive worldwide contacts, Atlanta was selected to host the Centennial Olympic Games in 1996. The Games ushered in a stream of international commerce benefitting Atlanta which continues to this day. Georgia has, over the past 25 years, experienced marked increases in population and economic growth.

Not surprisingly, Atlanta has become home to many Fortune 500 companies, ranking 8th among all American cities. Companies headquartered in Atlanta include The Coca Cola Company, Delta Airlines and UPS. Georgia ranks 8th and 9th, respectively, in the number of Fortune 500 and Fortune 1000 companies located within its borders.

Companies with operating facilities in Georgia include representatives of the aerospace, flooring, automotive, broadcast, international delivery, chemical, fabricated metal, paper, machinery and heavy equipment industries. To cite just one example, 95% of all wall-to-wall carpet which is installed worldwide is manufactured within a 25-mile radius of Dalton, Georgia.

Air, Rail and Shipping Transportation.

Atlanta's growth as an international air hub has been even more dramatic. More passengers pass through Atlanta's Hartsfield-Jackson International Airport than any other airport in the world: direct flights can be booked to more than 90 international destinations in 55 countries. Connections to a large number of American domestic destinations are also easily made; 80% of the entire U.S. population lives within a direct two-hour flight from Atlanta.

The National Railroad Passenger Corporation, Amtrak, last year released a $75 billion passenger rail proposal calling for the establishment of a new Atlanta rail hub with routes connecting to the cities of Birmingham (Alabama), Charlotte (North Carolina), Macon (Georgia), Montgomery (Alabama), Nashville (Tennessee), and Savannah (Georgia). In addition to heavy rail, since 1980 the city of Atlanta has operated one of the premier commuter passenger rail systems in the United States known as MARTA.

With Georgia's extensive coastline bordering on the Atlantic, the Georgia Ports Authority is also an important player in the state's commercial transportation activities. The Ports Authority closed out its Fiscal Year 2022 with its busiest June on record.

Outstanding Institutions of Higher Education.

Atlanta and the state of Georgia are able to offer employers a highly educated and trained workforce. Twenty-six different institutions of higher education, including the University of Georgia at Athens, comprise the

> "While America was contending with demonstrations precipitated by racial disharmony in the 1960s, Atlanta earned a reputation as ' the city too busy to hate.'"

colleges and universities of the University System of Georgia. In 2021, the University System conferred a total of 72,929 degrees.

The Georgia Institute of Technology is one of the nation's top five ranked Engineering Colleges, attracting students worldwide to its schools of Aerospace Engineering, Biomedical Engineering, Chemical and Biomolecular Engineering, Civil and Environmental Engineering, Electrical and Computer Engineering, Industrial and Systems Engineering, Materials Science and Engineering, and Mechanical Engineering.

Emory University is the state's pre-eminent private institution of higher education. It is renowned for its Medical and Law Schools, its School of Nursing, and its ongoing affiliation and work with the Centers for Disease Control (CDC). Emory is also host to The Carter Center, President Carter's policy and international dispute resolution center.

Foreign Direct Investment In Georgia.

More than 1,240 international employers have operations in Georgia. More than 287,400 Georgia workers are employed as a result of foreign direct investment (FDI) in the state. Significantly, 102,500 workers in Georgia – representing 36% of all FDI jobs in Georgia – are in manufacturing. Among international employers operating in the state, those from Japan, the United Kingdom and Canada supply the largest number of jobs for Georgians. From 2014 to 2019 Georgia's FDI employment increased by 32% while all of Georgia's private employment increased by a still impressive but relatively lower 13%.

A Highly Ranked Best State For Business.

In its 2022 Ranking of the American Best States For Business, Forbes Magazine listed Georgia as No. 6, making it eight straight years that Georgia has been in the top 10. Georgia's ranking is assisted by its General Assembly's establishment of low tax rates.

In 2018 Georgia signed into law its first corporate income tax rate reduction in 50 years, with a new rate of 5.75% taking effect in January 2019. Manufacturers save on taxes by locating in Georgia, particularly when their customer revenues occur mainly outside the state of Georgia.

Georgia's friendly business climate has prompted many companies to establish innovation centers in the state. Eligible research and development expenditures may be monetised in the form of claimed, unused credits applied to state payroll withholding.

A New Center For International Arbitration and Mediation.

In 2015 the Georgia State University College of Law, together with its affiliated Atlanta Center for International Arbitration and Mediation (ACIAM), opened a state-of-the-art arbitration and mediation hearing facility offering global concierge services in downtown Atlanta. ACIAM has partnered with the Atlanta International Arbitration Society (ATLAS) and other stakeholders to host international arbitration and mediation hearings, conferences and events.

Leveraging off of Atlanta's unparalleled air connections, its abundant hotel facilities, and the relatively lower costs for conducting such hearings in Atlanta, a concerted effort has been made to present Atlanta as an arbitration and mediation venue.

To say that the state of Georgia is a robust and attractive place in which to do business is a substantial understatement. It is one of the nation's very best – and there are no signs that the momentum of the past 30 years is slowing down.

Michael Alan Dailey is a broadly experienced litigator. He has handled cases of first impression and litigated the proper basis for overturning arbitration awards issued in Georgia, prompting the Georgia General Assembly to enact legislation upholding his courtroom contentions in the process.

Mr. Dailey has handled disputes involving health care, global positioning, and voice recognition technologies. He has brought copyright infringement actions on behalf of authors and developers of books and software. He has helped companies thwart the unlawful intentions of departing senior executives who secretly took with them tens of thousands of computer files and confidential technical and marketing data.

Mr. Dailey has also successfully defended corporate executives charged with violating non-competition agreements and other restrictive covenants, assisted terminated employees to recover pension and benefits due to them, and sued employers who have engaged in discriminatory conduct.

Mr. Dailey is an advocate for the Gwinnett County Pro-Bono Project and the Georgia Lawyers for the Arts.

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Anderson Dailey LLP is a business litigation firm that acts quickly and intelligently to advance the interests of its clients.

Each of the founding partners has spent more than 20 years prosecuting, defending and managing business litigation. Experienced in a broad range of commercial litigation matters, our lawyers pride themselves on anticipating issues most likely to impact a client's cause.

Our practice style is aggressive and measured. We never shirk a fight, but we work to reach a negotiated resolution as quickly as possible. We never wish to see a client compromise its interests because it cannot afford to stay the course. Our objective is to win the relief that is due as quickly and as cost-efficiently as possible.

Success is measured in terms of client satisfaction. Our greatest reward occurs when clients consider themselves recipients of the most perceptive and persuasive representation available.

Why you need a more strategic approach to IP protection.

There is little argument that intellectual property protection creates value for entities especially as the business grows. Over the years, I have formed the belief that tactics to protect intellectual property such as prosecuting trademarks, copyright, patents, trade secret, and drafting non-compete agreements, without a well thought-out strategy, potentially leads to missed opportunity and inadequate or misplaced protection.

An effective intellectual property approach involves more than prosecution/documentation

Many times, clients come to EmergeCounsel with a specific business and/or intellectual property need. For example, in this hypothetical:

- Balloon Boy had been selling balloons near the NY Empire State Building and seeks help in securing a trademark in the US and subsequently internationally as it opens kiosks near London Bridge, the Acropolis, and the Taj Mahal. EmergeCounsel uses its flat fee systems and processes to conduct a search for Balloon Boy and prepare the trademark applications. It either uses Madrid or lines up counsel in the various countries to prosecute.

It is fairly easy for any experienced intellectual property counsel to execute in light of the Madrid Protocol, the WIPO Patent Cooperation Treaty, the Berne Convention, cross-border dispute resolution arbitration services through e.g. the International Center for Dispute Resolution, and broadly available legal data bases containing cross-border contracts.

Strategy really matters

But is doing the above (which is exactly what the client wanted) without digging deeper really cost or otherwise effective? My experience suggests probably not.

Each business has a unique raison d'exister which, assuming the business is positioned towards success, involves some sort of competitive advantage. Maybe it is a unique product or service offering, a unique user experience, ties the business to a famous founder, a business-to-government play with vast government connections, a business-to-business play with an amazing supply channel, a business-to-consumer play focused on a need that has to be solved, etc. Maybe it is a solopreneur, a team of five or five thousand. It may be bootstrapped, venture-backed, or a subsidiary of a larger entity. Obviously, with this combination of relevant factors, each of those businesses is going to have its own specific needs when it comes to protecting its intellectual property and business assets.

- I set up a Zoom call with Balloon Boy and start asking questions as I build a relationship. I find out that many of the designs for the balloons are unique and potentially edgy works of art which do not have copyright registration. The reason for the organisation reaching out relates to knockoffs that may be emulating from the PRC where it buys its balloons through a customised supplier whom it has never met and does not have a formal written agreement with. The balloon designs seem fine for the US market etc. but it has gotten some negative press in India, especially the one imposing Bollywood star Priaynka Chopra's image in a compromising position. The company contacted me because it has been approached by a balloon business roll-up company and just sent them financials.

- Armed with this additional information, almost as sitting in a law school exam, I can quickly determine Balloon Boy is a growing entity who needs its legal strategy to catch up to its business strategy. It has IP exposure that is more copyright related. It may be violating the Indian Indecent Representation of Women Act of 1986. It has a potential investor who presumably in the near future is going to do some due diligence before investing, and will not be impressed.

- I create a strategic plan which takes into consideration the play, the jurisdictions, the copyright, the infringement, the supplier agreements and the brand protection. I line up and communicate with foreign counsel, draft and maintain the budget, and execute and counsel tracking through the plan in short order. My team maintains periodic connections with foreign counsel at set timeframes and maintains the master file, as well as bills, and makes sure everyone is paid and the client receives timely communication.

Strategy as a way of thinking

It is generally going to be less expensive to just file e.g. a trademark application than to think out a strategy. Strategic filings involve counsel taking into consideration information it needs to collect from the client, cross-border counsel and the market.

However, this strategic approach doesn't need to add significant time or cost. Generally, EmergeCounsel clients are small and medium-sized growth companies who have progressed because they have strategically focused on planning their businesses. They are generally able to summarise their business, value propositions, challenges, and goals in very short order if they feel like I am not wasting their time. They are generally receptive to the focused, strategic advice, even if it is not what they originally asked for. And finally, the outcome is far better for them when I take the time and effort to understand them, craft a strategy and execute against it.

> "Strategy without tactics is the slowest route to victory. Tactics without strategy is the noise before defeat." Sun Tzu

> "This strategic approach doesn't need to add significant time or cost"

Steven Weigler has built a reputation as trusted, strategic intellectual property and business counsel to entrepreneurial businesses around the world. Before founding EmergeCounsel, Steven gained experience in both transactional and litigation as corporate counsel for AT&T Corp. and through the founding and scaling of an international ed-tech startup. Steven's clients include international apparel, cosmetics, business services, and tech companies that desire to take advantage of the United States consumer and business market, as well as US businesses that have international goals.

Through IR Global, Steven has built relationships with similarly situated firms around the globe, allowing him to handle complex international matters at a lower price point than large enterprise law firms. He is a member of the Colorado and Florida Bar and practices in US District Courts, the USPTO, and the US Copyright Office. Steven, his wife Wendy and daughter Radley like to ski and listen to live music.

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EmergeCounsel's focus areas are in the protection of intellectual property and business assets. Our clients are worldwide. Our TotalTM® and Amazon Sellers services provide trademark guidance, search, appeals of office actions and denials, and trademark monitoring and enforcement at flat, affordable rates. EmergeCounsel also has an extensive network of professionals who provide co-counsel and services in taxation, patents, accounting, bookkeeping, marketing, copywriting and editing, financing, and more.

EmergeCounsel works with emerging businesses to give our clients peace of mind and ensure that their businesses are on solid ground.

EmergeCounsel offers our clients a unique skill set. Our founder Steven Weigler is an entrepreneur who has developed products and services, recruited and managed people in sophisticated markets, been responsible for the P&L, raised sufficient capital to consistently increase value, negotiated numerous exit strategies with acquirers and venture.

Understanding visas and immigration pathways for investors and entrepreneurs.

Investment and doing business in the United States continues to be attractive. Foreign direct investment in the United States increased by 10% in 2021 as compared to 2020.[1] Immigrants in particular play a substantial role in new business formation, and immigrants or their children have founded 44% of all Fortune 500 companies.[2]

This overview of immigration pathways draws from 30 years of experience representing thousands of investors and entrepreneurs, as well as US businesses that have raised $5 billion in capital from immigrant investors. Our practice at SGG Immigration also covers the spectrum of US immigration law, including services for universities, research and healthcare institutions, startups and multinational companies, and individuals qualifying as extraordinary immigrants in the sciences, arts or business. Discussion of immigration strategies often revolves around near-term needs and potential "non-immigrant visa" categories, as well as the longer-term horizon and applicable "permanent residence" categories. As US immigration law is a federal practice, we represent clients far beyond our head office in Southern California, to most states in the country. Also, our immigration law work is often in concert with transactional, real estate and corporate lawyers, securities counsel, international tax advisors, and experts from the client's home country.

Investment

Entrepreneurs seeking permanent residence typically inquire about the "EB-5 category" for investors. This pathway may be suited whether the investment is made for a startup, acquisition, or growth scenario. The minimum investment is $800,000 for businesses located in rural or high unemployment areas. The investment must create at least ten jobs for US workers, proven with payroll documentation or reasonable economic methodologies for estimating indirect job creation. Proof of lawful sources of investment funds is essential, and often leads to collaboration with foreign legal counsel. With the enactment of new legislation in March 2022, investments made in qualifying infrastructure are prioritised.

Given delays in government adjudications with EB-5 category applications, most entrepreneurs find the EB-5 category to be lacking as a standalone strategy. A parallel non-immigrant visa pathway is also essential. On the other hand, where the EB-5 category is the lone immigration pathway, the applicant is typically a passive investor.

Hands-on entrepreneurs are more likely to be drawn to the E-2 visa category as a potential near-term pathway. The E-2 visa authorises entry to the United States for purposes of developing and directing a US business. The applicant must have invested a "substantial" amount of capital (no minimum stated), and owns at least 50% of the business or is in operational control. The applicant must be a national of a country having a bilateral investment treaty with the United States. The Department of State publishes a long listing of these countries, including the United Kingdom, France, Germany, Netherlands, Japan, South Korea, Canada and Mexico, to name a few. Notably missing are Brazil, Russia, India, China, and South Africa. What to do in the latter case? Some clients have opted for a two-step strategy that involves obtaining citizenship from a third country that has a treaty (for example, Grenada) and then applying for the E-2 visa.

Extraordinary or exceptional ability

In certain circumstances, investors and entrepreneurs may have better odds of qualifying for US immigration benefits by applying on the merits of their own resume if it demonstrates "extraordinary ability" in a particular field of endeavour. For permanent residence, the "EB-1A category" is for persons who are in that "small percentage" at the "very top" of their field. Supporting evidence might consist of "sustained acclaim" and a major internationally recognised award, or alternative evidence such as awards, published material about the applicant, and scholarly articles. In a startup scenario where the company has not generated substantial revenues, the applicant might self-petition.

