

Michigan International Lawyer

INTERNATIONAL LAW SECTION

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Dear Members and Colleagues:



Reed Newland

Please mark your calendars now: We will hold our International Law Section 2013-2014 Quarterly Meetings and Programs on *Wednesday, November 13, 2013; and in 2014, on the 3rd Wednesday of January, March and May: January 22, 2014; March 19, 2014; and May 14, 2014.* All meetings and programs generally begin at 4:30 pm and conclude by 7:30 pm.

I am pleased and honored to lead our International Law Section in its 25th year in Michigan. Our 25 years and more than 460 members attest to our commitment to promoting the practice of international law in and from Michigan and Michigan's longstanding role in international business. We celebrated our silver anniversary September 12 by hosting a Celebration at the University of Michigan's Museum of Art after our Annual Meeting and co-sponsorship of an afternoon, three-panel Program with the University of Michigan Law School's *International Transactions Clinic* (ITC). Over 50 members of our Section attended the day's events. We even gathered seven former Chairpersons in one of the photos from our Celebration in this issue of the *Michigan International Lawyer*.

Program

The afternoon Program, titled "*Growing International Deal Lawyers: Doing Good by Doing Deals*", was a great success. Celebrating its 5th anniversary, the ITC brought back Clinic clients and graduates to discuss *Growing International Deal Lawyers, Doing Good by Doing Deals and Graceful Exits* in three separate Panels. The Panel discussions reminded us all how smart people innovate both in academia & commercial transactions. Between introducing law students to "real" clients and "real" deals and its "doing good" dimension, the ITC is a true innovation that other law schools would do well to emulate. Serving as Panel moderators, Dick Goetz, David Guenther and Bruce Thelen, Section members (and also two past Chairpersons and one future Chairperson) did an excellent job weaving coherent themes through the presentations and follow up questions and discussion. Most of our Section members left the Program wishing there had been an ITC when we were in law school!

Rachel Robbins, the former General Counsel of the International Finance Corporation, the New York Stock Exchange, and more than one "too big to fail" New York-based bank, gave a thought-provoking keynote address following the 3 Panel discussions. She challenged us as international lawyers (and her law school audience) to lead, not follow, efforts to adopt "green," sustainable and other social policy and practice value-driven business models that are penetrating the board-

Michigan International Lawyer Submission Guidelines

The *Michigan International Lawyer*, which is published three times per year by the International Law Section of the State Bar of Michigan, is Michigan's leading international law journal. Our mission is to enhance and contribute to the public's knowledge of world law and trade by publishing articles on contemporary international law topics and issues of general interest.

The Michigan International Lawyer invites unsolicited manuscripts in all areas of international interest. An author is encouraged to submit a brief bio and a photograph for publication. An article, including footnotes, should contain between 1000 and 3000 words.

Articles can be submitted for consideration in hard copy or electronic format. Manuscripts and photographs cannot be returned unless accompanied by a \$5 check or money order made payable to Wayne State University Law School for shipping and handling.

The Michigan International Lawyer will consider articles by law-school students and may publish student articles as part of a regular column. A student should submit the article either through a law-school faculty member or with a law-school faculty member's recommendation.

Submissions should be forwarded to:
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rooms of global companies. They are here to stay and impact global public policy and profitability.

The Celebration at the Museum of Art was a great way to close the day in very attractive surroundings. As noted earlier, there should be a photo from our Celebration in this *Michigan International Lawyer* issue that includes seven former Chairpersons. The Section's second chair, Steve Guittard, came down from his summer home up north to attend the entire day's activities and told us it was one of the highlights of his summer in Michigan. Steve always said that the International Law Section was the section that eats (and drinks) well!

I also want to give special thanks to Marilyn Bartley for helping organize and handle the many logistics related to our Annual Meeting and 25th Anniversary Celebration.

Finally, as the new Chairperson of our Section, I took the opportunity in front of the larger Program audience and on behalf of our Section to thank Jeff Paulsen, our Chairperson for 2012-2013, and to present him with a plaque, for his many years of dedication and service to our Section, and strong leadership this past year. I intend to continue to seek Jeff's support and involvement in his new position as *ex-officio* immediate Past-Chairperson. Jeff deserves extra kudos for organizing and leading our Section's sponsorship of the international law theme of the November issue of the *Michigan Bar Journal* discussed below.

Meeting

We also held our Annual Meeting September 12 at the University of Michigan Law School, immediately before the "*Growing International Deal Lawyers: Doing Good by Doing Deals*" Program co-sponsored with the ITC. In addition to electing the Officers and Council members and re-appointing Committee Chairs and Co-Chairs listed below this letter, we:

- Appointed Aaron Ogletree as Diversity Coordinator;
- Updated and amended our Bylaws;
- Approved our dues increase from \$30 to \$35, in equal parts to offset eliminating dues for law students and 1st 2 years' practitioners and to align ourselves with the dues' level of most sections; and
- Agreed to continue three of last year's four goals:
 - Provide Educational and Interesting Council Meeting Programs for Members
 - Increase Membership and Diversity of Membership, and
 - Increase Engagement and Activity of Council Members and Committees.

In furtherance of Goal 1, we settled on these programs for this year:

- Wednesday, November 13, 2013: Beginning at 4:30 pm at Miller Canfield's downtown Detroit office, Distinguished Economics Professor Mordechai (Max) Kreinen of MSU will address: *the Middle East And Israel: Post-Arab Spring Economic Dependencies, Troubled Economies Amid Conflict, Oil Politics, Embargo And Trade Sanctions*.
- Wednesday, January 22, 2014: *International Trade: Recent Developments In Export Control Regulations And Embargoes And Their Implication On Manufacturers*
- Wednesday, March 19, 2014: *ADR & Investment Treaties*; and
- Wednesday, May 14, 2014: *an Immigration & Employment update*.

I took the opportunity at the Annual Meeting to point out that, if each of our seven Committees takes a turn being responsible for putting a Program together, the commitment is barely one every other year. Look for further information on the loca-

tion and speakers for our 2014 Meetings and Programs via the ILS listserv announcements, the ILS LinkedIn website and on our Section's page of the State Bar of Michigan's website in the coming weeks and months.

In furtherance of Goal 2, I ask you (yes, you!) to do two small things this year: recruit one person to join our Section, and attend at least one (more) ILS Program: Together, these two steps could produce large results. Please reach out to someone who shares your affinity for international law and ask them to join our Section. Reach out to a law student (or first 2 years' practitioners) and remind them that it's FREE! Attend a meeting and network with some of Michigan's most accomplished international lawyers. A larger, more diverse Section stimulates more high quality programs and events. We provide food and drink free at every Program, and ample time to network before and after our Programs.

In furtherance of Goals 2 and 3, Section and Council members are scheduling informal "*International Food and Law*" events at each Michigan law school. The simple idea is for three (or more) of us to speak to what it is we do as international law practitioners in Michigan. To encourage law students to attend, we will provide "international-themed" food and advertise through Law School faculty and our Section's student representatives. I would like to recruit more student members to and involvement in our Section ("*Did I mention it's free?*"). This event is taking place as I write this at MSU. We have also identified volunteer coordinators for the other "*International Food and Law*" events at Michigan's other law schools, but still need volunteers. Please contact me or another officer or Council member if you would like to join one of these fun, informal "*International Food and Law*" events.