In a slightly different twist, where the investor-entrepreneur's work is considered of national significance, the applicant might qualify for permanent residence in the "EB-2 category" without a company sponsor. The applicant would demonstrate, initially, membership in a profession with an advanced degree, or exceptional ability in science, art, or business, that would substantially benefit the national economy, cultural or educational interests, or welfare of the United States. The self-sponsoring applicant then would show the proposed endeavour has both substantial merit and national importance, and the applicant is well positioned to advance it. The required proof may be in the form of ownership and/or unique skills and experience, publications referencing the applicant, relevant patents, substantial revenue growth, capital commitments from angel investors or VC firms, participation in incubator or accelerator programs, and grants provided by federal, state, or local development agencies.

While either of these permanent residence pathways may be applicable to the particular client, again, the application/approval process can be lengthy. Depending on whether the investor-entrepreneur is already in the United States, a near-term strategy may be necessary to fill the gap.

The O-1A non-immigrant visa is for individuals with extraordinary ability in the sciences, education, business, or athletics that could fit well for the entrepreneur. The applicant must prove sustained national or international acclaim in the particular industry, as evidenced by major internationally recognised awards, or publications about the applicant, contributions made to the field of endeavour, high compensation, and the like.

A different immigration benefit – "parole" – is not permanent residence or a non-immigrant visa category, but is a status for entrepreneurs that could be used for up to five years (assuming it is extended). The entrepreneur must hold at least a 10% ownership interest and will have a central role in the startup business. Also, the startup must have received at least approximately $265,000 in investments from angel or VC investors, or at least approximately $105,000 in qualified government awards or grants. The applicant must show that the startup has substantial potential for rapid growth and job creation. A broad range of evidence could be relevant, including revenues, the amount of funding, national scope of the endeavor, and the entrepreneur's earlier successes as evidenced by patented innovations and job creation.

Multinational companies

Investors and entrepreneurs might be able to qualify for the L-1 non-immigrant visa that is reserved for executives and managers of multinational companies. The applicant must have worked in the foreign company for at least one year in a managerial or executive capacity, or in a position requiring specialised knowledge. The foreign and US companies must be related as parent, subsidiary or affiliate. The L-1 visa generally is issued for three years, with an opportunity for extension. However, a one-year L-1 visa may be available for a "new office" established in the United States. As in a recent successful case, the pivotal managerial role of the foreign executive to the US company may be evidenced by the substantial VC funding that the business has garnered in anticipation of the foreign executive taking the reins of the US company.

On the whole it can appear that US policymakers are ambivalent about welcoming immigrant investors and entrepreneurs. Job-creating investment is desired, but then political expediency requires clarifying that the immigration benefit is not a pathway to US permanent residence or citizenship. The experienced practitioner helps the client weave through the many obstacles by pursuing a feasible strategy tailored to the client's core business objectives.

[1] https://www.bea.gov/sites/default/files/2022-07/fdi0722-fax.pdf
[2] https://data.americanimmigrationcouncil.org/en/fortune500-2022/

Lincoln Stone is a partner at SGG Immigration LLP, a full-service U.S. Immigration law firm in Los Angeles, CA. He has more than 30 years' experience as a lawyer, which includes comprehensive experience in business litigation and transactions, and US government experience in federal courts and litigation. Lincoln gained this diverse experience while achieving client solutions for hundreds of denied or challenged immigration cases; advising about complex business structures, disputes and litigation including numerous distress business litigation matters, receiverships, and SEC enforcement actions; helping thousands of investors, entrepreneurs and startup ventures from all over the world; and solving complex immigration compliance issues for US businesses and venture firms that have raised more than $5 billion in more than 200 different job-creating enterprises through the EB-5 immigrant investor program. Lincoln is recognised as a Certified Specialist in Immigration and Nationality Law by the State Bar of California Board of Legal Specialisation, and as a preeminent immigration lawyer by peer-based ratings such as Chambers as well as The Best Lawyers in America.

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SGG IMMIGRATION LLP

SGG Immigration LLP is a full-service immigration law firm with an international reputation for achieving outstanding results in the practice of immigration law. Our legal team includes more State Bar-certified specialists in immigration law than any other law firm. The law firm's expertise covers a broad range of matters, including extraordinary ability, investor, entrepreneur, employment, and family-based immigration petitions. Our expertise also includes advising on reorganisation of distressed EB-5 investment projects, employer compliance, federal court litigation, naturalisation and citizenship, asylum, waivers of all kinds, immigration court and appeals, worksite enforcement, advising on immigration consequences of crimes, and consular practice.

When negotiations fail: recovering damages without a written contract.

Assume that two parties express a mutual interest in joining together in a business venture. They work together toward the eventual goal. During the due diligence process one of the parties contributes something of value that benefits the other party. The contribution may be tangible or intangible, but it has value. Finally, one or both of the parties determine they are not a good fit. They go their separate ways without having signed an agreement. The party that provided the benefit to the other party believes it is entitled to compensation for the benefit bestowed on the other. Florida law provides a remedy in the form of a claim for unjust enrichment.

To prove a claim of unjust enrichment, a plaintiff must establish: (1) the plaintiff conferred a benefit on the defendant; (2) the defendant voluntarily accepted and retained that benefit; and (3) the circumstances are such that it would be inequitable for the defendant to retain the benefit without paying its value.

A plaintiff is obligated to prove some connection between the damages claimed and the defendant's tortious conduct. In an unjust enrichment claim, then, there must be a connection – the plaintiff must prove that it had a reasonable expectation of compensation from the defendant or the defendant a reasonable expectation that he would have to pay the plaintiff. A claim for unjust enrichment will fail if the plaintiff does not allege and prove that it had directly conferred a benefit on the defendant.

As a matter of Florida law, damages for unjust enrichment can be based on either the market value of the services or the value of the services to the party unjustly enriched. The measure of damages for unjust enrichment is the value of the benefit conferred, not the amount the plaintiff hoped to receive or the cost to the plaintiff. A damage claim for unjust enrichment that is not supported by competent, substantial evidence will fail where the plaintiff only presents evidence of the money it hoped to receive and does not present evidence of the value of the benefit conferred.

The amount of damages that a plaintiff claims must be measurable and quantifiable. It has long been accepted in Florida that a party claiming economic losses must produce evidence justifying a definite amount. Damages cannot be based on speculation, conjecture, or guesswork. A theory of damages that a plaintiff is entitled to a percentage of the defendant's future earnings will fail because it is pure speculation. Projections of value or earnings based on assumed facts are informed guesswork and will not suffice as proof of damages. Evidence of anticipated profits does not establish the value of the benefit allegedly conferred. Judgment will be entered in favour of a defendant when a plaintiff fails to prove damages and when there is no connection between the anticipated profits and the value of benefits conferred.

Proof of damages in an unjust enrichment case is almost always through an expert witness. In proving the market value of services provided by the plaintiff, the expert must be knowledgeable about the services rendered and be able to draw a comparison of the value of services rendered among others in the same industry. On the other hand, the alternate valuation of damages is based on the value of the services to the defendant. Here, the plaintiff might rely on a payment the defendant received based upon the use or sale of the benefit.

> "A damage claim for unjust enrichment that is not supported by competent, substantial evidence will fail where the plaintiff only presents evidence of the money it *hoped* to receive."

> "The law does not provide a remedy for every wrong. However, Florida law will recognise claims for unjust enrichment in the absence of an express contract."

A claim for unjust enrichment is essentially an equitable claim, based on a legal fiction created by the courts to imply a contract as a matter of law; the law will create an agreement in situations where it is deemed unjust for one party to have received a benefit without having to pay compensation for it. A claim for unjust enrichment will not **be upheld** if there is an express contract (oral or written) covering the subject matter of the claim. In the final analysis, whether a claim is legal or equitable will depend on an analysis of the historical nature of the claim and the remedy sought, with the scale tipped more in favour of the nature of the remedy.

For a claim to lie in equity the action must seek to restore to the plaintiff particular funds or property that is in the possession of the defendant. A claim to specific property or its proceeds held by the defendant accords with the restitution we regard as equitable.

If the court determines the claim is equitable, the parties are not entitled, as a matter of right, to trial by a jury. If the court determines the claim is legal, the Seventh Amendment to the United States Constitution guarantees the parties have a right to trial by jury. The right to trial by jury extends only to suits in which legal rights are to be ascertained and determined in contradistinction to those suits where equitable rights alone are recognised and equitable remedies are to be administered. In an equitable proceeding, the judge may empanel a jury as an advisory jury. The jury verdict in such an instance is not binding on the judge. The judge may ignore it totally.

The law does not provide a remedy for every wrong. However, Florida law will recognise claims for unjust enrichment in the absence of an express contract.

Harry A. Payton represents domestic and international corporations and high net worth individuals in complex business litigation matters involving commercial real estate, commercial foreclosures and lender liability; litigation involving fine art; corporate, shareholder and partnership disputes; probate, will and trust litigation; and intra-family business disputes. He is one of 88 attorneys in the state of Florida with dual board certification in Civil Trial and Business Litigation.

Payton is recognised by many legal professionals for his high standards of professionalism. In 2012, he was appointed to serve on the Supreme Court of Florida's Committee on Professionalism for the 11th Judicial Circuit, and chairs the mentoring program subcommittee. He serves on The Florida Bar Standard Jury Instructions (SJI) Committee - Contract and Business Cases. He previously served on The Florida Bar's Judicial Nominating Procedures Committee and The Florida Bar's Judicial Administration and Evaluation Committee. Harry has received Martindale-Hubbell's highest peer review rating, "AV Preeminent 5 out of 5," since 1983.

Payton's legal skills and experience have earned him inclusion in the South Florida Legal Guide's list of Top Lawyers in Complex Commercial Litigation and Real Estate Litigation since 2005, and recognition from Florida Super Lawyers since 2005. He is included in the 2018–2022 editions of The Best Lawyers in America© for Real Estate Litigation.

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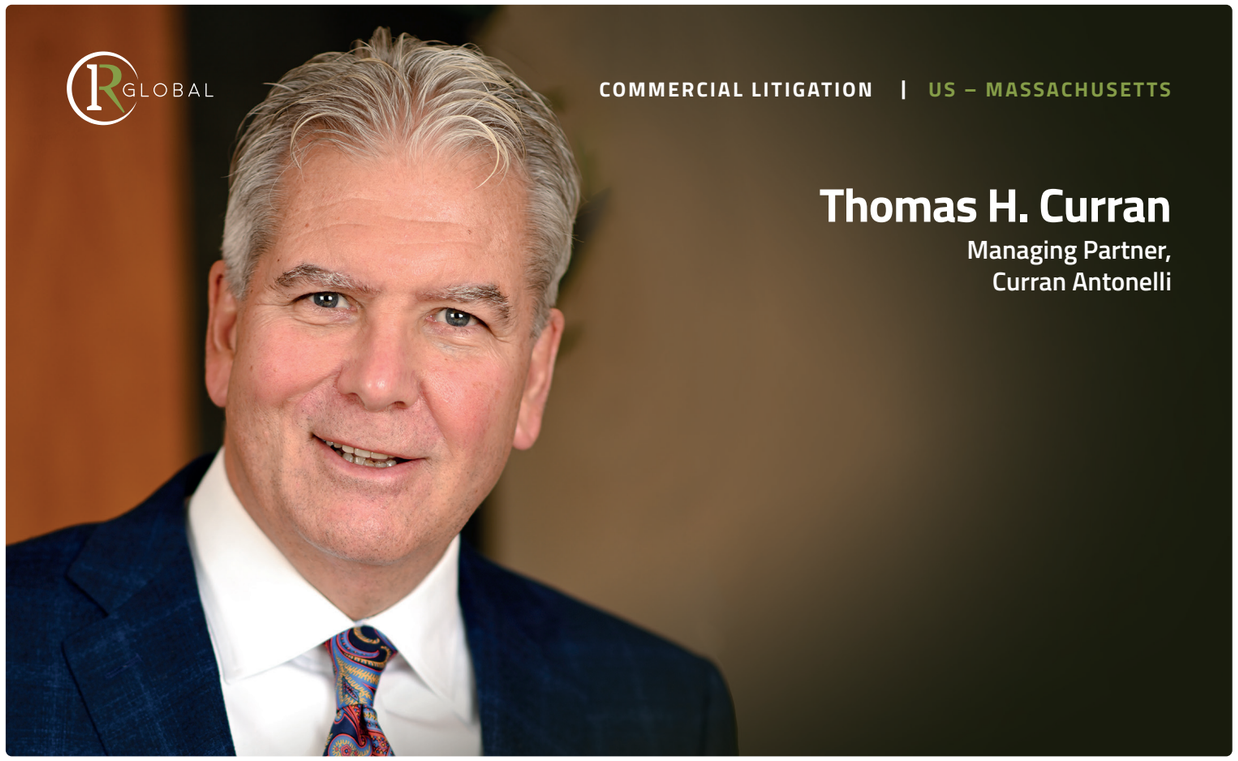
Payton & Associates, LLC represents domestic and international corporations and high-net-worth individuals in a broad spectrum of complex commercial litigation cases in Florida state and federal courts, as well as in mediation and arbitration. As a boutique firm, we provide our clients with personal attention from senior-level attorneys, and the highest quality legal representation available in firms of any size. Our attorneys understand the intricacies of business and formulate innovative strategies to achieve each client's litigation objectives. We offer advice and strategy to help our clients avoid disputes in the future.

The firm is handling an increasing number of cases involving intra-family business disputes for high-profile clients. Many clients have homes outside of the United States but have interests in Florida. Whether the clients reside in Venezuela, Colombia, Brazil, France, Spain or the U.S., the attorneys at Payton & Associates want to protect clients against the risk of wrongdoing by family members in business with each other or sharing in financial estates.



How to recover debt and assets in the most complex and high-stakes cases.

By the time the walls of Ireland's famous Walford home were coming down, creditors and the Bankruptcy Trustee had already been in court for over ten years seeking to recover assets owed to them by the property's predecessor. "The owner filed bankruptcy in the U.S. and attempted to protect 100 million euros of assets by transferring them to his wife in Ireland, Switzerland, South Africa, the UK and the United States, making this an international cross border matter," says Thomas H. Curran, managing partner of Curran Antonelli, who represents the claimants, Chapter 7 Bankruptcy Trustee Richard M. Coan in the bankruptcy case commenced by the former prominent Irish real estate developer Sean Dunne.

After the collapse of the Irish real estate market, Dunne and Killilea moved to Greenwich, Connecticut leaving Dunne's Irish lenders and other creditors with almost one billion Euro in debt. After the Irish bank restructuring agency known as NAMA commenced suit against Dunne and Killilea in Connecticut state court, Dunne filed for bankruptcy in early 2013. The Trustee's avoidance and recovery action soon followed, and Trustee Coan engaged Curran Antonelli as his special counsel.

Under daily scrutiny by the press, Curran went toe-to-toe with several other law firms for years as he and his team skillfully argued cases in United States Federal Courts, the High Courts of Ireland, England & South Africa as well as multiple lower courts in varied jurisdictions. When the dust settled, his client received a favorable outcome: a $21+ million jury verdict.

"Walking away with a win in court or in arbitration is only part of the battle," says Curran. "In high-stakes, complex cases such as this one, enforcing rights and recovering the assets is equally challenging. It demands tenacity and creativity to fully explore the business and financial affairs of debtors, their constellation of companies, and their insiders."

On February 8, 2022, the United States District Court for the District of Connecticut (Meyer, J.) enter its Order denying defendant Gayle Killilea's post-trial motions seeking a directed verdict or new trial in the fraudulent transfer action brought against her after extensive briefing and oral argument in the Fall of 2021 following the Court's entry of final Judgment in July 2021.

The jury entered its verdict after a more than four-week trial conducted in New Haven in which the jury also voided as fraudulent, multiple transfers of millions of Euro made by Dunne to Killilea's Swiss bank account and other monies and real properties under Irish, US bankruptcy and Connecticut law. The Court's Order disposes of the last remaining trial court challenges to the Jury Verdict. The Court already denied the Debtor Sean Dunne's similar post-trial motions in July 2021 on similar grounds. In addition to the post-trial Order, the Court also entered an Order modifying its interim stay pending appeal of the Judgment to the Second Circuit. Under the Court's Order, Killilea was required to post an additional amount of approximately $5.6 million dollars in security, market and sell a home in Greenwich built by Dunne and Killilea worth approximately $4 million dollars, terminate the mortgages granted to Killilea's offshore insider entity that encumbered the property, and to turn over monies held in escrow

"Walking away with a win in court or in arbitration is only part of the battle. Enforcing rights and recovering the assets is equally challenging."

"Assembling a specialised team for a particular case, from our deep bench of talented professionals, is second nature to us."

in another bankruptcy case pending in Connecticut. Significantly, the Court also ordered the turnover of the proceeds of the Walford sale to the Trustee, amounting to more than $12.5 million dollars. In its Order, the Court largely adopted the Trustee's positions on imposing stay conditions, which followed extensive briefing and oral argument in autumn 2021 by Curran Antonelli. The Court previously awarded in excess of 1.4 million Euro in pre-judgment interest to the Trustee following extensive briefing and oral argument by Curran Antonelli in 2021. The Trustee now has full security for his Judgment pending appeal. The Court's recent Orders represent a resounding victory by Curran Antonelli for its client, Trustee Coan, in a highly complex cross-border avoidance action initiated in 2015 in which Curran Antonelli has doggedly pursued the Debtor and Killilea for the benefit of the Estate. Curran Antonelli will represent the Trustee as appellate counsel in the Second Circuit Court of Appeals.

Handling Insolvency

Thomas Curran and Peter Antonelli founded the firm in 2016 as an alternative to large law firm practices, leaving behind the cumbersome pace and often times unyielding red tape of the mega-firms while still offering the same level of sophisticated legal service in the areas of litigation, bankruptcy, and debt & asset recovery.

With 50 years combined experience in insolvency matters themselves, they have added talented attorneys with diverse backgrounds in bankruptcy and creditors' rights, employment, real estate, litigation and corporate governance. The firm now has seven offices, including the newest in Austin, Texas.

Curran Antonelli is preeminent in all bankruptcy, insolvency and asset recovery matters, including cross border insolvency. "We represent all matters of claimants as well as defendants. There's no type of insolvency or asset recovery matter we haven't already handled," says Curran. As a boutique firm, Curran Antonelli can move quickly without the necessary delays larger firms encounter. "We work with our outstanding team located throughout the country and our IR Global colleagues in the UK and across the globe, to deliver the timely and effective results demanded by our clients" says Curran.

"Assembling a specialised team for a particular case, from our deep bench of talented professionals, is second nature to us."

Curran Antonelli is an indispensable resource for corporate, multi-jurisdictional organizations, entrepreneurs, investment partnerships, private equity funds, and venture capital. "The years we've spent arguing before judges and arbitrators, and doggedly chasing down assets, have given us the insights to help clients successfully navigate bankruptcy and high stakes litigation with an eye towards successful asset recovery," adds Curran. "When we can engage with clients early, we have the best chance of a successful outcome."

Thomas Curran has developed his practice over the past four decades, focusing primarily on bankruptcy and insolvency proceedings and debt & asset recovery. He assists clients in navigating in asset recovery, assignments for the benefit of creditors, foreclosures, repossessions, and the sale of distressed assets and businesses.

He has extensive experience in all facets of cross-border insolvency litigation and cross-border debt & asset recovery strategies in an insolvency scenario, with particular emphasis on United States/Western Europe jurisdictions.

He has cultivated extensive knowledge and skill in commercial and complex business litigation including asset location & recovery, veil piercings, corporate officer and director liability, successor liability, fraudulent conveyance and transfer litigation and constructive trust litigation. He also has significant experience representing financial institutions in workouts and foreclosures of all types of assets including aircraft and related international equipment and has repossessed aircraft and vessels in various states throughout the United States.

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CURRAN ANTONELLI

With offices in Austin, Boston, Fort Lauderdale, London, New York, Stamford and Tampa, Curran Antonelli represents a wide variety of clientele in litigation and transactional matters throughout the United States and Western Europe. We have navigated a broad range of commercial litigation cases, including debt and asset recovery, cross-border insolvency, institutional creditors' rights, and 'bet the company' litigation, and have earned a winning track record throughout the United States.

Our group has a unique speciality in counselling on financing, buying and selling, and investing in distressed assets. We assist domestic and foreign firms with these complex transactions from a debt and asset recovery perspective.

With our innovative and aggressive approach to complex litigation and asset recovery challenges, we consistently and effectively deliver unparalleled value to our clients. Our reputation for reliable counsel and consistent results is what continually drives clients back to Curran Antonelli for all their litigation, business, and corporate legal needs.

CONSTRUCTION LAW | US – PENNSYLVANIA

Robert J. Cosgrove
Partner, Wade Clark Mulcahy LLP

Be careful what you wish for: why arbitration clauses aren't always the answer for construction contracts.

Careful the wish you make
Wishes are children
Careful the path they take
Wishes come true
Not free

So ends the finale of Stephen Sondheim's musical Into the Woods in the song Children Will Listen. And how true it is when thinking of arbitration clauses. Many a developer or contractor has been told that inserting a binding arbitration clause into a US contract is the easiest way to minimise costs and increase efficiencies. But even if true (and we have our doubts when you consider you have to pay the very expensive arbitrators) these potential benefits come with a cost, and that cost is the lack of checks and balances or any real limits on what the arbitrator can do. This brief essay will explore how arbitration clauses work in the US and what perils we perceive.

Standard American Arbitration Association language for arbitration clauses in construction cases:

- Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association under its Construction Industry Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

Once you have this language and an arbitration is commenced in the event of a dispute (which begins with pleadings – just like in a lawsuit) you are assigned to a track. AAA arbitration rules have four tracks: The Regular Track Procedures, the Procedures for the Resolution of Disputes through Document Submission, the Fast Track Procedures, and the Procedures for Large, Complex Construction Disputes. For brevity, we note that Construction Arbitration Rules (which apply if the disclosed claim or counterclaim of any party is at least $1,000,000 exclusive of claimed interest, attorneys' fees, arbitration fees and costs) require (1) a highly qualified, trained panel of arbitrators, compensated at their customary rate; (2) a mandatory preliminary hearing with the arbitrators; (3) broad arbitrator authority to order and control discovery, including depositions; (4) the presumption that hearings will proceed on a conservative or block basis, and; (5) a reasoned award unless the parties agreed otherwise.

So, you might say – all of this sounds well and good. It's fast, it has rules, what more could you want? Well, the problem is that if you get a bad arbitrator who, for example (and this is purely hypothetical and not based upon personal experience), writes an opinion that directly copies 64% of the claimant's post-arbitration brief, refuses to allow you to engage in certain types of discovery, grants relief that wasn't sought or holds that the defendant in an arbitration has the burden of proof in showing that it didn't

"In NY, the courts construe the grounds to set aside an arbitration result very narrowly."

"Make sure you understand just what you're giving up by agreeing to arbitration."

do anything wrong (which is not how burdens of proof work in the US), what can you do about it? The answer is hardly anything.

In NY, the courts construe the grounds to set aside an arbitration result very narrowly. The circumstances in which they allow for an arbitration result to be challenged are consistent with the standards of the Federal Arbitration Act. The narrowly tailored grounds are the following: (1) the award was procured by corruption, fraud, or undue means; (2) there was evidence of partiality or corruption by the arbitrators; (3) the arbitrators were guilty of misconduct in refusing to hear evidence pertinent and material to the controversy or of any other misbehaviour by which the rights of any party have been prejudiced; and (4) the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

The Supreme Court of New Jersey has offered grounds for vacating an arbitration award when there is the following: (1) fraud or undue means by either party to the arbitration; (2) bias and partiality by the arbitrator; (3) where the arbitrator refuses to postpone a hearing, upon good cause shown or refuses to hear material and relevant evidence to the controversy, or of any other behaviour prejudicial to the rights of any party; and (4) where the arbitrator(s) exceeds his/her power. Under the New Jersey Arbitration Act, a court will not overturn an arbitrator's decision for mistakes of law or fact, as long as the arbitrator and his or her decision were not corrupt in any way and the arbitrator did not exceed his or her power.

In PA, a party may appeal an arbitration award within 30 days of the decision. Under Rules 1308 and 1309 of the Pennsylvania Rules of Civil Procedure, in order to appeal the decision, the party must file a notice of appeal and payment of the fee prescribed by the local rules within 30 days from the entry of the award and an appeal by one party is deemed an appeal by all parties as to all issues.

What does all of this mean for you and your client? Make sure you understand just what you're giving up by agreeing to arbitration. While US litigation can be messy – and not every US jurist is a legal scholar:

- it's "free" (after you pay the filing fees and any motion fees)
- if you don't like a ruling, you can almost always appeal it to a higher court
- if the judge makes a bad decision, you still have a chance to convince a jury and if the jury makes a bad decision there are still post-trial motions and appeals. In other words, the US legal system has checks and balances built into it and unless required by contract the loser never pays.

So, just be careful in your wishes or you'll end up in another Sondheim song – Agony – singing:
Agony, beyond power of speech
When the one thing you want
Is the only thing out of your reach

Robert J Cosgrove is a former prosecutor, courtroom-tested trial lawyer and appellate advocate, who has handled cases in state and federal venues across the United States as well as in the International Court of Commerce. A Thompson Reuter Super Lawyer, https://www.superlawyers.com/about/selection_process_detail.html, Bob is a frequent speaker and his writing has appeared in various books and journals.

Bob is a member of the Multi-Million Dollar Advocates Forum, an association of trial lawyers who have obtained multimillion-dollar verdicts and settlements and has been elected a Fellow of the American Bar Foundation, a research organisation dedicated to the study of law, legal institutions and legal processes.

In addition to his work for clients, Bob sits as a judge pro tempore, handling settlement conferences in Philadelphia.

Bob is a graduate of Georgetown University's School of Foreign Service and Fordham University School of Law, where he met his wife with whom he has four children.

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Far value: how to accurately evaluate contingent consideration.

Contingent consideration, mostly in the form of earnouts, is a mechanism in which a valuation gap can be bridged emanating from the buyers' and sellers' different views of the deal price.

Contingent consideration puts the onus on the sellers to stay invested in the business and ensure performance parameters are met. It can also work as a retention and motivational tool for the seller's top management to continue operating the business for the common interest of buyers and sellers.

In the US, accounting pronouncements require private as well as public companies to measure and report contingent consideration at fair value. This article discusses certain nuances that would be of importance to the buyer in the post M&A financial statements issued by them. While this article refers to US GAAP codifications the concepts discussed would be relevant even for IFRS or IND AS issued financial statements.

Introduction to contingent consideration

ASC 805: Business Combinations ("ASC 805"), Para 30-25-5 requires consideration transferred in a business combination to be measured at fair value, which is to be calculated as: the sum of the acquisition-date fair values of assets transferred by the acquirer; the liabilities incurred by the acquirer to former owners of the acquiree, and; the equity interests issued by the acquirer. Contingent consideration is one of the forms of consideration as described in ASC 805. Such consideration is to be recorded at the acquisition-date fair value as a part of the total consideration transferred.

Contingent consideration, also referred to as earn-out payment, is an obligation of the acquiring entity to transfer additional assets or equity interests to the former owners of a target company. The consideration will only be paid if specified future events occur or conditions are met.

As discussed above, contingent considerations are typically employed in transactions to bridge the valuation gap between buyers' and sellers' differences of opinion regarding the target company's future economic prospects. It helps to get the buyer and seller on the same page when it comes to the valuation of the target company.

Let's examine the basic concept by way of an example: Company A intends to acquire company B. Company B has just introduced a new product line that is expected to generate significant sales. Company B's owners have projected a significant amount of sales from the proposed product line and are considering the same to influence the deal size. The buyer, on the other hand, believes that there is a risk of uncertainty in the achievement of targets contemplated by the acquiree and hence there is a disagreement in the deal valuation. By incorporating a contingent consideration clause in the purchase agreement, the seller accepts part of the business risk along with the buyer, and also participates in any upside post-transaction.

Contingent consideration may be contingent on different events, for example on the launch of a product, on receiving regulatory approval, or reaching a revenue or income milestone. The achievement of such events often spans over more than a year. Thus, it is necessary to understand the post-acquisition treatment of such contingent consideration.

Classification and measurement of contingent consideration

- **Liability v/s equity classification**

The obligation to pay contingent consideration is classified as a liability or in shareholders' equity in accordance with ASC 480: Distinguishing Liabilities from Equity, ASC 815: Derivatives and Hedging, or other applicable U.S. GAAP. The classification of such consideration is essentially driven by the mode of settlement of such consideration. Consideration settled in cash is always classified as a liability. In a scenario where the consideration is to be settled by issue of certain instruments of the buyer, we need to determine whether the number of instruments to be issued are fixed and determined at the acquisition date. In a scenario where the number of instruments is fixed, then such consideration is classified as equity and where the number of instruments to be issued is not fixed, then such consideration is to be recognised as a liability. For example, a fixed monetary amount to be settled in a variable number of shares, would be classified as a liability.

Contingent consideration classified as a liability is required to be remeasured at its fair value at each reporting period. For example, a consideration depending on revenue achieved over the next three years from acquisition, will need to be fair valued at the end of each year/quarter. Whereas a consideration classified as equity is not required to be fair valued post initial recognition, since the consideration has already been determined and locked as at the acquisition date.

Valuation of contingent consideration/ earnouts

The methods to be followed and the approach will be driven by the way the payment of such contingent consideration or earnouts is structured. The payouts are structured based on a single or more than one metric. Most commonly, contingent consideration is paid on the achievement of certain revenue or profit targets. Additionally, such payments may be spread over more than just one year. The payouts can either be linear or nonlinear payouts.

- **Linear payouts**

Payouts that are dependent on a single metric and are expressed in terms of a fixed percentage or product of financial or some non-financial parameters are referred to as linear payouts. Consideration varying based on different levels of revenue or other parameters is a non-linear pay-out. For example: Target will receive a payment at some future date as follows:

- If EBIT < $1 million, the payoff is zero
- If EBIT ≥ $1 million, the payoff is a 10x multiple of EBIT

The valuation methods will be driven by the structure of the contingent consideration payouts. There are two broad valuation approaches used to value a contingent consideration.