Appointing Aaron Ogletree as our Diversity Coordinator builds on one of Jeff Paulsen's goals of increasing our membership and its diversity. Jeff, Aaron and I are still mapping out what this Diversity coordination might entail. It starts as a declaration of intent to give a more sustained effort to increasing our membership and its diversity. Simply put, our International Section membership should be more *international!*

Other Section News

Mentor-Mentee Committee

I am pleased to report that Professor Gregory Fox and Jillian Berndt have agreed to lead the *Mentor-Mentee* Committee for 2013-2014. The idea grew from an initiative to provide young Section members with "free" access to experienced international practitioners in our Section for informal but confidential consultations and advice. To get a list of Mentors, members Doug Duchek and Jillian Berndt successfully recruited virtually all past Section Chairpersons to participate. Mentors would have office hours, and prospective mentees would have the opportunity to telephone potential mentors and ask questions. Prospective mentees would need to join the

Section after the first call if they wanted to continue the mentoring relationship. I would like to thank Section members Doug Duchek and Jillian Berndt for creating this Program and recommending its evolution into a Section Committee, as well as Greg and Jillian in advance for their future efforts to get this Program/Committee more established this year.

International Law Section LinkedIn Group

I would also like to thank Weldianne Climo and Sonia Salah on behalf of the Section for their efforts in establishing with the Section's LinkedIn group this past year. Approximately one-third of the Section's members have joined as of last count. I encourage members to join if they haven't and continue discussing and posting comments on our LinkedIn site. The Section recognizes as pivotal the use of social media to communicate within and outside our Section, especially with or among our younger members and the future members we are trying to recruit. It will be as robust as we make it.

International Law Theme to November issue of the Michigan Bar Journal

Jeff Paulsen, our active, *ex-officio* immediate Past-Chairperson, started and coordinated our Section's leadership of the International Law-theme to the *Michigan Bar Journal's* November issue. This *Michigan Bar Journal's* issue reflects the continued and growing importance of international law to Michigan lawyers and citizens and the substantial contributions of our Section to that ever growing community. Jeff's introduction to the *Michigan Bar Journal's* November issue appears elsewhere in this issue of the *Michigan International Lawyer*.

I hope to see you at a future ILS Council Meeting or ILS Annual Meeting. Please enjoy this issue of the *Michigan International Lawyer*. On behalf of your 2013-2014 Officers and Council, I look forward to interacting and working with our current, new and law student Section members. Help us achieve our goals by recruiting one person to join our Section, and attending at least one ILS Program this year: Together, two small steps to produce stimulating programs and activities for our membership and community. Help us continue the next 25 years of our Section's vitality by helping us reflect the rich diversity of international law in Michigan.

If I can be of assistance to you or if you want to talk with me about the issues and activities of our Section, please feel free to call me at (734) 354-7142 or email me at rnewland@plastipak.com.

Sincerely,

A. Reed Newland

Chairperson 2013-2014

International Law Section, State Bar of Michigan

First Preference Petitions for Aliens of Extraordinary Ability: Practice Pointers

By Nathan Graham, Esq. and Lauren LaCourse

Introduction

The decision by the U.S. Court of Appeals in *Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010) has far-reaching effects on the adjudication of extraordinary ability petitions. Each fiscal year, INA § 203(b)(1)(A) affords a substantial number of immigrant visas to aliens who have “extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation” provided they seek to continue work in the area of extraordinary ability and that it may, prospectively, substantially benefit the United States.

Under 8 C.F.R. § 204.5(h)(3): “a petition for an alien of extraordinary ability must be accompanied by evidence that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise. Such evidence shall include evidence of a one-time achievement (that is, a major, internationally recognized award), or at least three of [10 possible criteria]”.

Requirement to Meet at Least Three Criteria

As defined by the statute, meeting three of the possible 10 criteria is a minimum threshold, but in light of *Kazarian*, USCIS must review evidence under a two-stage test. First, it must be determined whether the applicant has submitted the requisite evidence of meeting at least three criteria. Second, USCIS will make a “final merits determination” as to whether the totality of the evidence demonstrates both a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of their field of endeavor, whether the alien has sustained national or international acclaim, and whether his or her achievements have been recognized in the field of expertise.¹

This bifurcated method of review provides applicants with the opportunity to have their evidence evaluated in the aggregate, rather than only reviewing each individual point of evidence in isolation; however, this approach is not set forth as the official opinion of the court. Rather, the court in *Kazarian* only upholds the denial of a petition on the basis that the applicant had presented sufficient evidence of meeting only two criteria, rather than the required three. Nonetheless, the two-stage review process incorporating this final merits determination was set forth in USCIS guidance that was released later in the year.²

As a result of the *Kazarian* decision, this new process may provide a more favorable review than previously had been given to applicants for consideration under extraordinary ability. As a result, practitioners



Nathan Graham



Lauren LaCourse

may find that the *Kazarian* review process provides a better opportunity for cases to “get a foot in the door. Prior to the decision, USCIS was prone, at times, to improperly expand the threshold of each individual criterion for qualification, requiring that a petitioner not only show they made scholarly publications, for instance, but that their scholarly publications were, themselves, “extraordinary” in nature.³ Ultimately, these expansions of the actual regulatory requirements for classification as an alien of extraordinary ability frequently broke down into an exercise in circular reasoning: requiring the foreign national to prove he has extraordinary ability in order to prove he has extraordinary ability. The *Kazarian* decision, and subsequent AFM guidance, prevents USCIS from taking liberty in their interpretation of the statute.

Tips in Presenting Evidence

1. Submit the strongest evidence first, and leave out weaker arguments altogether. USCIS officers are pressed for time and are more likely to become annoyed by attempts to make a case for arguments and evidence that clearly fall short of meeting a criterion than to be convinced as to the applicant’s qualifications. For instance, the submission of student awards, “junior” level awards, or awards limited to a particular university or institution have been deemed by long-standing precedent to fail to meet the criterion of having received lesser nationally or internationally recognized prizes or awards for excellence in the field. Acceptable evidence of recognition, generally, must be awarded in the context of an open competition for all persons in the field of endeavor, and well recognized among those in the field. Thus, attempting to bolster a case on this point through use of limited awards may be more likely to hurt a case than to help. If a strong argument cannot be made as to why a particular award or membership in a particular association meets the level of being truly outstanding in nature, it is generally most advisable to

exclude this evidence. Further effort into strengthening the case for why the applicant meets the other relevant criteria may be a better expenditure of time.