- Probably weighted expected return method, more commonly referred to as "PWERM" or Scenario Based Method (SBM); and
- Option pricing method also referred to as the "OPM"

- **Probably weighted expected return method**

The PWERM assesses the distribution of the underlying metric based on estimates of forecasts, scenarios, and probabilities. The payout computed is then discounted to the present value using a discount rate corresponding to the risk inherent in the inputs considered while computing the compensation. The steps followed are:

- Estimate scenarios of outcomes and associated probabilities
- Compute the expected payoffs using the scenario probabilities
- Discount expected payoffs to present value using risk-adjusted discount rates.

> "Contingent consideration may be contingent on different events, for example the launch of a product, receiving regulatory approval, or reaching a revenue milestone."

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Rajesh is member of the American Society of Appraisers, American Institute of Certified Public Accountants and the Institute of Chartered Accountants of India.

Service area expertise include: valuations for financial reporting (PPA's, Impairment testing, valuation for share based payments, intangible valuations); valuing complex securities; 409A valuation; economic valuations for transfer pricing; cross border mergers and acquisition and due diligence; valuation for litigation support and dispute settlement, and; valuations for SBA loans.

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KNAV is an Atlanta, US based firm offering a complete suite of services including Assurance, Advisory, Tax and Transaction Advisory Services. KNAV started operations in 1999 with offices in the US and has since expanded in Canada, India, Netherlands, UK, and Singapore. The firm's 300+ employees serve a diverse range of clients from our offices across the globe.

KNAV has been catering to distinct requirements of multinational organisations as they expand and establish in new geographies. With its qualified team of pioneers in assurance, advisory, tax and transaction advisory services, KNAV distinguishes itself through its client-centric focus and partner-led solutions.

With its expertise and experience, KNAV provides support at each step for organisations to meet the regulatory requirements and accounting frameworks, enabling businesses to flourish. Being a robust organisation with over two decades of international experience serving various industries viz. automotive, BFSI, entertainment & media, manufacturing, pharma & healthcare, retail, technology, telecommunication, etc., KNAV still retains its customised and partner-led solutions.

How to understand the magnitude of property taxes in New York State.

There are two types of taxes imposed by New York State, as well as by certain counties and municipalities, that directly affect transactions for both residential and commercial real property. The "real property transfer tax" is a tax on conveyances of real property and on the transfer of controlling interests in entities that own real property. The "mortgage recording tax" is imposed upon a mortgage or similar security instrument is recorded. It is important to understand and determine the magnitude of transfer and mortgage recording taxes well before closing because they; (1) generally comprise a significant transaction cost; (2) vary depending on the type and location of the real property and; (3) must be paid concurrently with the mortgage, deed or other conveyance and payment is a condition to acceptance for recording.

Real Property Transfer Tax

Real property transfer taxes are payable in transactions where an interest in real property is conveyed, including in connection with a sale, exchange, assignment, surrender, option, or foreclosure. Additionally, real property transfer taxes are payable upon the transfer of a controlling interest (50% or more) in an entity that has an interest in real property. The aggregation rule applies to any related transfers within a three year period, meaning that multiple transfers may be aggregated and qualify as a transfer of a controlling interest if the transactions are found to be related or done for the sole purpose of evading the tax.

New York State imposes a tax on transfers of interests in commercial and residential real property located within the State with a purchase price that exceeds $500. The tax is charged at a base-level rate of 0.4%. If the real property is in New York City (or any city with a population of one million or more) the state charges an additional 1.25% for: (1) residential property with a purchase price of $3 million or more; and (2) other types of property (commercial, typically) with a purchase price of $2 million or more. This tax is generally paid by the seller of such real property. In addition, the State charges a second transfer tax, often referred to as the "mansion tax," on any transfer of an interest in residential real property with a purchase price of $1 million or more. The mansion tax is charged at a rate of 1% of the total purchase price. If the residential property is in New York City (or any city with a population of one million or more) and the purchase price is $2 million or more, there is a supplemental mansion tax ranging from 0.25% to 2.90%. The buyer is primarily responsible for payment of the mansion tax.

New York City imposes a tax for transfers of real property where the property is located within the City and the consideration exceeds $25,000. The rate at which the tax is charged is dependent on the amount of consideration and type of property being conveyed. If the property is residential, the tax is charged at a rate of (1) 1% when the purchase price is $500,000 or less; and (2) 1.425% when the purchase price is greater than $500,000. For all other types of property, the tax is charged at a rate of (1) 1.425% when the purchase price is $500,000 or less; and (2) 2.625% when the consideration is more than $500,000.

"It is important to understand and determine the magnitude of transfer and mortgage recording taxes well before closing."

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Founded in 1975, Rosenberg & Estis, P.C. is widely recognised as one of New York City's pre-eminent real estate law firms. R&E provides full-service representation and advice in every aspect of real estate, from performing due diligence and evaluating financing, to handling joint ventures, acquisitions and leasing, construction and design team agreements, property tax exemptions and abatements, land use and zoning matters, Real Property Income & Expense (RPIE) filings, co-op and condo offering plan filings, distressed situations and bankruptcies, trust and estate planning, as well as the litigations and negotiations which sometimes ensue when deal-making. R&E's wealth of experience in New York real estate makes it the ideal thought partner for owners, developers, not-for-profit corporations, educational institutions, sponsors, equity investors and lenders in both real estate transactions and in all court venues.

Municipalities outside of New York City may also impose their own real property transfer tax and are typically subject to a different transfer tax rate, as the New York State has authorised local towns and counties to adopt their own transfer tax laws.

Mortgage Recording Tax.

Mortgage recording taxes are imposed in connection with the recording of a mortgage. Other instruments that secure a debt (like an assignment of rents) are also subject to the tax, but not if filed in connection with a mortgage that secures the same debt. The mortgage recording tax is typically paid by the borrower, except that in residential home mortgages, the lender is required to pay a portion of the tax.

New York State assesses the following three taxes when a mortgage is to be recorded: (1) a "basic tax" equal to $0.50 for each $100; (2) a "special additional tax" equal to $0.25 for each $100; and (3) an "additional tax" equal to $0.30 for each $100 if the property is located within the Metropolitan Commuter Transportation District ("MCTD"). The additional tax is earmarked specifically for the funding of regional transportation districts and is imposed at a higher rate if the property is located within the MCTD. The MCTD includes the following counties: New York City, Dutchess, Nassau, Orange, Putnam, Rockland, Suffolk and Westchester. It is important to consider the location of the property because some counties located outside of the MCTD have the option to suspend, and have suspended, the additional tax.

Under New York Tax Law, cities in New York State with a population of one million or more may impose their own mortgage recording tax. Currently, New York City is the only city that meets this test; however, Yonkers also charges its own mortgage recording tax of $.50 for each $100. In New York City, all mortgages on properties located within the city are subject to tax assessed at the following rates: (1) $1 for each $100 if the secured amount is less than $500,000; (2) $1.125 for each $100 if the secured amount is $500 or more if the property is a 1-3 family home or individual condominium unit; and (3) $1.75 for each $100 if the secured amount is $500,000 or more and the property is not a 1-3 family home or individual condominium unit.

Mortgage recording taxes are due only once on each debt, and so long as that debt remains outstanding and unpaid, no additional taxes are due. This has led to a protocol in New York State where mortgages in commercial transactions are typically assigned to a new lender (rather than satisfied) upon a sale or refinance in order to pay mortgage recording tax only on any additional funds being lent. A new note/mortgage is created for the additional funds and mortgage recording tax is paid on the additional funds, after which the pre-existing debt and the new debt are consolidated and restated into one aggregate debt.

Leasing a high tech office in a real estate boom: things to consider.

Technology companies are driving a new boom in commercial real estate leasing, as these businesses look to expand with new office spaces. The tech industry has been the main driving force of the commercial real estate market since the beginning of the COVID-19 pandemic, according to the JLL Technology Research Group. Tech companies who are looking to make their own commercial real estate deals should be aware of the complexities of the leasing process.

The tech industry impact on office leasing
The pandemic made working from home the norm in tech and many other industries. However, many tech companies have banked on at least a partial return to the offices. Since March of 2020, the five largest United States tech companies have expanded their office space by a total of 10.1 million square feet. According to the Mortgage Bankers Association, tech tenants accounted for 22% of all office leasing nationwide in Q4 2021, with 5.4 million square feet of office space.

The tech industry has prompted a rapid rise in commercial leasing rates, with the largest impact in secondary-growth markets (cities with populations of between one and five million). Office leasing rates remain below pre-pandemic numbers, but this demand is expected to gradually rise. These rates are already on an upward trend: in the fourth quarter of 2021, more office space was leased than left vacant for the first time since 2020.

> "The pandemic made working from home the norm in tech and many other industries."

What should tech companies prioritise when looking for an office?
Leasing an office space is a critical decision for startups and other businesses. Whether it is the first office space for a brand-new business or an upgrade for an established company looking to expand, it is vital to do extensive research and find space that meets the needs of the business. While these needs will vary, there are certain priorities that most high-tech companies should have when searching for an office to lease.

Location
Location is the cliched top priority in both commercial and residential real estate for a reason. A strong location can provide many benefits to high-tech office leasing tenants. Workplaces located in well-connected and thriving parts of the city will attract a larger pool of younger applicants, giving the company better access to the top talent that can help the business grow.

Scalability
Just about every high-tech company has goals to expand eventually. Successful tech companies often grow at a rapid pace, and those who are in the market for an office lease should prioritise finding a scalable space. Properties with sufficient space to accommodate new employees can ensure that the company remains in the space for the long term.

Bandwidth and internet quality
Strong internet connectivity is a necessity for many industries in the modern world, but none more than in the tech industry. Ideally, tenants should seek out office spaces that offer either fibre or gigabit internet connections. These higher speeds will make it easier for the company to meet its current bandwidth needs. Additionally, tech companies will have higher bandwidth needs as they expand.

> "Those who are in the market for an office lease should prioritise finding a scalable space."

Considerations for commercial real estate landlords
The tech industry has taken a much larger piece of the commercial real estate market over the past two years, and commercial real estate owners should be mindful of this change. Those who own office spaces should carefully consider what they can do to attract high-tech office leasing tenants. Tailoring office spaces to the needs of these potential tenants allows office owners to find high-quality tenants in the industry with the largest representation in the commercial real estate market.

Invest in the latest internet technology
Tech companies universally require fibre-optic cables, as a consistent connection and high speeds are paramount in this industry. Property owners who are looking to attract tech industry tenants will need to install these cables if they want to be competitive in this growing high-tech office leasing market.

Offer amenities
The modern tech industry values onsite workplace amenities. Features like gyms and exercise classes are a draw for employees who prioritise their health and can help them work at their most productive levels. Developers should consider building office spaces in central areas that are within walking distance of restaurants, cafes, and other local businesses.

Design tech-friendly floor plans
Office owners should consider the preferences of tech companies when designing their office plans. Open office spaces with a handful of private offices and a conference room are a common preference in this industry. The open space fosters collaboration between co-workers, while the offices are necessary for holding important private meetings.

An experienced business and real estate lawyer can help with high tech office leasing
Both prospective tenants and commercial office owners should consider seeking legal guidance throughout the negotiation and transaction process. Office leasing agreements are complex documents that often involve a variety of complicated terms and conditions.

While either side is free to go through the process on their own, a lawyer can be helpful in several ways:

- Protect their client's financial interests by working towards a fair deal
- Handle the entire legal process on their client's behalf, allowing the client to focus on their business
- Research to ensure the property has no major issues, such as liens
- Help the client understand how local zoning laws may be relevant
- Draft legal documents, such as lease agreements
- Provide legal guidance during commercial lease disputes

Keep these items in mind when planning to build or lease an office space in the future.

Matthew Harrison is the founding member of Harrison Law and has been practising law for over 20 years. Prior to forming Harrison Law, Mr. Harrison was an attorney with a nationally-recognised surety, construction, and fidelity law firm in Phoenix, Arizona, where his practice focused on complex civil litigation. Previously, Mr. Harrison was a Deputy County Attorney with the Maricopa County Attorney's Office for over seven years where he held leadership positions and mentored less-experienced attorneys.

Mr. Harrison has extensive experience in civil and criminal law. He also has significant trial and arbitration experience, which includes being lead counsel in over 35 jury trials. He is rated as an AV© Preeminent™ Attorney by Martindale Hubbell and is a Sustaining Member of Arizona's Finest Lawyers™. Mr. Harrison has represented clients in claims and litigation from a few thousand dollars to in excess of 100 million dollars. He is the author or co-author of several legal publications and is a frequent presenter at CLE workshops and other programs for business owners.

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HARRISON LAW PLLC

From start-up companies to multi-billion dollar organisations, along with individuals who were searching for high-quality and cost-effective representation, Harrison Law delivers what was not being provided at your classic large metropolitan law firm. To cater to our clients, Harrison Law, PLLC was founded with the goal of providing high-quality representation for the variety of legal areas that a typical corporation, its owners, and employees would encounter. The firm is based in the Phoenix Metropolitan area and represents clients in Arizona, Utah, and throughout the southwestern United States.

Harrison Law understands how businesses work and of the significant issues at stake when problems arise. Harrison Law has a highly favourable reputation for its discreet representation of high-profile business and individual clients whose legal issues may involve the media.

Understanding the law and enforceability of noncompetition covenants in Washington.

Effective since January 1st, 2020, Washington's statutory law governing noncompetition covenants (Chapter 49.62 RCW) has changed the legal landscape for employers, employees, and independent contractors in the state. This article highlights the key statutory provisions and also briefly discusses the second component of the analysis: how courts determine whether enforcing the noncompete covenant is reasonable.

Agreements affected.
The noncompetition covenant law broadly applies to all noncompete agreements between an employer and its Washington employees and independent contractors. RCW 49.62.010. Expressly excluded, however, are confidentiality agreements and nonsolicitation agreements — agreements that are closely related to and sometimes included within agreements not to compete. *Tori Belle Cosmetics LLC v. Meek*, No. C21-0066RSL, 2022 U.S. Dist. LEXIS 39677, *8 (W.D. Wash. Mar. 7, 2022) (nonsolicitation agreements enforceable as to both employees and independent contractors given statutory carveout and relevant definitions).[1]

> "If an employer seeks to bind an existing employee to a new noncompetition covenant, the employer must provide independent consideration for that agreement."

Noncompetition covenants are enforceable only against higher-earning employees and independent contractors.
Noncompetition covenants are enforceable only against Washington employees and independent contractors whose annualized earnings exceed certain thresholds, adjusted annually for inflation. RCW 49.62.020(1)(b); -030(1). For 2022, those earnings thresholds are $107,301.04 for employees and $268,252.59 for independent contractors. *See* https://lni.wa.gov/workers-rights/workplace-policies/Non-Compete-Agreements.

Noncompetition covenants for new employees must be timely disclosed, and those for existing employees must be supported by new consideration.
For new hires, any noncompetition covenant must be disclosed to the prospective employee in writing at or before the time the employee accepts an offer of employment. RCW 49.62.020(1)(a). If a noncompetition covenant becomes enforceable only at a later date due to changes in the new employee's compensation (*e.g.*, when his or her earnings pass the threshold discussed above), the employer must disclose that the covenant may be enforceable against the employee in the future. *Id.* If an employer seeks to bind an existing employee to a new noncompetition covenant, the employer must provide independent consideration for that agreement, such as a raise or a promotion. *Id.*

Special rule for layoffs.
A noncompetition covenant is enforceable against an employee who is laid off only if it provides for post-employment compensation at the employee's base salary at the time of termination for the period of enforcement, minus compensation the employee earns through subsequent employment during that period. RCW 49.62.020(1)(c). There is no such statutory requirement for employees who voluntarily quit or retire, or are fired for cause.

Noncompetition covenants are presumptively limited to 18 months.
The statute provides that any noncompetition covenant with a duration exceeding 18 months after termination of employment is presumptively unreasonable and unenforceable. RCW 49.46.020(2). An employer may rebut the presumption by proving by clear and convincing evidence that a longer duration is necessary to protect the employer's business or goodwill. *Id. Prime Grp., Inc. v. Dixon*, No. 2:21-cv-00016-RAJ, 2021 U.S. Dist. LEXIS 81551, *11-12 (W.D. Wash. Apr. 28, 2021) (in the absence of clear and convincing evidence supporting the 36-month restriction, plaintiff failed to rebut the presumption of unreasonableness).[2]

Parties may not contract around the law.
The statute declares as void and unenforceable any provision in a noncompetition covenant that requires a Washington-based employee or independent contractor to litigate the covenant outside the state or deprives them of the protections or benefits of the statute (*e.g.*, non-Washington forum-selection or choice-of-law clauses). RCW 49.62.050.

Enforcement and remedies for noncompliance.
The Washington State Attorney General or any "person aggrieved by" a noncompetition covenant that allegedly runs afoul of the statute may bring an action and, if the covenant is in violation, the "violator" (*i.e.*, the employer) must pay either actual damages or $5,000, whichever is greater, plus reasonable attorneys' fees, expenses, and costs. RCW 49.62.080. The remedy is the same if a court or arbitrator "reforms, rewrites, modifies, or only partially enforces any noncompetition covenant." *Id.*

Retroactive application.
The noncompetition covenant law regulates both covenants entered into after the law's 2020 effective date and those entered into before, if the proceeding concerning such pre-2020 covenant was commenced after the law's effective date. RCW 49.62.100. So, an employer may not today seek to enforce a pre-2020 noncompetition agreement that violates the current law.

However, a person "aggrieved by" a noncompetition covenant signed before 2020 may not bring an action regarding that covenant if it is not being enforced. RCW 49.62.080(4); *Sowa v. Ring & Pinion Serv., No. 2:21-cv-00459-RAJ-BAT*, 2021 U.S. Dist. LEXIS 249678, *8-11 (W.D. Wash. Sept. 9, 2021) (employer's alleged intent or threat to enforce pre-2020 noncompetition covenant that violated statute did not give rise to cause of action where covenant not actually being enforced).

The reasonableness analysis still applies.
Even if the statutory requirements are satisfied, the court must consider whether enforcing the noncompete is reasonable. *A Place for Mom v. Perkins*, 475 F. Supp. 3d 1217, 1227 (W.D. Wash. July 31, 2020). To determine reasonableness, the court considers: (1) whether the restraint is necessary to protect the employer's business or goodwill; (2) whether it imposes upon the employee any greater restraint than is reasonably necessary to secure the employer's business or goodwill; and (3) whether it violates public policy. *Emerick v. Cardiac Study Ctr., Inc., P.S.*, 189 Wn. App. 711, 721-22 (2015).

[1] *But see* RCW 49.62.060 regarding special restrictions on franchisor nonsolicitation agreements.
[2] A special rule applies to independent contractors who are either performers or schedulers for performers: a performance space may enforce a noncompetition covenant against them only if it does not exceed three calendar days. RCW 46.62.030(2).

Brandi Balanda has wide-ranging experience successfully litigating large, complex cases, from defending a senior executive against the largest trade secret claim asserted in Washington to prosecuting fraud, contract, and fiduciary duty claims related to the financing of major real estate development projects. She is a passionate advocate, driven to achieve outstanding results for her clients through creative problem solving and collaboration. Brandi has resolved disputes in many different forums, including federal and state trial and appellate courts, administrative agencies, and in arbitration.

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Michele Stephen has extensive complex commercial litigation experience representing corporate and entrepreneurial clients in state and federal courts in disputes involving commercial and partnership contracts, employment issues, business torts, intellectual property, and other complex matters. Michele earns client loyalty through informed, tenacious representation, balanced and driven by business needs. Her strategic and cohesive approach leads to successful results for her clients, whether achieved at trial or settlement.

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Will climate change reignite California as the premier real estate market for global investment?

US real estate markets, particularly California, reportedly cooled in the post-pandemic years. With relatively cool summer temperatures in San Diego, Los Angeles, San Francisco, and the rest of coastal California compared to the 2022 record high temperatures across Europe and Asia, will Global Warming (renamed "Climate Change" during the Bush presidency) reignite California as the premier real estate market for global investment? We believe the answer is a resounding yes. Global climate change models show coastal California as being one of the least impacted regions on the planet.

Land and building costs on a per square meter basis (or sq. ft. for the U.S.) in California are still lower than can be found in much of Europe, Japan, Canada, and other regions. As temperatures on average continue to rise across much of Africa, Southern Europe, the Middle East, and Mid and Southeast Asia, migration by necessity will move north and west. The instability in what was the former Soviet Bloc will continue to drive that migration into middle and northern Europe. Whether one is looking for a stable investment market or a comfortable residence, at least for the expanding summer months, coastal California will pop up on every international investor's radar. As this summer demonstrated, moving to Europe might just be jumping from the fire onto the grill.

So, what does it take for a non-U.S. investor to buy and own real estate in California? The answer is a carefully planned investment structure. A non-U.S. individual investing in U.S. real estate would generally be subject to negative tax consequences, including withholding tax on rental income and distributions made outside the U.S., additional withholding tax on sale of the property, U.S. income tax on rents, and U.S. inheritance tax upon transfer of the property after death. However, if the investment is structured properly, investors can avoid withholding and inheritance taxes and minimise the income tax that would otherwise apply.

The most common non-U.S. investor structure is what is known as a "blocker" structure, which has become increasingly popular in part as a result of tax reforms in the U.S., which reduced the corporate tax rate from 35% to 21%.

This structure involves creating a U.S. corporation (the "Blocker Corp") to hold the property. It is referred to as the "Blocker Corp" because it is used to block withholding and inheritance tax. The Blocker Corp typically has two classes of stock: voting stock owned by a friendly, but not "related" person, and non-voting stock owned by a non-U.S. entity. The non-U.S. entity is owned by the foreign investor(s). Stock of the non-U.S. entity that owns the Blocker Corp will not be treated as U.S. property for purposes of U.S. inheritance tax. Therefore, if this structure is used, death of the foreign investor will not trigger U.S. inheritance tax.

While the Blocker Corp pays taxes on its income, including rents received and gains from sale of property, once the Blocker Corp has liquidated its investments in U.S. real property, the disposition of stock after the property is sold is not treated as a sale of real property, but is instead treated as a sale of an investment security. It is, therefore, not subject to capital gains tax, unless modified by treaty between the U.S. and the investor's country of residence.

"If the investment is structured properly, investors can avoid withholding and inheritance taxes and minimise the income tax."

In addition, by funding the Blocker Corp. with equity and a debt instrument, interest paid on the debt instrument can be deductible to the Blocker Corp against its rental income and exempt from U.S. income tax or withholding tax to the non-U.S. investor receiving the interest payments, unless such tax is imposed by treaty.

International investors may also consider investing in U.S. real estate through a domestically-controlled Real Estate Investment Trust (REIT). A REIT is an entity otherwise taxable as a U.S. corporation that elects REIT status and is permitted a tax deduction for dividends paid to its shareholders. A REIT is "domestically controlled" if more than 50% of the stock is owned by U.S. persons. A major advantage to investing through a domestically-controlled REIT is that the investor can sell the stock in the REIT without incurring federal income tax under the Foreign Investment in Real Property Tax Act. In addition, because the REIT is eligible for a deduction for dividends paid, it will generally have little or no U.S. federal income tax liability. However, REITS are designed for passive investors and thus provide investors with significantly less control over their investments.

Either structure discussed above can be used to mitigate the tax consequences of non-U.S. investors investing in U.S. real estate. California in particular is a desirable real estate market for both U.S. and non-U.S. investors, given its comparably mild temperatures, strong job market, and high rental demand. California is also an appealing location for real estate investment due to Proposition 13, an amendment to the California Constitution, which limits the property tax rate to one percent of the assessed value of the real property. Proposition 13 also provides that a property's assessed value can rise by no more than two percent per year unless a change in ownership or new construction occurs. All of these factors certainly position California as a premier real estate market for global investment.

"California in particular is a desirable real estate market for both U.S. and non - U.S. investors."

Robert Blanchard and Jordan Ondatje have more than forty-five years of combined experience representing real estate investment groups, individual real estate investors (U.S. and Non-U.S.), commercial lenders, developers, landlords and tenants. Recent transactions include purchases, sales, exchanges and financings for hotels, shopping centres, industrial, retail, NNN single tenant and warehouse/logistics properties. Leasing representations include a multi-floor corporate headquarters for a public pharmaceutical company, U.S. retail store locations for a European clothing line and ground leases for hotel and industrial properties under development. Jordan and Bob, together with the other real estate team members, work closely together to provide clients the immediate attention today's real estate professional demands of their advisors.

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Founded in 1992, Blanchard, Krasner & French offers high-quality legal services from offices in La Jolla, California and Reno, Nevada. We serve a diverse base of clients ranging from large financial institutions to local and regional enterprises and individuals. Our attorneys have broad domestic and international legal experience in the following practice areas:

- Real Estate
- Trust, Tax, and Estate Planning
- Corporate and Securities
- Financial Institutions
- Appellate Practice
- Civil Litigation
- Intellectual Property
- Labour and Employment
- Family Law

Attorneys at Blanchard, Krasner & French strive to maintain "small firm" accessibility, service, and attention to our clients. We offer more than just technical legal expertise; we take a creative, intelligent, and pragmatic approach to getting transactions closed and disputes resolved.

Chris M. Goodrich
Partner, Crady, Jewett, McCulley & Houren LLP

David Rae
Partner, Crady, Jewett, McCulley & Houren LLP

Gone to Texas: why Texas is the right choice for international companies.

For over 200 years, Texas has been the destination for pioneers and entrepreneurs. Amid the panic of the first US financial crisis in 1819 and the early 1820s, indebted Americans abandoned their homes in pursuit of new beginnings on the Texas frontier. The only thing these hopeful Americans left behind was a simple message carved into their doors or fences, "GTT" or "Gone to Texas."

"Gone To Texas" is now the slogan for thousands of companies – both big and small – who have relocated their headquarters to Texas. With the relocation of Caterpillar Inc. from Deerfield, Illinois to Irving, Texas in June 2022, Texas is now the top state in the nation for Fortune 500 headquarters, surpassing California and New York. Caterpillar follows other notable corporate moves to Texas, including Tesla, Hewlett Packard Enterprise, Oracle, Charles Schwab and CBRE. In addition, Texas has been attracting many innovative companies from the West and East Coast who now call Austin, Houston and Dallas home. In fact, Texas is ranked number One in the United States for company relocations from other US states.

This business migration is not only due to Texas' world-famous BBQ and Tex-Mex cuisine – Texas also offers the best business ecosystem in the United States and is frequently considered the best state in which to start a business. Texas' leading business climate and favourable regulatory and tax environment provide a strong framework for businesses and entrepreneurs to grow, succeed and thrive. The low cost of living, combined with a highly educated and motivated work force, readily available capital and a continued migration of new residents into the State, only add to the favourable business environment in Texas. The Texas "can do" spirit is pervasive both in the individual work force as well as the local and state government.

While nothing is certain except death and taxes, Texas is as tax friendly of a state as you will find in the United States. Texas is one of the few states without a state, corporate, or personal income tax. Instead, businesses are generally subject to a low franchise tax, which only applies to businesses with annual Texas revenue in excess of $1,230,000, subject to annual inflation adjustments. This benefits small businesses and companies in the early years of growing their business in Texas who can avoid additional tax costs. The franchise tax regime is also generous towards mid-size and larger businesses. A business entity with less than $20 million in annual Texas revenue generally pays 0.331% in franchise taxes. A retail or wholesale entity that exceeds $20 million in annual Texas revenue generally pays about 0.375% in franchise taxes. Entities other than retail or wholesale that exceed $20 million in annual Texas revenue are taxed at 0.75%. This compares extremely favourably with almost every other state in the United States.

Texas also has easy-to-navigate business laws which allow businesses to stay in compliance without expensive third-party assistance. Forming an entity in Texas is a simple and straightforward process, and can be accomplished relatively quickly and without paying unreasonable fees. Only a limited amount of information must be disclosed by a business entity formed in Texas. The governing persons, typically managers or directors, are listed in the Certificate of Formation and on an annual Public Information Report, but generally no other personal information is required to be disclosed. If an out-of-state entity plans to operate its business in Texas, it will need to register with the State of Texas and provide some additional disclosures in excess of the requirements for an in-state entity.

The Texas business statutes are largely patterned from (and improve upon) Delaware statutory law and case law, but without the focus on public companies which you see in Delaware. In Texas, the freedom of contract reigns supreme, and courts and judges are in most instances willing to defer to businesses' written documents rather than applying theoretical legal rules. This adds to the "what-you-see is what-you-get" business environment, reducing risk and uncertainty for Texas businesses.

For many clients – both foreign and domestic – Texas is a gateway to global trade and a leading location for foreign direct investment. Texas is one of the most diverse states in the US, with Houston ranked as the most ethnically diverse metropolitan area in the United States. The state's diverse population, strategic geographical location and robust infrastructure offer companies easy access to worldwide customers. In fact, the Port of Houston ranks first in the United States with respect to foreign waterborne tonnage.

While the motive for relocating to Texas may have changed since the 1800's, the Texan spirit of openness, opportunity and freedom remains. Combined with a relatively simple regulatory environment and low taxes, it is easy to see why so many businesses, old and new, are moving to the Lone Star State.

"While nothing is certain except death and taxes, Texas is as tax friendly of a state as you will find in the United States."

Chris earned his reputation for a responsive, efficient and innovative approach that clients want in their corner.

While conducting a broad-based transactional, tax and estate planning practice, Chris has some notable achievements, e.g., a successful negotiation of a minority shareholder's swap of stock issued by Berkshire Hathaway, identification of the primary issue in a will contest involving the heiress to the Mutual of Omaha, successfully lobbying U.S. Congress for a federal tax law change curing late-filed defective 2032A elections, and testifying before the U.S. Treasury and IRS National Office regarding proposed regulations for qualified opportunity zones.

Whether preparing transaction documents or communicating complex tax considerations, Chris possesses a knack for clear and concise communication with any audience. Chris's pragmatic, analytic, and down-to-earth nature ensures successful client relationships. Clients appreciate his efforts to help them solve current as well as avoiding future problems.