2. The objectivity of documentation is key. Citations from independent researchers in the case of an applicant engaging in scientific or academic research are more persuasive than those from colleagues, even if colleagues may have more in-depth insight into the applicant's work. Similarly, this holds true for recommendation letters and references who may be asked to provide specific details regarding the nature of the applicant's accomplishments and contributions to their field of endeavor. In cases where the nature of an applicant's work may be difficult for a layperson to understand, such as highly advanced fields in academia or the sciences, including letters from persons who are closely connected to the applicant's research and therefore are in a prime position to provide the greatest explicit details as to the nature of their work can be helpful, but overall immediate peers and persons with whom the applicant has worked should not be heavily relied on as the source for recommendation letters.

3. Do not simply document an applicant's accomplishments. Wherever possible, substantiate the documentation itself with further corroborating evidence. If the applicant has been interviewed in trade magazines or news media, provide documentation verifying the publication and readership of the media sources. If the applicant is a member of an association requiring outstanding achievement for membership, obtain documentation directly from the association that verifies their requirements for membership. If the applicant has been a judge over the work of others in the field, providing evidence of the prestigious nature of the judging events, the competition, academic journal, or venue itself, and the high degree of accomplishment in the field required to become a judge in that context will provide a strong boost to the overall picture of an applicant's national

or international recognition and acclaim. This supporting documentation can help greatly in the final merits determination of the overall level of accomplishment by the applicant.

The adjudication of extraordinary ability cases has changed greatly since the *Kazarian* decision and USCIS' subsequent guidance implementing its understanding of the court's decision. However, with attention to detail and focused crafting of arguments on behalf of clients, it is possible to make these changes work in a client's favor. 🌍

About the Authors

Nathan Graham is an Associate Attorney with Fragomen, Del Rey, Bernsen and Loewy. He is based in the firm's Troy, MI office and provides legal assistance to a diverse range of clients in obtaining immigration benefits. He represents clients across multiple industries, including information technology, automotive manufacturing, engineering consulting, and higher education. He has assisted numerous scientific researchers and advanced-level professionals in a variety of engineering, medical research, and scientific fields to obtain "extraordinary ability" and "outstanding researcher" classifications based on demonstrated expertise and prominence in their field of endeavor in the U.S. and abroad.

Lauren LaCourse is an Assistant Paralegal at Fragomen. She graduated from Oakland University with a degree in French Language and Literature and enthusiasm for learning about all cultures.

Endnotes

- 1 8 C.F.R. § 204.5(h)(2)-(3).
- 2 (PM-602-0005.1, Evaluation of Evidence Submitted with Certain Form I-140 Petitions; Revisions to the *Adjudicator's Field Manual (AFM)* Chapter 22.2, *AFM* Update AD11-14, December 22, 2010).
- 3 See *Buletini v. INS*, 860 F.Supp. 1222 (E.D. Mich. 1994).



(E-) Discovery and the International Corporation: Changing Business Practices Result in Increased Electronic Data

By *Alisha Cieslak*

As the economy emerges from the “crisis years” of 2008-2011, conducting business in every industry is changing. No longer are handshake deals or leniency in favor of long-lasting relationships the norm. Companies are tightening their belts akin to the way our parents and grandparents did in the post-Great Depression era.

At the same time, phone calls and in-person meetings have been replaced with emails, instant messages, and web meetings hosting participants from all different locations. Standard issue purchase orders have been replaced with arduous General Terms and Conditions with global application, three-party warranty agreements, and long-term supply framework agreements. In that way, not only is the conduct of the business changing, but the contractual infrastructure supporting the business is becoming more complex.

While many believe these changes make a business more sophisticated and efficient, the implications this changing landscape has on the discovery process in US litigation may be overlooked. While the contractual infrastructure is designed to protect the business, the ease of communication between companies creates unforeseen risks and obligations. This is especially true for international companies conducting business with the participation of its players around the world.

This article focuses on discovery issues that may arise when US companies with foreign ownership are subject to litigation in the US.

Increased Attention from US Courts on E-Discovery in Civil Litigation

This article will not specifically review or address all of the Federal Rules of Civil Procedure on discovery. However, it is important to note that many courts in the US are publishing rules that specifically address electronic discovery. Specifically, Michigan’s Court Rules were amended in January 2009 to address e-discovery issues in Rules 2.302, 2.310, 2.313, 2.401, and 2.506.

On September 20, 2013 the United States District Court for the Eastern District of Michigan released a “Model Order Relating to the Discovery of Electronically Stored Information (ESI) Checklist for Rule 26(f) Meet and Confer Regarding ESI” (The Model Order). While this model order is for a “pilot period basis”, it may be adopted as a uniform practice

for the Court at a later date. While this practice brings clarity to the e-discovery process, it has several interesting characteristics that international corporations, especially their in-house counsel, should pay close attention:



Alisha Cieslak

1. **Principle 2.01(c) - Duty to Meet and Confer:** The Model Order states “the attorneys for each party shall review and understand how their respective client’s data is stored and retrieved before the meet and confer discussions in order to determine what issues must be addressed during the meet and confer discussions.”

In order for external counsel to confer, the company must have a clear understanding of how its records are kept. With various network locations, backups, email systems, instant messaging systems, data management systems, etc. this exercise may be complicated for the international corporation. What may be a seemingly simple exercise becomes much more cumbersome when a US subsidiary’s central IT department is housed at their parent company, with their the email server in a different country, and their backup system in another.

2. **Principle 2.04(a) - Scope of Preservation:** “Every party to the litigation and its counsel are responsible for taking reasonable and proportionate steps to preserve relevant and discoverable ESI within its possession, custody or control. Determining which steps are reasonable and proportionate in particular litigation is a fact specific inquiry that will vary from case to case. . . .”

Because e-discovery is a relatively new addition to the discovery process, and because each case has its own set of facts and circumstances, defining reasonable and proportionate steps to preserve electronic documents can be difficult. As previously discussed, if a US subsidiary is subject to litigation, but data is housed in many different locations, it may be difficult to have complete control of the disposition of the data. Nonetheless, counsel must take affirmative steps to control such data and should define an internationally applied procedure to ensure compliance.

3. Principle 3.01 - Judicial Expectations of Counsel:

“Because Discovery of ESI is being sought more frequently in civil litigation and the production and review of ESI can involve greater expense than discovery of paper documents, it is in the interest of justice that all judges, counsel, and parties to litigation become familiar with the fundamentals of discovery of ESI.”

Inferred from this statement is that e-discovery is not something the courts will ignore and will not likely go away anytime soon. This statement seems to be a strong suggestion to the bar that attorneys should not only educate themselves in the e-discovery process, but their clients as well.

Data Privacy Protection in the European Union and Limitations on E-Discovery

Many countries have data privacy laws that govern the extent to which certain information can be disclosed, reviewed, or transferred. Specifically, European Union countries consider data privacy as a constitutional, fundamental right of the people (and employees)¹. In the US, information created in the workplace on company owned equipment is generally considered the property of the company. The approach to privacy in the US can be considered “sectorial” (i.e. HIPAA, etc.) However, in the European Union the information is owned by the individual unless a certain set of circumstances occurs relinquishing or waiving the right of ownership. This right, however, is not absolute.