After receiving his Bachelor's degree, Chris earn his Juris Doctorate from the University of Nebraska, and then his LL.M. in Taxation from Washington University in St. Louis. Chris has held many leadership positions with the State Bar of Texas Tax Section and the Houston Bar Association.

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David B. Rae Over the last 30 years, David has assisted countless clients buying and selling businesses and serving as a de facto in-house counsel to many companies. In addition, the dollar amount of his innumerable closed real estate transactions is in the hundreds of millions. Having grown up in Mexico City, David enjoys representing a broad range of international clients.

Clients appreciate David's ability to give practical legal advice specifically tailored to their unique needs. Because of his commitment to excellence and high regard for integrity, David is AV Rated by Martindale-Hubbell. This prestigious award is peer-reviewed and selected based on a strict criterion, which includes the highest ethical standards.

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CJMH Crady Jewett McCulley & Houren LLP

Since the firm's inception in the early 1900s, Crady Jewett McCulley & Houren LLP has provided comprehensive legal counsel to businesses and individuals throughout Texas. With more than 100 years in practice, CJMH has experience in almost all legal issues that may face your business.

CJMH's team of attorneys offers a full range of legal expertise to protect and grow your business, including specialties within business formations, M&A, corporate transactions, taxation, succession, litigation, dispute resolution, and more.

Our longstanding Houston roots have built a vast network of specialists that we can rely on for even the most specific legal needs – elevating our ability to serve our clients effectively and maximise their results. We use a solution-focused approach and personal attention to give clients the legal counsel they need so they can turn their efforts to other business needs.

Intellectual assets: successfully transacting IP as part of the M&A process.

Value generation is one of the primary incentives motivating mergers and acquisitions. This objective is achieved by creating synergies, gaining competitive advantages, increasing market share, stimulating growth and influencing supply chains. Intellectual property (IP) promotes these goals. IP assets must be identified, negotiated, integrated and leveraged to effectively achieve the goal of value generation through M&A.

Identification

Identification of IP assets is a foundational aspect of the transaction. Virtually every organisation uses IP in its daily operations, across all functions, and these assets now are essential in organisations of any type. Therefore, it is essential to identify the IP assets that support the organisation's business and understand how they are owned and used.

IP includes patents, trademarks and copyrights that are publicly discoverable. The target should disclose lists of IP assets, independently confirmed by the acquirer through public and subscription sources. The scope of IP and the forms it takes are varied, including non-public and/or unregistered assets. Non-published IP assets can be just as important as issued patents, registered copyrights and registered trademarks.

The acquirer must investigate liability issues attendant to the IP. Due diligence is critical to locating the IP, understanding who owns it and uses it, assessing value as part of the deal valuation and the ongoing operation after closing, and informing the parties how to structure the transaction.

Structuring and Negotiating the Transaction

The parties may have an idea of the legal and organisational structure for their deal. However, only after thorough diligence can the transaction be finally designed and the deal documents structured to address the conditions revealed during due diligence.

Where joint ventures are formed, the parties must consider patentability provisions particular to the country where the JV is formed. For example, patent laws of some jurisdictions make patenting easier where the same entity owns both a patent application and the cited prior art. In these jurisdictions, the parties may wish to have one entity own all of the patented technology, in which event additional licenses may be necessary to implement use of the patented technology.

Diligence may reveal a significant body of know-how or trade secret information to be transferred to the acquirer. This information may be unwritten, and consulting agreements must be negotiated to ensure effective delivery and transition of the unregistered IP assets to representatives of the acquirer. This information also may impact the labour and employment issues of the transaction.

IP holding companies may own and exploit IP assets in ways that take advantage of tax laws. This strategy may be employed when creating the deal structure, in which case the relevant entities must be included in the deal documents. If holding companies are set up after the transaction, there may be additional tax consequences to consider.

The representations and warranties and the indemnity provisions of the transaction documents are extremely important. The acquirer gilds the reps and warranties while the seller offers few assurances. The acquirer must seek warranties of title and ownership. Additional IP representations and warranties, including enforceability, validity, and conduct of the prosecution of the IP assets, may be requested but such representations and warranties are risky. Targets tend to resist these reps or limit them with knowledge-based restrictions.

Offensive and defensive claims by or against third-parties must be disclosed and explained in schedules and appropriate exclusionary language and/or indemnification language included. IP claims against third parties may be seen as a desirable right that the acquirer wishes to enforce or as a litigation problem to be avoided.

"The IP assets must be integrated into the acquiring organisation to realise synergies, expand product lines, increase market share and gain competitive advantages."

Integration and Exploitation

The IP assets must be integrated into the acquiring organisation to realise synergies, expand product lines, increase market share and gain competitive advantages. If the acquirer fails to integrate, the IP assets may be ignored or lost. Unfortunately, this defeats the value generation purpose of the M&A transaction. An integration team should be formed and tasked with responsibility for integrating the IP assets into the acquiring organisation and profitably leveraging these assets.

The integration team should comprise cross-functional membership who can assess the use and value of the IP assets to the acquiring organisation and implement these assets across the organisational structure, including affiliates and subsidiaries. The integration team utilises its expertise to further evaluate, integrate, manage, and leverage these assets throughout the organisational structure and implement a plan for management and exploitation.

The IP assets should be integrated into the particular culture of the organisation. Members of the organisation must be educated and aware of the assets and their value. A cross-functional approach to IP protection is essential. Everyone from human resources to tax, sales, marketing and accounting should understand what IP is and what their responsibilities are for creating, protecting and maintaining the organisation's intellectual capital.

The IP assets should be inventoried and documented. The integration team can rely on the diligence investigation to determine the number, type, and quality of IP assets and identify those assets that drive value for the organisation. Certain assets may have value to a smaller division while other assets have value across the entire organisation.

The IP assets may be valued again post-closing. Valuations are dependent on the tax laws and the purpose of the valuation. Accountants legally can value IP assets differently based upon different circumstances.

Once acquired, the IP assets must be protected and maintained. The integration team implements processes and policies for leveraging the IP assets into the fabric of the business or may hand this task to the intellectual property management team.

Regular reviews and pruning of the IP portfolio are essential to assess strategic significance in relation to the organisational operations and financial climate. Post-closing, it is critical to integrate the IP assets, know and understand the value of these intellectual assets and implement them throughout the organisation.

Balance

The deal team must maintain a collective vision for the transaction, driven by the organisation's goals and objectives. The deal team should include an IP attorney to advise during diligence, structuring and negotiation of the transaction. IP assets sometimes are undervalued in the transaction but a balance that achieves the overall deal goals must be achieved. No perfect formula exists for weighing the significance of all of the assets and issues that arise in the course of negotiating and executing a deal. The relevant industry and the needs and purposes of the organisations involved will help the parties bring balance to the transaction and appropriately focus resources and energies. In this process, however, awareness of the importance of IP assets to the business operation is essential to generating value from the transaction.

Margaret "Peggy" Millikin is a registered patent attorney, with a B.S. in petroleum engineering, and has an international client base gathered over 30 years of intellectual property law practice. Peggy formed Millikin Intellectual Property Law in 2014 and represents clients in all phases of IP law. She led the IP function on international transactions, involving IP assets worth hundreds of millions of dollars. Prior to forming Millikin IP Law, Peggy was a shareholder and director with Crowe & Dunlevy where she co-chaired the Intellectual Property Law practice group and chaired the International Law practice group. She was also manager for the U.S. intellectual property office for Basell (a joint venture of BASF and Royal Dutch Shell) at their R&D Center in Elkton, Maryland, and served as senior IP counsel for Owens Corning, Honeywell Inc. and Hercules, Inc. Peggy has counseled clients with operations throughout Europe, Asia, and North and South America.

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Millikin
INTELLECTUAL PROPERTY LAW
PATENTS | TRADEMARKS | COPYRIGHTS

Millikin Intellectual Property Law is a boutique IP firm that takes innovative, attentive approaches to address client needs. Our mission is two-fold. We help clients achieve IP goals that propel them to the next level and solve problems and restore peace to clients' lives and businesses. Our passion is to help clients create, manage, protect and enforce their IP assets on a global basis. The firm manages the IP portfolios for a number of national and international businesses, counseling clients on aspects of portfolio creation, management, protection and enforcement. Millikin IP Law helps clients seek value-driven results and optimise their IP spend while making IP assets an integral part of the overall organisational strategy.

Slowing or going? The state of M&A in the USA.

Sell-side M&A
Owners of middle market businesses make their sell decision based on many factors, most of which have little or nothing to do with economic, political, or industry conditions. We are currently selling a company for which the majority owner was motivated by his wife moving across the country to be with their grandchildren. He could stay or go. He went.

I want to understand my potential clients and who they are as people. Before attending a meeting with a potential client, I read the company website and find out all I can about the owners. When I walk into the office of a potential client, I look around to his pictures, trophies and other memorabilia to seek how we can connect.

We recognise the premium importance of personal relationships with clients. Those relationships result in the ability to serve the client's needs and maximise the result of the assignment.

The story
I have long held the belief that the Confidential Information Memorandum that we prepare – the sale document – must tell a compelling story about the company: history, current condition, prospects. The story represents a significant part of the value of the client and the owner's company. I have long held the belief that the story accounts for half of the transaction value.

We have learned many lessons from the COVID-19 pandemic.

"Twenty-five years ago, none of us had heard of 'private equity." Transactions were identified as leveraged buyouts."

An example is that we frequently record a ZOOM meeting with senior management and owners that is made available to potential purchasers. This process introduces the senior members of a company as real people.

Origins
Several years ago, The Wall Street Journal reported that private equity groups worldwide held US$ 1.5 trillion of Dry Powder. That level of investable capital has been the principal driver of middle market merger & acquisition activity. Twenty-five years ago, none of us had heard of 'private equity." Transactions were identified as leveraged buyouts. Soon thereafter, the private equity designation arose.

Two to three decades ago, the sale of lower middle market business focused principally on strategic buyers undertaking to expand either vertically or horizontally. Institutional buyers were limited in scope and closed comparatively few transactions as compared with the current environment.

Private equity impact
Private equity groups are highly motivated to acquire operating companies as the firms do not earn income until they invest the funding committed to them. The vast majority of these firms focus on the lower middle market of companies with enterprise values of less than US$100 million.

An offshoot of Private Equity, many which existed long before the Private Equity designation was invented, is the Family Office. These institutions are generally funded by the wealth of one family. Many of the parameters of both groups are identical. Family offices tend to own companies longer than PEGs.

Every day, my colleagues and I speak with PEGs and family offices as they search for their 'next transaction'. The conversations are always similar. Discussions include their requirements and our clients. Our questions include information to update and enhance our PEG/Family office database: "Share with me information about your firm that we cannot find in your database."

The availability of capital and the need to earn for both themselves, and their investors are significant motivators to complete transactions. Our experience is that, from the date of our engagement until closing a sell-side transaction requires nine to twelve months. Many factors can extend that timing. Few factors arise that shorten the time.

Due diligence
We provide a due diligence checklist to each client that is designed to make the process of uploading documents, financial statements, and other information to an electronic dataroom. We understand that the process can be daunting; therefore, one of our goals is to describe the process clearly to executives, most of whom have never engaged in this task.

Our professionals work closely with the client and his staff to ensure that documentation is both accurate and complete.

Quality of earnings reports
The in-depth approach to due diligence has gradually expanded. Acquirers are motivated to understand the business that they are acquiring. Frequently, the acquisition is in a new industry for the acquirer. A relatively new development has come about, the Quality of Earnings Report (QoE). The acquirer engages its CPA firm, many of whom have developed internal staff, that focus on these reports.

A QoE engagement has many of the qualities of an audit; however, the purpose is different. A principal goal is to determine which income and which expenses will continue after a transaction has closed. Adjustments proposed by the accounting firm are applied by the buyer to the Recast Earnings Before Interest, Taxes on Income, Depreciation and Amortisation (EBITDA).

Since multiples of EBITDA are used as a shortcut method of determining enterprise value, the results of these reports can have a dynamic effect on valuation – not always to the good of the seller. We recommend to our clients that they engage their accounting firm to undertake the QoE work to identify questions that might arise. A written report from the seller's accounting firm is not usually needed.

Business operations
As time has passed, institutional investors have learned that financial results are vitally important; however, the success of any company is based on people. An understanding of the human elements of operations is the key component of a successful acquisition – and do not forget the importance of confidentiality! This matter is a concern of all owners.

Database
My firm has developed a proprietary database of private equity groups and family offices that we have colour-coded for size of transaction interest and industry focus. Access to this information allows us to market client companies in many sectors.

Transaction timing
On one occasion 20+ years ago, I closed a sale transaction in six months. I have not experienced that timing again. M&A is an extraordinarily complex process that includes a seller and family, its executives and staff, buyers, lawyers, accountants, consultants, investment bankers, and wealth management.

All these people properly coordinated can complete a sell-side transaction within a period of 9 to 12 months. The longest closing time our firm has experienced for a domestic transaction – including consulting and transaction – is 57 months. Our longest international transaction to close required 37 months, including a change of government.

Summary
The M&A market rises and falls as with all events in our world and lives. The market is active and well-funded. Middle market M&A transactions are intriguing, complex, people-driven, and – in the end – extraordinarily rewarding for all parties.

R. Carter Freeman, CMC, is the Founder, CEO and Chairman of Janas. Mr. Freeman began his career as a Certified Public Accountant. He became a Certified Management Consultant in 1973. He merged his practice with Pannell Kerr Forster in 1967 and transferred to Honolulu, Hawaii. Subsequently, he accepted a senior position with Touche, Ross & Co., now part of Deloitte.

By 1969, he was engaged in international consulting assignments, the first of which was for the government of the Republic of China, Taiwan. His work has taken him to more than 50 countries around the world. He continues to share his personable approach and decades of transaction experience with his muti-industry clients.

Mr. Freeman founded Janas to provide middle market companies with the same level of sophisticated advice as received by their larger competitors.

Carter directs the expansion of Janas whose professionals function under the premise: "The client always comes first". He consults with clients to determine their strategic direction and closes client transactions through a combination of innovative solutions and effective negotiations.

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JANAS
Investment Banking
Management Consulting

Janas Associates, Investment Bankers, and Janas Consulting, Inc., Management Consultants, were founded in 1995. An Affiliate, JCC Capital Markets, LLC, is a member of the Financial Industry Regulatory Authority (FINRA), through whom Janas Investment Bankers are securities licensed.

A principal purpose is to provide high-quality, international Merger & Acquisition and management consulting services to middle market companies. Middle market owners and management frequently find themselves focused on putting out fires, which leaves little time to focus on the future.

Janas professionals have worked in earlier positions as Company Owners, CEO, CFO's, lawyers, Certified Public Accountants, and Management Consultants with major firms. That experience and the resulting skills allows the firm to understand the challenges of ownership and management.

Hospitality for all: understanding ADA website accessibility regulations for retail and hospitality businesses.

At Conn Maciel Carey LLP's global employment practice, our attorneys regularly advise international, chain, and independent hospitality companies on how to ensure that their U.S.-based property – which is a place of accommodation under federal and state law – complies with the Americans with Disabilities Act (ADA), and in particular with respect to their websites to ensure that individuals are able to make room reservations online in the same manner as individuals who are not disabled. In addition to hospitality companies, our attorneys also advise retailers who engage in e-commerce on ADA regulations impacting their websites.