In 1938 the German Federal Constitutional Court stated individuals have a right to “information self-determination”. This right guarantees each individual the discretion to decide how and when to disclose or use their own personal data. Later, the Federal Data Protection Act was established to define personal data as “any information concerning the personal or material circumstances of an identified or identifiable natural person”. Personal data covers any information concerning personal or material circumstances, can be kept in any form, and can apply to personal or professional matters.

There has been much discussion regarding the interplay between e-discovery and European data privacy rights. It has been said that European companies involved in US litigation act as a “servant with two masters”; that is, international companies must try to strike a balance between protecting the data privacy interests of their European employees whilst complying with US discovery rules. There is no equivalent to e-discovery in European Courts.²

Some scholars have said that personal data is not protected against disclosure in US litigation because litigation is one of the few exceptions to data privacy protections. This theory has not yet been presented to German Courts, for example. However, some say it is best to err on the side of caution and apply a two-step process: 1) Apply stringent handling param-

A practical matter it is permissible to transfer personal data of European citizens to a US subsidiary if necessary to assist in their defense in a US litigation matter.



eters—identifying data, safely storing it, internal then external review; and 2) Apply an export balancing test—whether or not there is a legitimate legal necessity to export the information outside of the company or across borders that would outweigh the interests of the individual whose information will be disclosed.

Most agree that obtaining consent of international employees is neither practical nor efficient due to the time constraints to produce data in litigation and the stringency of the law to achieve a valid legal consent/waiver of data privacy rights. Thus, as a practical matter it is permissible to transfer personal data of European citizens to a US subsidiary if necessary to assist in their defense in a US litigation matter. This right exists regardless of whether there are adequate protection levels for the data, a balancing test is used, or consent of the employee is received.

Best Practices for International Companies Subject to Jurisdiction in US Courts

Companies are obliged to retain records for specific periods of time, as occasionally required by statute as well as certain contractual obligations. Furthermore, it is often in the interest of the company to retain business records to reference historical information or in furtherance of day-to-day work.

However, companies have a vested interest in crafting a well-defined records retention (and deletion) policy when considering how best to handle the demands of e-discovery. Specifically, international companies with many data locations and international custodians of evidence should define what data should be stored, where, and for how long. Further, there should be guidelines around which media should be used for

which purpose (to avoid casual conversation about important business topics over instant messenger, for example). Failure to have such a defined policy and procedure makes collection of the data nearly impossible, cumbersome for both internal and external counsel, and extremely expensive due to the sheer volume of data. Worse than having no policy is a policy that the international company does not follow or has only sporadic participation.

Conclusion

Electronic data has become deeply engrained in the ordinary course of dealing for businesses large and small, and is of growing importance in litigation. The volume of electronic data will only increase as new forms of media are utilized by companies in an effort to increase efficiencies and communicate internationally.

In order to streamline the process of e-discovery when representing an international company, it will be important to fully understand all possible locations of electronic data that may be subject to discovery. This data may be housed in the US subsidiary but could also be maintained at the parent company or elsewhere abroad. A streamlined document retention policy and deletion schedule will reduce some of the volume, cost to collect and review, and help counsel to identify where potentially responsive data is stored. From the business per-

spective, this will also help to eliminate redundancies, cost to store data, and, ultimately, reduce risk to the company.

International organizations should have a clear, detailed policy and practice for how it retrieves, culls, sorts, and reviews data in cooperation with a qualified e-discovery provider and outside law firm. This will help the international company control litigation costs and ensure compliance with legal requirements and court rules. 🌐

About the Author

Alisha Cieslak is the Director of Legal Affairs for the Benteler Group, responsible for all legal and corporate affairs for its business units operating in North America. The Benteler Group is an international organization with business units in automotive, steeltube, and distribution in 150 locations in 38 countries. Prior to serving as its Director of Legal Affairs, Ms. Cieslak was Corporate Counsel to Benteler's Automotive division and was an associate attorney at a law firm in Farmington Hills, Michigan.

Endnotes

- 1 See Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and free movement of data.
- 2 See the "Working Document 1/2009 on pre-trial discovery for cross border litigation" adopted February 11, 2013.

International Consequences of Domestic Human Trafficking

By Kelly A. Carter¹

All too often the question arises, "Do we even have human trafficking in Michigan?" This question is a product of the all too common misconception that human trafficking involves the transport of people across international or even state borders. Human trafficking does not require movement, transport or an international victim. To the contrary, human trafficking is more aptly described as modern day slavery, or forced labor or services. Rather than a crime of transportation, human trafficking is a crime of exploitation. The victims are vulnerable in some way that the trafficker exploits to his or her financial benefit.

Certainly, human trafficking exists internationally. Some 46,570 victims world-wide were identified last year² with estimates of 20-30 million unidentified victims world-wide.³ And as horrible and frequent as international trafficking is, the

shocking truth is that human trafficking happens every day in Michigan—from a minor being offered as a prostitute on the streets of our urban centers or the internet's "backpages," to the young foreign-national promised educational opportunities in the U.S. only to find themselves locked away as a Michigan family's domestic servant, constrained to come and go working for little or no money. The victims of human trafficking are young and old, foreign nationals and U.S. citizens, men and women and girls and boys. Likewise, the traffickers may be isolated individuals or national or international rings adept and practiced at the fluid transportation of their "product" from city to city, state to state and amongst nations.



Kelly A. Carter

Developing an understanding of the problem of human trafficking and the importance of adequate recognition of the immigration consequences and framework for foreign victims becomes essential. Whether purely domestic or with significant international implications, an overview of the entire problem is helpful in understanding the international implications.

What is Human Trafficking?

Essentially, human trafficking is compelled labor or services of another through force, fraud or coercion. The legal definition comes from several sources in both federal and state law.

In 2000 the federal law against trafficking in persons was passed.⁴ It laid out the basic principle of human trafficking – compelled labor or services obtained through the overcoming of will by the exertion of the signature triad of force, fraud or coercion. In addition to targeting traffickers directly, the federal law recognizes the complex criminal structure often accompanying human trafficking by targeting those who financially benefit from trafficking as well.⁵ The sex trafficking of minors was exempted from a showing of force, fraud or coercion,⁶ under the premise that a minor can never consent to sexual exploitation thus there is no will to overcome.

The Michigan legislature followed suit in 2006 with the passage of the Michigan Human Trafficking Act.⁷ The Human Trafficking Act was based loosely upon the 2007 version of the Department of Justice Model State Law.⁸ Although the Michigan Human Trafficking Act did not initially include the signature *terms*, force, fraud and coercion, the *concepts* were nonetheless included

These concepts are emphasized because these are the means whereby a trafficker is able to exploit the victim's vulnerability. These concepts are applied in the following examples. A trafficker may use physical violence and threats thereof to *force* a woman to engage in prostitution or a man to continue with manual labor for little to no pay. Fraud is often used by traffickers to create a false reality for a victim in which there is no real opportunity to escape. The idea that a foreign-national is an illegal and subject to arrest, or the concept that a minor is committing the crime and likewise subject to criminal penalties, all operate to make a victim believe they have no choice but to comply with their traffickers demands. Likewise, the concept of coercion is applied in settings, most likely, where a foreign-national, so dependent upon their immigration status and supporting documents, is told if they do not comply, their trafficker will turn them in as a criminal.

So, then, one can see the concepts in the Michigan law. For instance, the concept of force is contained in the prohibition against labor or services that are obtained or maintained through, 1) causing or threatening to cause serious physical harm to another person;⁹ or 2) physically restraining

or threatening to physically restrain another person.¹⁰ Next, coercion is intermingled amongst the remaining provisions addressing abuse of the legal process,¹¹ and interfering with immigration documents.¹² Finally, the concept of coercion is addressed in the provisions addressing blackmail¹³ and threats of financial harm.¹⁴

As important as the concepts of force, fraud and coercion are, the idea that a minor is never able to legally consent to his or her own sexual exploitation prevails in the Michigan minor sex trafficking provision, which like its federal counterpart,¹⁵ requires no showing of force, fraud or coercion in circumstances of minor sex trafficking.¹⁶

Victim Assistance – International Implications

Unlike most other crime victims, human trafficking victims become almost entirely dependent upon their perpetrators. They may form a bond with their trafficking and therefore find difficulty in identifying themselves as a victim. Others, while terrified by their perpetrator, feel powerless to leave because of the very dependence their perpetrator has instigated.

Quite often, human trafficking victims recovered from their trafficker will be isolated, intimidated, and frequently more vulnerable than when their trafficker targeted them. Each victim has their own unique set of needs, amongst the most common are: security, shelter, food and clothing, psychological support, medical care, income, family reunification, and education. Assisting an English-speaking domestic victim in meeting all those needs is daunting enough, but the foreign-national victim is even more precariously situated due to their immigration status – or lack thereof. In addition to all the same needs of a domestic victim, the foreign-national victim requires legal assistance in establishing and maintaining immigration status.

Fortunately, the TVPA¹⁷ recognizes and provides for the unique additional needs of foreign-national victims. Initially, the TVPA provides a mechanism for stabilization of foreign-national trafficking victims by providing immigration status specifically for victims of trafficking.¹⁸ Recognizing the complete upheaval that a foreign-national trafficking victim likely suffers, foreign-national victims who are certified as trafficking victims¹⁹ are provided the opportunity to remain in the country under special immigration status.²⁰

The TVPA further allows for “certification” that a foreign-national is a human trafficking victim.²¹ The certification allows that foreign-national victim to seek a specialized immigration status referred to as “continued presence.”²² Continued presence is a temporary status granted to victims of severe human trafficking²³ during an ongoing investigation.²⁴ The continued presence designation is applicable in the case of either a federal, state or local investigation.²⁵ Although temporary, continued presence status is renewable,²⁶

it may be a means to more permanent residence under a “T” visa designated for trafficking victims²⁷ or a “U” visa for victims of serious crimes.²⁸ It is worth noting that each of these specialized immigration designations is dependent upon the victims’ assistance with the law enforcement in the ongoing investigation and prosecution, even though some victims may not feel they are capable of such involvement. investigation? This sentence isn’t complete...

The TVPA further provides assistance to foreign-national trafficking victims through programs to provide support and services specifically for foreign-national victims of trafficking.²⁹ Specifically, the TVPA provides for protection of victims against intimidation and threats,³⁰ protection of their identities,³¹ as well as the provision of medical care and “other assistance.”³²

Thus, while all victims of human trafficking require a great deal of assistance in recovering from their victimization, foreign-national victims may be in a better position to receive that assistance. Helping these victims in particular seize the benefits offered to them under the TVPA requires guidance and aid in managing the legal framework that provides such assistance. In short, the key to ensuring the greatest benefit to foreign-national trafficking victims is informed legal advice.



About the Author

Kelly Carter is an Assistant Attorney General in the Criminal Division of the Michigan Department of Attorney General. She began prosecuting when she joined the High Tech Crime Unit in September 1999 where she specialized in the prosecution of computer crime cases including Internet fraud, child exploitation, computer intrusion, threats and similar crimes. In 2011, she was appointed Senior Attorney Specialist and now, in addition to mortgage fraud, she prosecutes human trafficking having obtained the first several convictions under the state’s human trafficking statute.

Endnotes

- 1 **Statements made in this article are my own and not intended to reflect the views, opinions, or position of the Michigan Attorney General or the Michigan Department of Attorney General.**
- 2 United States Department of State, Trafficking In Persons Report, 2013 pg. 46. <http://www.state.gov/j/tip/rls/tiprpt/2013/index.htm>.
- 3 *Id.*
- 4 VICTIMS OF TRAFFICKING AND VIOLENCE PROTECTION ACT OF 2000, 106 P.L. 386; 114 Stat. 1464; 2000 Enacted H.R. 3244; 106 Enacted H.R. 3244; Division A, TRAFFICKING VICTIMS PROTECTION ACT OF 2000 (TVPA), Sec. 112. STRENGTHENING PROSECUTION AND PUNISHMENT OF TRAFFICKERS, codified at 18 U.S.C. § 1589; amended at Trafficking Victims Protection

- Reauthorization Act of 2003; Trafficking Victims Protection Reauthorization Act of 2005; Wilber Wilberforce Trafficking Victims Protection Reauthorization Act of 2008; and Trafficking Victims Protection Reauthorization Act of 2013.
- 5 18 U.S.C. § 1593A.
- 6 18 U.S.C. § 1591.
- 7 MICH. COMP. LAWS § 750.462a through MICH. COMP. LAWS § 750.462i.
- 8 Department of Justice, Civil Rights Division, *Model State Anti-Trafficking Criminal Statute*, 12 (2007).
- 9 MICH. COMP. LAWS § 750.462a(e)(i).
- 10 MICH. COMP. LAWS § 750.462a(e)(ii).
- 11 MICH. COMP. LAWS § 750.462a(e)(iii).
- 12 MICH. COMP. LAWS § 750.462a(e)(iv).
- 13 MICH. COMP. LAWS § 750.462a(e)(v).
- 14 MICH. COMP. LAWS § 750.462a(e)(vi).
- 15 18 U.S.C. §1591.
- 16 MICH. COMP. LAWS § 750.462g
- 17 VICTIMS OF TRAFFICKING AND VIOLENCE PROTECTION ACT OF 2000, 106 P.L. 386; 114 Stat. 1464; 2000 Enacted H.R. 3244; 106 Enacted H.R. 3244; Division A, TRAFFICKING VICTIMS PROTECTION ACT OF 2000 (TVPA) Sec. 107, PROTECTION AND ASSISTANCE FOR VICTIMS OF TRAFFICKING, codified at 22 U.S.C. § 7105; amended at Trafficking Victims Protection Reauthorization Act of 2003; Trafficking Victims Protection Reauthorization Act of 2005; Wilber Wilberforce Trafficking Victims Protection Reauthorization Act of 2008; and Trafficking Victims Protection Reauthorization Act of 2013.
- 18 *See*, Loftus. COORDINATING U.S. LAW ON IMMIGRATION AND HUMAN TRAFFICKING: LIFTING THE LAMP TO VICTIMS. 43 COLUM HUMAN RIGHTS L REV 143, Fall 2011. *see also* Beck. FEATURE: HUMAN TRAFFICKING AND THE T VISA PROCESS, 75 Tex. B. J. 770, November 2012
- 19 22 U.S.C. § 7105(b)(1)(E).
- 20 22 U.S.C. § 7105(c)(3)(a).
- 21 22 U.S.C. § 7105(b)(1)(E).
- 22 22 U.S.C. § 7105(b)(1)(E)(i)(II)(bb).
- 23 22 U.S.C. § 7105(b)(1)(C).
- 24 22 U.S.C. § 7105(b)(1)(E)(ii).
- 25 22 U.S.C. § 7105(b)(1)(E)(iv).
- 26 22 U.S.C. § 7105(b)(1)(E)(ii).
- 27 8 U.S.C. § 1101(a)(15)(T).
- 28 8 U.S.C. § 1101(a)(15)(U).
- 29 22 U.S.C. § 7105(a).
- 30 22 U.S.C. § 7105(c)(1)(C)(i).
- 31 22 U.S.C. § 7105(c)(1)(C)(ii).
- 32 22 U.S.C. § 7105(c)(1)(B).