In 2022, we are continuing to see a steady stream of lawsuits filed against hotels and retailers alleging website violations under the ADA, without showing any signs of slowing down. These lawsuits stem from the ADA's guarantee that people with a disability are entitled to "full and equal enjoyment of the goods and services of any place of public accommodations." Whereas previously, even a "drive-by" plaintiff had to go to a hotel physically, experience an ADA violation, and then allege an intent to return to the hotel to establish the standing necessary to bring a lawsuit, now an individual can sue multiple hotels on the same day from the comfort of their own home. They must simply claim they wanted to visit a specific hotel (or multiple hotels) but were deterred from doing so and/or making a reservation because the hotel's website failed to provide enough information to determine the accessibility features of the hotel met their needs. These lawsuits often allege that as well as hotel websites, Online Travel Agencies (OTAs) such as Expedia, Hotels.com, or Orbitz have failed to provide enough information about the amenities of the hotel that are accessible to individuals with disabilities. While it may seem counterintuitive that a hotel would be responsible for the information provided on the OTAs website, that often is the case.

Typically, website lawsuits allege one of two different types of ADA violations: a hotel or other place of public accommodation has not provided enough information concerning ADA-accessible features on their website, or the website itself is not accessible to individuals with disabilities. The first type of website accessibility case concerns whether a hotel or other place of lodging provides enough information on its website regarding the accessible features of its physical property. ADA regulations require hotels to make reasonable modifications in their policies and practices to afford goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities. Therefore, a hotel must identify and describe accessible features in the facilities and guest rooms offered through its reservations service in enough detail to reasonably permit individuals with disabilities to independently assess whether a given facility or guest room meets their accessibility needs.

"Now an individual can sue multiple hotels on the same day from the comfort of their own home."

"The best practice for the hospitality and retail industries is to determine the state of their website's compliance with accessibility requirements and implement any necessary changes to improve it."

The second type of accessibility case deals with a company's obligation to make its website accessible to individuals with visual, hearing, or physical impairments. Although the ADA's implementing regulations do not specifically apply to websites, the U.S. Department of Justice (DOJ) has emphasised that businesses, including retailers or other companies that make their goods and services available on a website, should make websites accessible to disabled individuals by relying on the World Wide Web Consortium known as the Web Content Accessibility Guidelines (WCAG), a series of web accessibility guidelines published by the Web Accessibility Initiative of the World Wide Web Consortium, the main international standards organisation for the Internet. In the absence of more specific regulations, most of the law regarding website accessibility has resulted from court decisions. However, the recent trend is that companies are generally required to make their websites more accessible. The caveat is that this is so as long as the website has a significant "nexus" to a physical location. Still, this trend signals potentially consequential legal liability to companies who disregard the accessibility of their websites.

The best practice for the hospitality and retail industries is to determine the state of their website's compliance with accessibility requirements and implement any necessary changes to improve it. Companies should involve legal counsel when conducting website accessibility testing and/or remediation efforts to preserve attorney-client privilege and shield the results from discovery in legal disputes. Similarly, companies should also consider creating and/or adopting a website accessibility policy that is consistent with the requirements outlined in the WCAG and require training and compliance with those requirements. And it is also imperative that businesses provide an appropriate "accessibility statement" explaining to users the steps they have taken to improve their website's accessibility. Such an accessibility statement must include language that your property or store is accessible to all guests and must also provide a phone number, email address, and contact person with whom an individual with a disability can speak for all inquiries regarding potential accommodations that can be made.

Compliance with website accessibility is an important priority for businesses in the hospitality and retail industries who interact with the members of the public about the businesses' goods and services. Conn Maciel Carey LLP can provide strong guidance and resources to assist with testing, remediation and developing an accessibility statement, as well as defend against any legal actions brought due to non-compliance with the ADA.

Kara M. Maciel is a founding partner of Conn Maciel Carey and Chair of the firm's national Labor & Employment Practice Group. She focuses her practice on representing employers in all aspects of the employment relationship.

Ms. Maciel works to create workplace solutions for her clients across all industries. She counsels clients on issues related to ADA accessibility, wage hour compliance, prevention of harassment and discrimination, effective employment policies and procedures, developing a compliant employee handbook, effective strategies for labour relations, and managing a unionised workforce. She also defends employers in litigation at both the federal and state levels, including matters related to ADA, FLSA, FMLA, and Title VII.

Ms. Maciel pays special attention to the issues facing companies in the hospitality (including hotel owners and managers, resorts, restaurants, spas, country clubs, golf clubs, and fitness clubs); retail; grocery; food and dairy distribution; healthcare; trade association; and non-profit sectors.

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CONN MACIEL CAREY

Keeping track of the ever-changing patchwork of federal, state, and local laws governing the workplace may often seem like a never-ending ordeal whether you are a human resources professional, in-house attorney or business owner. Change appears to be the one constant as state legislatures continually introduce new laws and regulations governing workplaces across the country on top of the already wide range of potential legal challenges facing employers. Enter the Labor and Employment Group of Conn Maciel Carey LLP ("CMC"). Our boutique law firm focuses on labour and employment as well as OSHA/MSHA Workplace Safety and serves a wide range of clients — from multi-national organisations to individuals — who seek us out to provide strategic guidance or create dynamic solutions for all of the challenging and ever-changing workplace issues facing them. We provide a comprehensive array of legal services, ranging from day-to-day employment counselling, to managing government regulatory investigations to representation in complex litigation matters.

Final judgment: the collection of foreign judgments in the USA.

The United States does not have a federal law that governs the recognition or enforcement of foreign judgments, However, the majority of US states have adopted a version of the Uniform Foreign-Country Money Judgments Recognition Act of 2005 (Recognition Act 2005) or Uniform Foreign Money- Judgments Recognition Act of 1962 (Recognition Act 1962) (together, the Recognition Acts), which authorize the recognition of a judgment by a state only if it is shown to be a final judgment under the law of the originating country.

In order for a US court to enforce a foreign judgment, it must be a final judgment (Section 3(a)(2) Recognition Act 2005; section 3, Recognition Act 1962).[1] The judgment must be certified by the originating foreign court, and must include both a certified English translation of the judgment order as well as an affidavit by a legal expert in the country where the originating court is seated attesting that the judgment is final and enforceable per the laws of the foreign jurisdiction.

Additionally, judgments from foreign courts do not fall under the Full Faith and Credit Clause of the US Constitution (which requires each state to respect the "public acts, records and judicial proceedings of every other state"). Therefore, the US court must also find that requirements of due process, personal jurisdiction, and subject matter jurisdiction are satisfied when considering a petition to recognize a foreign judgment.

"In order for a US court to enforce a foreign judgment, it must be a final judgment."

The foreign court's due process does not need to be identical to the process afforded under US law; however, in accordance with the 2005 Recognition Act § 4(b)(1) the due process of the foreign court needs to be "compatible with the requirements of due process of law." This requires a showing by the petitioner that the defendant had an opportunity for a full-and-fair trial abroad before a court of competent jurisdiction, voluntary appearance of the defendant, impartial administration of justice between domestic and foreign parties, and that the judgment and applicable legal system presents no indicia of either prejudice or fraud. In addition, the petitioner must show that the court had valid basis for its jurisdiction over the defendant and the property involved in the judgment. Under the Restatement and Recognition Acts, lack of personal jurisdiction and/or subject matter jurisdiction are mandatory grounds for non-recognition of a foreign judgment.

Understanding foreign judgments in the state of Florida

Florida has adopted the Revised Uniform Enforcement of Foreign Judgment Act.[2] Companies and individuals who have obtained judgments in a foreign court against debtor/defendants with assets in Florida seek to domesticate their judgments under this Act to collect monies owed for unpaid goods and services, and to otherwise enforce their rights under the Uniform Commercial Code (UCC), the Convention on the International Sale of Goods (CISG), and multiple other laws which may apply. Domestication of a foreign judgment in Florida is permitted only if the defendant/debtor lives in Florida, the defendant/debtor owns property or assets in Florida, or the defendant/debtor is a company domiciled in Florida.

The Act requires the petitioner/creditor to file an affidavit containing the information that the court needs to recognize the foreign judgment in Florida; most notably, evidence that the judgment at issue is a final judgment that is enforceable in the country in which it was issued.

"Once a judgment is registered in Florida, it lasts for twenty years and, it is the same as if the judgment was originally ordered there."

Once a foreign judgment is registered in Florida, the registration is valid for twenty (20) years, and the foreign judgment is administered as if it was ordered by a US court. It can be enforced as a Florida judgment, and may also be used to obtain a lien on the defendant's real and/or personal property to satisfy the judgment. Judgments that are not recorded as liens, or are recorded as junior liens, are still valid judgments that can be executed against the defendant/debtor's property. A judgment creditor can also have the sheriff seize and sell any non-exempt property that the defendant owns, garnish the defendant's non-exempt wages, or take the defendant's non-exempt bank accounts to satisfy the judgment, among other actions.

[1] Whether the defendant must have exhausted all appeals prior to a judgment being deemed a "final judgment" depends on the US state in which you are seeking to have the judgment enforced. While some states will allow enforcement of judgments prior to any and all appeals having been exhausted, others do not. In this regard, anyone attempting to enforce a foreign judgment should first check the law of the applicable state prior to taking any action.

[2] California and Vermont are the only US states which have not adopted the Uniform Enforcement of Foreign Judgments Act.

Lisa graduated from Hofstra University, Long Island, New York in 1978 with a B.A. dual-degree in political science and psychology. A native of New York, Lisa moved to South Florida to earn her J.D. from Nova Southeastern University School of Law. Lisa has been practicing in South Florida and New York since 1983. Lisa is a member of the Bar in Florida, New York, and Washington D.C., as well as being admitted to the U.S. District Court for the Southern and Middle Districts of Florida. Lisa leveraged her vast experience to found Daniel Law Group with the mission to offer creative, unique, and sustainable legal and business solutions for clients.

Lisa is the former president of the National Association of Women Business Owners, and she is an active member of numerous professional organizations, including the International Business Alliance, Women of Excellence, The Wealth Planning Council, Attorneys and Accountants Network of Florida, and Commercial Real Estate Women.

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DANIELS LAW GROUP

Daniels Law Group is a boutique law firm with offices in South Florida, New York and Brazil. The firm's practice focuses on Business, Immigration, Real Estate, Wills, Trusts and Probate matters, including family business succession planning and U.S./Florida domiciliary and tax planning. The firm is committed to bridging the gap for clients accustomed to doing business in foreign jurisdictions and ensure their success in the U.S.

The firm's business group focuses on the acquisition and development of small to medium size businesses for U.S. and Foreign National Investors. The real estate team includes full brokerage services in New York and Florida.

Daniels Law Group provide large-firm expertise with small-firm commitment to ensuring personalized client service and sophisticated, cost-effective solutions to individuals, as well as established and emerging businesses. The firm's value-add approach to the practice of law encourages premium clients to consult Daniels Law Group for business and strategic insight in addition to sound legal counsel.

The battle to boost consumer demand and its impact on M&A at the crossroads of America.

Merger and Acquisition activity in the Great Lakes Region of the United States is moderating after a sustained period of robust activity. Rising interest rates have reduced the use of debt capital, impacting adversely deal feasibility and expected returns from leverage. Inflation is starting to suppress consumer demand and efforts to combat it have intensified. Supply chain delays that have plagued manufacturers and builders have "whiplashed" in some instances, resulting in oversupply. A post-COVID funk adversely affects workforce participation and productivity. Two consecutive quarters of negative GDP growth signal the existence of recession or one coming. COVID lockdown performance reversals and other earnings anomalies have presented valuation and due diligence challenges not seen before.

Still, as President Biden recently stated, this does not feel entirely like a recession…yet. Americans are experiencing a wealth effect from rising asset values and government largesse in unprecedented proportions. Corporate and fund coffers generally abound in cash. Insolvencies are starting to reappear, but commonly due to special circumstances, such as product failure, rather than poor economic conditions (the 3M subsidiary bankruptcy pends in Indianapolis.) The unemployment rate in Indiana is 2.6%. Paradoxically, full employment is a big problem. There is more work than there are workers.

2021 saw a surge in middle market combination activity as private company owners headed for the exits to avoid promised Biden Administration tax increases. When those tax increases failed to materialise, a number of those deals carried over and bolstered statistics for the first half of 2022 however, the market has not gone still. 2022 statistics are down from 2021, but 2021 was extraordinary. 2022 Q4 will likely tell a different story, but thus far, 2022 has been, more or less, business as usual.

The Great Lakes Region is comprised of the States of Ohio, Michigan, Illinois, Wisconsin, Minnesota, and Indiana. It is a major part of America's industrial heartland. Chicago, Illinois is the largest city in the GLR. Indianapolis is third, trailing closely Columbus, Ohio. The northwest corner of Indiana, dubbed "The Region," borders Lake Michigan and is a major steel-producing area.

Indiana is blessed with a diverse mix of economic drivers including manufacturing, agriculture and food processing, mining, pharmaceuticals, life sciences and health care, information technology, financial and insurance services, transportation and logistics, and warehousing and distribution. Indianapolis, the seat of state government, is known as "The Crossroads of America" due to the fact that several Interstate highway systems converge here, and over half of the population of the United States is located within 500 miles of the state.

Speaking of 500 miles, the Greatest Spectacle in Racing is held at Indianapolis Motor Speedway the last weekend in May annually. Racing technology companies from all around the world have clustered on the Indianapolis westside to carry on their quest for safety and speed in the open-wheel racing world. Locally-based Andretti Motorsports just announced plans for a $200 million complex and 500 new employees.

Indiana was a leader in the development of motorised vehicles and, to this day, much of its manufacturing base is devoted to automobile component manufacturing largely for the "Big Three" automakers in Detroit,

"Paradoxically, full employment is a big problem. There is more work than there are workers."

"The Biden Administration has taken an activist approach to antitrust cases."

Michigan, directly north. Indiana cities and towns are populated with asset-rich, privately-owned manufacturing companies, and are prime targets for both private equity and strategic acquirers. Advanced manufacturing is a major industry thrust and driver.

Other manufactured products include pharmaceuticals, recreational vehicles, home appliances, construction materials, orthopaedic devices, and goods having agricultural or military applications.

Eli Lilly, Salesforce, Rolls Royce, Federal Express, Amazon, Roche and Elevance (formerly Anthem/Wellpoint) are major Indianapolis employers, but public, multi-national and major private companies do not dominate the Indiana economic landscape. Rather, mid-sized ancillary B2B businesses that serve these companies abound in Indianapolis, as well as in communities around the state.

The buildings and monuments in Washington, D.C. were constructed with limestone mined in southern Indiana quarries.* Coal, gypsum, and construction sand and gravel are other major mining products.

Indianapolis is the home of the second largest medical school in the U.S. It is no coincidence that hospitals, health care service providers and ancillary businesses in Central Indiana are remarkable and many.

Transactions involving private companies not involved in a regulated industry such as banking or insurance are largely unregulated. A transaction involving a purchase price of $101 million or greater is subject to the federal Hart Scott Rodino Antitrust Improvements Act (HSR) which requires notice to the Federal Trade Commission and the Antitrust Division of the Department of Justice. The agencies have a period of time thereafter to challenge the combination on antitrust grounds. The Biden Administration has taken a *more* activist approach to antitrust cases. Thus, where the size of the deal qualifies for HSR treatment, antitrust should be a focus of the parties from deal inception, lest loose language in the Confidential Information Memorandum or an untoward email betray in the slightest that the transaction is being pursued to reduce competition.

Another hot area of federal regulatory concern is in the areas of defence, technology, and national secrets. Not least of these is the need to obtain approval from the Committee on Foreign Investment in the United States (CFIUS), where national security concerns are present. World tensions have hastened the Committee's work.

If a U.S. entity must be formed in connection with the transaction, it is important to be mindful of the federal Corporate Transparency Act, which requires submission of personal identifying information about the entity's remote beneficial owners to aid enforcement against money-laundering and other financial crimes.

In terms of the lawyer's role in combination transactions, two things are of particular note. Representations and Warranties (R&W) Insurance is now present in most private deals of any serious magnitude. The lawyer needs to know how to navigate the R&W world and integrate concepts and understandings into traditional transaction documents.

The other phenomenon is the advent of "Deal Term Studies" published under the auspices of the American Bar Association and other private purveyors that have access to large volumes of transaction data. These studies standardise document alternatives and analyse what is "market" in various types of situation. A lawyer who might try to strictly adhere instant deal terms to a deal term study would be foolish, but one who sought to navigate a transaction naïve to study outputs would be more foolish still.

*Indianapolis is second only to Washington D.C. in its number of monuments and, hence, is called the "Monument City." and The hub and spoke street design for Indianapolis was the work of L'Enfant, the famous French planner who designed Washington, D.C.

Don Densborn is a business lawyer whose practice is concentrated in merger and acquisition transactions and related entity, financing and fundraising activities.

Don's M&A work has earned him recognition by Chambers and Best Lawyers®. On four occasions, he has been named a Best Lawyers® "Lawyer of the Year" in the Indianapolis area. He is rated AV Preeminent by Martindale Hubbell.

For 15 years, Don served as a gubernatorially appointed Indiana delegate to the National Conference of Commissioners on Uniform State Laws, where he served on the Drafting Committees for the Revised Uniform Limited Liability Act and the Uniform Business Organizations Act. He has also served as a member of the Board of Directors of several Indiana companies, including Elevate Ventures, Inc., the second most-active venture fund in the Midwest United States.

Don has served IR Global as a member of its M&A Committee and its East Coast and Central-US Groups.

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DENSBORN BLACHLY LLP

Densborn Blachly, an Indiana law firm founded as a corporate transaction boutique, has expanded to the point where, today, the firm is recognised by Best Lawyers® as a Best Law Firm in 12 practice areas, namely: Banking and Finance Law, Commercial Transactions/UCC Law, Corporate Law, Business Organizations (including LLCs and Partnerships), Real Estate Law, Mergers and Acquisitions Law, Patent Law, Trademark Law, Copyright Law, Information Technology Law, Technology Law and Insurance Law. The firm was recently named a top Indiana firm in the corporate transaction area by IFLR1000, the provider of market intelligence regarding the world's leading financial/corporate lawyers and law firms.

Densborn Blachly lawyers have been selected as the exclusive IR Global members for the state of Indiana in the M&A, Corporate, Real Estate and Litigation practice areas. Over half of the firm's lawyers are recognised as Best Lawyers® in their respective fields.

The Inflation Reduction Act 2022: promoting innovation and clean vehicles.

Recently, President Biden signed The Inflation Reduction Act of 2022. The Act contains several new environment-related tax credits. The Act also extends and modifies some preexisting credits.

New credit for qualified commercial clean vehicles
There is a new qualified commercial clean-vehicle credit for qualified vehicles acquired and placed in service after December 31, 2022.

The credit per vehicle is the lesser of: 1) 15% of the vehicle's basis (30% for vehicles not powered by a gasoline or diesel engine) or 2) the "incremental cost" of the vehicle over the cost of a comparable vehicle powered solely by a gasoline or diesel engine. The maximum credit per vehicle is $7,500 for vehicles with gross vehicle weight ratings of less than 14,000 pounds, or $40,000 for heavier vehicles.

Increase in qualified small business payroll tax credit for Increasing research activities
Previous to this Act, a "qualified small business" (QSB) with qualifying research expenses could elect to claim up to $250,000 of its credit for increasing research activities as a payroll tax credit against the employer's share of Social Security tax.

Some small businesses were concerned they may not have a large enough income tax liability to take advantage of the research credit. For tax years beginning after December 31, 2022, QSBs may apply an additional $250,000 in qualifying research expenses as a payroll tax credit against the employer share of Medicare. The credit can't exceed the tax imposed for any calendar quarter, with unused amounts of the credit carried forward.

Extension of incentives for biodiesel, renewable diesel and alternative fuels
Under pre-Act law, you could claim a credit for sales and use of biodiesel and renewable diesel that you use in your trade or business or sold at retail and placed in the fuel tank of the buyer for such use and sales on or before December 31, 2022. The Act now allows a business to claim a credit for sales and use of biodiesel and renewable diesel fuel, biodiesel fuel mixtures, alternative fuel, and alternative fuel mixtures on or before December 31, 2024.

You're also now allowed to claim a refund of excise tax for use of 1) biodiesel fuel mixtures for a purpose other than for which they were sold or for resale of such mixtures on or before December 31, 2024, and 2) alternative fuel as that used in a motor vehicle or motorboat or as aviation fuel, for a purpose other than for which they were sold or for resale of such alternative fuel mixtures on or before December 31, 2024.

"To help offset and pay for the clean energy tax credits and incentive provided, Congress has passed new legislation creating a new corporate alternative minimum tax."

"The IRS announced it will provide automatic relief from certain failure to file penalties and information reporting penalties for 2019 and 2020 taxable years."

New corporate alternative minimum tax
To help offset and pay for the clean energy tax credits and incentive provided, Congress has passed new legislation creating a new corporate alternative minimum tax. The corporate alternative minimum tax pre-2018 was imposed on taxable income as adjusted. The new corporate alternative minimum tax is imposed on adjusted financial statement income. Thus, the new alternative minimum tax applies if 15% of the corporation's adjusted financial statement income minus any alternative minimum tax foreign tax credits exceed its regular tax plus its base erosion anti-abuse tax for the year.

The new alternative minimum tax applies only to applicable corporations with average annual adjusted financial statement income for the three-tax year period ending with the current tax year when it exceeds $1,000,000,000 ($1 billion). Special rules apply to members of a foreign-parented multinational group that may cause the new alternative minimum tax to apply if the average adjusted financial statement income for the corporation equals or exceeds $100,000,000 ($100 million). Also, there are a number of aggregation rules, under which related businesses may be aggregated for purposes of the income test, including a rule that includes income of a partnership in which the corporation is a partner.

Stock repurchase plan
The Inflation Reduction Act of 2022 has added a 1% excise tax on the repurchase of stock of any domestic corporation whose stock is traded on an established securities market. Only repurchases that are treated as redemptions for tax purposes are subject to the tax. A $1 million exemption is provided, which is increased to the extent the corporation issues additional stock during the tax year, including stock issued or provided to employees of the corporation or employees of certain affiliates of the corporation.

Automatic penalty abatement (notice 2022-36)
Hot off the press, the IRS announced it will provide automatic relief from certain failure to file penalties and information reporting penalties for 2019 and 2020 taxable years. The IRS will determine whether the taxpayer qualifies and will automatically abate, refund or credit the taxpayer's account, as appropriate.

This is huge as penalties related to some of the international reporting forms can amount to upwards of $25,000 per form per year. You will want to act quickly because the tax years 2019 and 2020 returns must be filed by September 31, 2022. The relief applies to these foreign information forms:

- Form 5471 – Information Return of US Persons with Respect to Certain Foreign Corporations
- Form 5472 – Information Return of a 25% Foreign-Owned US Corporation or a Foreign Corporation Engaged in a US Trade or Business

Our firm is equipped to handle the new provisions. Please reach out to us if you think you can benefit from any of the above applied incentives, alternative minimum tax, or penalty abatement.

Kimberly Hatfield is a CPA with over 15 years' experience in taxation. Her clientele is closely-held businesses and their owners.

Kimberly handles the kinds of tax returns most people wish they didn't have but want a favourable outcome:

- Complex transactions that include:
- International matters and/or
- Multi-state

Kimberly specialises in international tax compliance for both domestic and inbound foreign companies. She has experience with individual tax returns with a focus on US ex-pats and those who are new to the US tax system.

More importantly, she helps interpret tax code and resolve ambiguity around the code to the benefit of her clients.

Kimberly can assist businesses and owners struggling to resolve tax controversies with federal and state taxing authorities. She can also help businesses that want to grow, need tax planning because of growth or want to maximise their business value.

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The wisdom of transactional planning: protect your assets and reduce tax exposure.

What is "transactional planning"? How can an individual, married couple, business or entity structure the way they hold and transact assets and financial wealth in a manner that reduces risk, while increasing the protections surrounding those assets? Can you reduce taxation associated with those holdings and associated transactions?

Transactional planning is a process of structuring investments, business and real estate transactions in a manner which preserves and protects underlying assets while reducing associated risk and exposure to taxation. Allen Barron begins the process of transactional planning with a complimentary consultation with our clients to discuss their goals and objectives, current strategies, the challenges they've encountered and their present exposure to state, federal and international taxation.

"Our clients approach us with a burning issue, a challenge they're facing," notes Allen Barron's founder Janathan Allen. "It's always interesting to help our clients discover the smoke of the challenge in front of them is actually a symptom of a smouldering fire at a deeper level. We will absolutely manage the issues at hand, but the genuine solution lies in the resolution of that underlying challenge."

The primary goals of transactional planning and the client

From an asset and investment point of view, the primary goals are almost always:

- Protect the assets and minimise risk surrounding how those assets are held as well as associated transactions
- Reduce taxation

The same goals apply to any well-conceived estate plan, a single closely-held business or a constellation of international corporate interests.

Transactional planning begins with a conversation. What motivates our client? What are their goals and plans for their present and future life? How are those plans currently structured and what assets do they contain? What is the fair market value and/or income created or produced by those assets?

The next step is to ascertain how those assets are held. Perhaps the client owns real estate which has been placed into a Limited Liability Company (LLC). Perhaps they own their own company, or several companies. What financial assets and accounts are in place and how are those accounts structured? Is everything local, or are there interests in several states or outside of the United States?

How should assets be held?

If two of the primary goals are to protect existing and future assets and minimise associated risks, the central question to evaluate is, "How should these assets be held?" Corporate entities such as an LLC or S or C Corporation exist to literally separate the individual owners and their personal assets from those held in the entity. Each entity protects the assets held by the company while reducing exposure to contingent liabilities associated with those assets for the owner of the entity. The nature of an individual asset or group of assets and the transactions associated with each determine how each asset should be held.

How, when and where is income realised?

How is income generated, when is income realised and where (geographically) is it coming from? How, when and where should income be realised? These powerful questions are an essential step in the transactional planning process.

There are three types of income in a transactional plan: investment income, active income and passive income. Investment income is generated by profitable sales of investment assets such as stocks or real estate as well as dividends. Active income relates to duties, services or tasks based upon a specific time frame such as a salary, tips, commission, fees or allowances. Passive income relates to earnings from rents, an LLC or other entity in which the client isn't actively involved. Each type of income is taxed in a different manner.

> "An effective transactional plan is a sophisticated integration of legal strategies, tax expertise and supporting accounting structures."

PIGs and PALs

A conversation about transactional planning often includes a discussion on PIGs and PALs. Recent changes to the tax code provided the opportunity to reduce tax exposure by reclassifying the nature of some income and the tax liabilities associated with that income. Passive Income Generators (PIGs) are fully taxed. Passive Activity Losses (PALs) can be utilised to offset income from PIGs or shelter passive income from taxation in a manner which is not available with other forms of income or investment.

One objective of a transactional plan is to minimise tax. This might be a reason for creating a new entity or structure of entities within a transactional plan. For example, LLCs can hold active income or passive income. Part of the transactional plan may include varying LLCs based upon the type of income each generates and offsetting specific types of income and losses (PIGs and PALs for example) to get as close to zero as possible.

Pass-through entities such as an LLC or S Corporation operate on a calendar year. A C Corporation, however, can set its fiscal year to be independent of the calendar year. Consider the impact of a year-end pass-through in an LLC or S Corporation. It's the end of December and any remaining earnings in the LLC or S Corporation must be passed as income to the owner(s). If that occurs in December of 2022, the taxes on those earnings would be paid and reported on tax returns in April of 2023. In this same example, a C Corporation with a year-end of March 31 would allow the owner to defer the realisation of that same income until January 2, 2023, thereby deferring the tax impact of that event for an entire year!

The wisdom of transactional planning

Generally speaking, an effective transactional plan is a sophisticated integration of legal strategies, tax expertise and supporting accounting structures. Legal entities provide additional protection for assets and reduce exposure to risk. A transactional plan should provide the ability to accelerate or defer income or losses into periods that provide the greatest tax advantage. The same is true geographically. Those with international assets, investments, corporate ownership and/or income are prudent to develop transactional plans which provide the opportunity to structure the realisation of income in the most favourable tax jurisdiction possible.

The process of transactional planning begins with a thorough analysis of existing portfolios, income, losses, entities and transactions. The integration of legal, tax and accounting skill and expertise is required to answer the questions of how assets should be held, as well as how, when and where income is realised. A well-crafted transactional plan protects your assets, minimises risk and reduces taxation to facilitate the accomplishment of your life's goals and plans.

Janathan Allen is an experienced tax attorney and business lawyer who integrates business, legal, tax and accounting strategies to provide her clients with better answers to their questions and more informed strategies to leverage their opportunities.

Most businesses have separate attorneys for tax and business, CPAs and accountants, tax preparers and financial advisors. If you take the same problem to each, they will provide their best answer, based upon their (somewhat limited) perspective.

The business attorney will have no idea how their solution impacts business operations or your accounting systems. The financial planner has no idea how their recommendation may be impacted by interstate or international tax implications.

This is the genuine value of the integrated approach Janathan Allen and Allen Barron take when they work with you as a client on any challenge or opportunity.

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Law ▪ Tax ▪ Accounting
Janathan L. Allen, APC

Allen Barron provides integrated high-level business consulting services to provide a competitive advantage to our clients. The business climate is fast-paced and quickly evolving. Important business decisions must be made quickly. Complex decision-making requires integrated information from multiple disciplines, and the questions facing executive management are complex and intertwined.

Tax decisions may affect the structure of entities within affiliated companies. Accounting systems must capture detailed up-to-the-minute data and communicate it to operational decision-makers to inform supply channel decisions. Critical business opportunities such as expanding to a new continent may lie outside of managers' existing expertise. How will the structure of entity "x" affect the tax liabilities of company "y" and the distribution of products in various jurisdictions?

Allen Barron provides all these services in a single source. We can tell you how a decision will impact your business from multiple perspectives: tax advantages or burdens, operations, profitability, corporate structure, accounting and tax reporting, as well as your supply chain management and employee culture.

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