The Impact of Borders on Bi-National Same-Sex Couples

By Lara Pierce



Despite the stagnation of the U.S. House of Representatives, leaving much-needed Immigration Reform legislation stifling, activity in the U.S. Supreme Court has breathed new life into U.S. Immigration Law. The Supreme Court's decision in *U.S. v. Windsor*¹ extends immigration benefits to same-sex spouses of bi-national couples for the first time. *Windsor* examined whether Section 3 of the Defense of Marriage Act (DOMA) amounted to a violation of the Equal Protection Clause of the Fifth Amendment. Section 3 defined "marriage" for purposes of federal law as a "legal union" between a woman and a man only. This major milestone in U.S. Immigration Law places the U.S. in a group of nearly 20 countries that recognize same-sex relationships as a legitimate basis for immigration purposes.

The result is that any bi-national same-sex couple married in any of the fourteen U.S. states that recognize same-sex marriage⁴ or in a country that permits gay marriage, may now apply for immigration benefits, including Permanent Residence, on the basis of that marriage.



Immigration is not considered a human right, and in the U.S. it does not amount to a right at all, but is instead treated as a benefit conferred on eligible applicants at the government's discretion. Moreover, there is no international law specifically dedicated to LGBT rights, but the bedrock of international human rights is one of non-discrimination.² However, momentum is building in support of applying international human rights standards to the LGBT community at-large, which is being manifested in many ways, including the elimination of discriminatory civil laws and the creation of more inclusionary policies. Same-sex marriage is now legal nationwide in sixteen countries and in parts of two others, which is also opening the door for immigration to many same-sex couples.³

Same-Sex Marriage and U.S. Immigration Law

Until *Windsor*, same-sex foreign national spouses were not recognized as valid beneficiaries in visa applications and could

not join or accompany their partners in the U.S. This held true even if the marriage was legal in the jurisdiction where it took place; even U.S. citizens born and raised in the U.S. could not sponsor their foreign same-sex spouses to live with them in the U.S. This obstacle forced these couples to make difficult choices. For the "lucky" few U.S. citizens whose same-sex relationship would be recognized in the home country of their partners, uprooting from the U.S. and relocating as an immigrant was an option. For U.S. Permanent Residents, who must reside in the U.S. to maintain their status, it was not. For those couples unable to reside together permanently inside or outside the U.S. because of immigration limitations, short-term international visits, even over the course of many years, was often the only viable solution. For those with the available funds, becoming a perpetual college student in the U.S. provided another way to live with their American spouses. Same-sex couples in which neither spouse is a U.S. Citizen or Permanent Resident who sought to study or who were sponsored by an employer to work in the U.S. were also affected. For opposite-sex couples, the spouse of the student and temporary worker have long been permitted to reside (but not necessarily work) in the U.S. but for same-sex spouses, residing in the U.S. was not possible.

Now, it is. The same long-term standard is applied to same-sex and opposite-sex married couples alike. The determination of whether marriage is valid "for immigration purposes is generally governed by the law of the place of celebration of the marriage." *Matter of Hosseinian*, 19 I&N Dec. 453 (BIA 1987). The result is that any bi-national same-sex couple married in any of the fourteen U.S. states that recognize same-sex marriage⁴ or in a country that permits gay marriage, may now apply for immigration benefits, including Permanent Residence, on the basis of that marriage. Likewise, foreign same-sex married couples studying or working in the U.S. are eligible to reside together in the U.S. for the duration that status is held. As for opposite-sex couples, there remains *no* immigration benefit for same-sex couples not united in marriage.

Following the *Windsor* decision, the Departments of Homeland Security, Justice, and State began adjudicating same-sex cases almost immediately. Secretary of Homeland Security Janet Napolitano confirmed that petitions and applications based on marriage for same-sex couples would no longer be automatically denied.⁵ Within one month of the



Lara Pierce

Windsor decision, the Board of Immigration Appeals (BIA) issued its first decision sustaining an appeal of a marriage-based immigration petition by a same-sex couple.⁶ Shortly afterward, Secretary of State Kerry announced that visas for same-sex married couples would be processed on an equal basis to those of opposite-sex couples. “Today, the State Department, which has always been at the forefront of equality in the federal government... is tearing down an unjust and an unfair barrier that for too long stood in the way of same-sex families being able to travel as a family to the United States.”⁷

Same-Sex Couples and Immigration Around the Globe

Recognition of the obligation of United Nations (UN) Member States to apply human rights principles in the LGBT context through non-discrimination is taking a more prominent role in global discussions. On Human Rights Day in 2010, UN Secretary General Ban Ki-Moon reiterated the need for progress on this front. “[W]e reject discrimination in general, and in particular discrimination based on sexual orientation and gender identity. . . . Where there is a tension between cultural attitudes and universal human rights, rights must carry the day.”⁸ The UN issued its first report dedicated to LGBT human rights in November 2011.⁹ Released by the UN Office for the High Commissioner for Human Rights (OHCHR), the report highlights the most critical concerns regarding human rights violations to members of the LGBT community throughout the world, as well as responses to them. It found that discrimination and violence against the LGBT community is frequent and often overlooked or even condoned by governments.¹⁰ “Same-sex conduct” is criminalized in seventy-six countries, and in at least five countries, it is punishable by death.¹¹ In response to the OHCHR 2011 report, senior-level officials from nine nations, the UN, and the European Union (EU) convened on September 26th in New York to reaffirm the need for and their commitment to ending LGBT discrimination.¹² Secretary of State Kerry, who was one of only 14 Senators to vote against DOMA in 1996, attended the “historic” meeting and emphasized the significance of it in sending “a clear and compelling message by coming together.”¹³

Considering the state of LGBT human rights violations around the world, it is not surprising then that civil liberties and rights are also limited. However, as the rapid increase in recent years of the number of states allowing same-sex marriage and the *U.S. v. Windsor* decision highlight, this is changing and quickly. Of the sixteen countries where same-sex marriage is legal nationwide, nine have legalized it since 2010.¹⁴ With the legalization of same-sex marriage, as in the U.S., more same-sex couples are free to reside together throughout the world.

In fact, more countries grant immigration benefits to same-sex couples than allow for same-sex marriage.¹⁵ Among

others, this is true of Australia and of member states in the EU, thanks to EU directives and laws.¹⁶ Australia does not yet allow same-sex marriage, but does permit Australian citizens or permanent residents to petition for their same-sex partner to receive a “Partner Visa.”¹⁷ This visa is relatively new, as Australia has recently revamped its immigration laws, but is similar to the “Interdependency Visa” that had benefitted gay Australians in same-sex relationships since 1995.¹⁸ The requirements include demonstrating that the couple has cohabitated in a “de facto” relationship for at least one year prior to applying and that the relationship is “genuine and continuing.” The process is relatively common in that first a visa that authorizes temporary residency and employment is issued, and after a period of two years, permanent residence may be granted, pending the ongoing validity of the relationship as interdependent. Although Australian immigration also offers a fiancé visa and a marriage-based visa, neither is available to same-sex married couples because Australia, and specifically Australian immigration law, defines fiancé-relationships and marriage as being between a man and a woman, or husband and wife, respectively.

Countries that recognize same-sex marriage often include a dedicated spouse-based visa that is available to same-sex couples as well as visas for couples in civil unions or common law-type relationships. This is the case in Sweden, for example.¹⁹ Until recently passing same-sex marriage into law, France was a particularly interesting case due to its membership in the EU.

French law allows civil unions (PACS) for both opposite-sex and same-sex couples that include at least one French national, and provides immigration benefits in both cases. However, evidence must prove that the PACS couple cohabited “on French soil” for at least one year in order for the non-French national to obtain long term residence and work authorization.²⁰ For those couples that cannot demonstrate this, the foreign national can obtain permission to reside in France, but cannot obtain permission to work in France, until the requirement is met. Prior to permitting same-sex marriage, PACS was the only option for many French citizens in bi-national relationships.

Interestingly, France’s PACS-based immigration law makes it more difficult for the partner of a French national to live and work in France than for same-sex couples in which at least one partner is from another EU nation. Under EU Law, same-sex couples joined in civil union or married in EU jurisdictions that recognize same-sex civil unions or marriage, such as England and Wales, Belgium, and the Netherlands, are immediately eligible to benefit from civil union- or marriage-based immigration status in France, including the right to reside and work in France without proof of cohabitation or residence in France. Now that France recognizes same-sex marriage, it follows that immigration benefits for same-sex spouses of French nationals should mirror those for opposite-

sex partners, such that residence and employment are readily authorized, thereby eliminating the snafu caused by the PACS standard for those who prefer to marry.²¹

This intersection of same-sex relationships and immigration remains one of relatively little reach, but will continue to spread as other countries pass same-sex marriage legislation. For those countries that do not have the societal or political will to allow same-sex marriage, the option of recognizing same-sex civil unions or long-term, “de facto” relationships for immigration purposes remains a viable and simpler option. Opening immigration doors to same-sex couples, either through marriage legislation or immigration policy, is to be expected given the UN’s sharpening focus on the human rights of the international LGBT community. 🌐

About the Author

Ms. Pierce is a Senior Associate at the immigration law firm of *Antone, Casagrande & Adwers, P.C. in Farmington Hills, where she has practiced since 2008. She practices all aspects of U.S. Immigration Law, including Employment- and Family-based Visas, Removal Defense, Asylum, VAWA, Consular Processing, and Naturalization. She specializes in Inadmissibility Waivers, Criminal issues, and has begun taking on Same-Sex Marriage-Based cases. Ms. Pierce is a graduate of the University of Cincinnati College of Law, where she focused on civil rights and international law, and of Syracuse University, where she earned a B.A. in Geography and Photojournalism. Ms. Pierce is licensed to practice in Michigan and is pursuing a solicitor’s license to practice the laws of England and Wales. She is a member of the American Immigration Lawyers Association, American Bar Association, French American Chamber of Commerce, and is a supporter of Freedom House and the Fair Housing Center of Metropolitan Detroit. She speaks French.*

Endnotes

- 1 *U.S. v. Windsor*, 570 U.S. ____ (2013) (Docket No. 12-307).
- 2 See e.g. Charter of the United Nations, Preamble. Entered into force Oct. 24, 1945. Available at: <http://www.un.org/en/documents/charter/preamble.shtml>; “All human beings are born free and equal in dignity and rights.” The Universal Declaration of Human Rights, Article 1, adopted December 10, 1948. Available at: <http://www.un.org/en/documents/udhr/>.
- 3 Argentina, Belgium, Brazil, Canada, Denmark, England and Wales, France, Iceland, The Netherlands, New Zealand, Norway, Portugal, South Africa, Spain, Sweden, Uruguay. It is legal in Mexico City and in some states within the United States. Pew Research, “Gay Marriage Around the World.,” published July 16, 2013. Available at: <http://www.pewforum.org/2013/07/16/gay-marriage-around-the-world-2013/#allow>.
- 4 California, Connecticut, Delaware, District of Columbia, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire,

- New York, Rhode Island, Vermont, Washington, and as of this writing, New Jersey. See <http://www.freedomtomarry.org/states/>.
- 5 Statement from Secretary of Homeland Security Janet Napolitano, “Implementation of the Supreme Court Ruling on the Defense of Marriage Act” and Frequently Asked Questions, July 2, 2013. Available at : <http://www.uscis.gov/portal/site/uscis/m.5af9bb95919f35e66f614176543f6d1a?vgnextchannel=e7801c2c9be44210VgnVCM100000082ca60aRCRD&vgnextoid=4579215c310af310VgnVCM100000082ca60aRCRD>
- 6 *Matter of Zeleniak*, 26 I&N Dec. 158 (BIA 2013).
- 7 Remarks by Secretary Kerry, “Announcement on Visa Changes for Same-Sex Couples,” U.S. Embassy London on August 2, 2013. Full transcript and video available at: <http://www.state.gov/secretary/remarks/2013/08/212643.htm>.
- 8 Report of the United Nations High Commissioner for Human Rights, *Infra, EN9*, at 3.
- 9 Report of the United Nations High Commissioner for Human Rights, “Discriminatory laws and practices and acts of violence against individuals on their sexual orientation and gender identity,” Human Rights Council 19th Session, GA A/ HRC/19/41, Nov. 17, 2011. Available at: http://www2.ohchr.org/english/bodies/hrcouncil/docs/19session/A.HRC.19.41_English.pdf.
- 10 See UN News Centre, “UN issues first report on human rights of gay and lesbian people,” published on December 15, 2011. Available at: <http://www.un.org/apps/news/story.asp?NewsID=40743#.UmPs3CSE7i8>. Charles Radcliffe, Chief of OHCHR’s global issues section, summarizing the reports overall finding. “The law essentially reflects homophobic sentiment, then it legitimizes homophobia in society at large. If the State treats people as second class or second rate or, worse, as criminals, then it’s inviting people to do the same thing.”
- 11 Iran, Saudi Arabia, Sudan, Yemen, Mauritania. See UN News Centre, “UN issues first report on human rights of gay and lesbian people,” published on December 15, 2011. Available at: <http://www.un.org/apps/news/story.asp?NewsID=40743#.UmPs3CSE7i8>
- 12 Attendees included senior level officials from Argentina, the Netherlands, Norway, United States – John Kerry – France, Brazil, Croatia, the EU, Japan, New Zealand, as well as UN High Commissioner for Human Rights. Human Rights Watch, “UN: Landmark Ministers’ Meeting on LGBT Rights Governments, UN Should Act to End Homophobic Bias, Violence,” published Sept. 26, 2013. Available at: www.hrw.org/news/2013/09/26/un-landmark-ministers-meeting-lgbt-rights.
- 13 Remarks by Secretary Kerry, “Remarks at the LGBT Ministerial Event,” New York City on September 26, 2013. Full transcript and video available at: <http://www.state.gov/secretary/remarks/2013/09/214810.htm>. See Senate Vote #280, 104th Congress, Sept. 10, 1996 at: <https://www.govtrack.us/congress/votes/104-1996/s280>.
- 14 Drew Silver, Pew Research, “A Global Snapshot of Same Sex Marriage,” published June 4, 2013 (pre-dating New Zealand’s passage of its gay marriage law). Available at:

<http://www.pewresearch.org/fact-tank/2013/06/04/global-snapshot-sex-marriage/>.

- 15 See Human Rights Watch, *infra* EN 28, identifying Australia, Brazil, and Israel, for example.
- 16 EU law includes a variety of regulations related to the “Free Movement of Persons” for EU citizens and non-EU spouses and partners of EU Citizens. See <http://ec.europa.eu/social/main.jsp?catId=457&langId=en>; See also http://europa.eu/legislation_summaries/justice_freedom_security/free_movement_of_persons_asylum_immigration/
- 17 Australian Government Department of Immigration and Citizenship, “Partner Migration” publication, pp. 34-35 (2013). Available at: <http://www.immi.gov.au/migrants/family/family-visas-partner.htm>.
- 18 See Human Rights Watch, “Family Unvalued: Discrimination, Denial, and the Fate of Binational Same-Sex Couples under U.S. Law,” Appendix B (2006). Available at: <http://www.hrw.org/reports/2006/us0506/10.htm>.
- 19 See *Id* at Sweden.
- 20 Haywood M. Wise and Karim Oudy, “France Flirts with Gay marriage: The Immigration Rights of Same Sex Partners in France Prior and After the Law Instituting Gay Marriage,” last visited October 15, 2013. Available at: <http://www.immigration-france-usa.com/gifs/the-immigration-rights.pdf>.
- 21 I have not been able to confirm whether current French immigration law does allow the same rights to same-sex spouses of French nationals. Additionally, pursuant to French treaties and agreements with several countries and former colonies, same-sex marriage is not legal or recognized in France for persons of several nationalities. See (in French) Stéphanie Trouillard, “Le mariage pour tous en France, mais pas pour tous les étrangers,” France 24, published June 27, 2013. Available at: <http://www.france24.com/fr/20130626-mariage-tous-circulaire-exception-pays-etrangers-convention-homosexuels-gay>.

Treasurer's Report

For the eleven months ending August 31, 2013

	Current Activity August 2013	Year-to-date August 2013	Year-to-date August 2012
Revenue:			
International Law Section Dues	90.00	13,020.00	12,605.00
International Stud/Affil Dues		115.00	145.00
Total Revenue	<u>90.00</u>	<u>13,135.00</u>	<u>12,750.00</u>
Expenses:			
ListServ	25.00	250.00	250.00
Meetings		4,005.02	2,370.62
Seminars		155.00	280.00
Travel Expenses		1,777.75	1,904.98
Telephone	23.76	188.61	23.17
Newsletter	162.71	3,225.70	3,664.88
Postage		10.90	7.76
Miscellaneous		96.92	153.25
Total Expenses	<u>211.47</u>	<u>9,709.90</u>	<u>9,514.91</u>
Net Income	(121.47)	3,425.10	3,235.09
Beginning Fund Balance:		<u>17,268.85</u>	<u>18,051.59</u>
Total Beginning Fund Balance		<u>17,268.85</u>	<u>18,051.59</u>
Ending Fund Balance	(121.47)	20,693.95	21,286.68

Section Events At-a-Glance ILS Calendar of Upcoming Events

For regular updates, see ILS Website (www.michbar.org/international)

Wednesday, November 13, 2014: ILA Meeting

Middle East and Israel: Post-Arab Spring

Miller Canfield, 150 West Jefferson Ave., Suite 2500, Detroit, MI 48226

Wednesday, January 22, 2014: ILS Quarterly Meeting.

International Trade: Recent Developments in Export Control Regulations and Embargoes and their Implication on Manufacturers

Location: TBA

Wednesday, March 19, 2014: ILS Quarterly Meeting

Topic: TBA Location: TBA

Wednesday, May 14, 2014: ILS Quarterly Meeting

Topic: TBA Location: TBA

Section Member Profile: Richard G. Goetz

Richard G. Goetz leads the International Practice Group of Dykema Gossett PLLC in Detroit. This interdisciplinary group helps meet the evolving legal needs of clients in a global economy whether they are entering the United States from abroad or pursuing opportunities outside the U.S. His experience and judgment derived from over 35 years of international practice are sought by clients engaged in a broad range of investment, trade and commercial matters. In addition, he regularly counsels clients regarding compliance with FCPA, Antiboycott, economic sanctions, export controls and other U.S. laws governing individuals and entities doing business abroad. Mr. Goetz speaks and writes frequently on topics involving international legal matters.

Mr. Goetz joined Dykema following a 32 year career with Ford Motor Company where, as Associate General Counsel-International, he was responsible for legal matters affecting the company's international operations as well as providing strategic advice and counsel to senior company management. Mr. Goetz was instrumental in establishing Ford's operations in China, India, Korea, Russia and Eastern Europe. His work in these countries included overseeing an initial placement of B shares with a strategic investor as part of an IPO by a Chinese vehicle manufacturer as well as IPOs by joint ventures in India, Korea and Pakistan. During his career with Ford, he represented the company on five continents, on a broad range of international legal matters, including joint ventures, acquisitions, dispositions, public offerings, litigation, corporate governance, distribution, licensing, international trade, government negotiations, regulatory matters and compliance programs. His career with Ford began at Ford's affiliate in Venezuela, where he remained for ten years.

Q: How do you define "international law"?

International law could be defined as the law governing relationships between parties that may be subject to the laws of two or more nations or international bodies. It has traditionally been divided into public and private international law. Those are high level definitions, friends have described it as chess with a third dimension or like domestic law but with a lot more ambiguity. Much of what I do involves helping clients understand and comply with the laws of countries in which they seek to do business.



Richard G. Goetz

Q: Why international law?

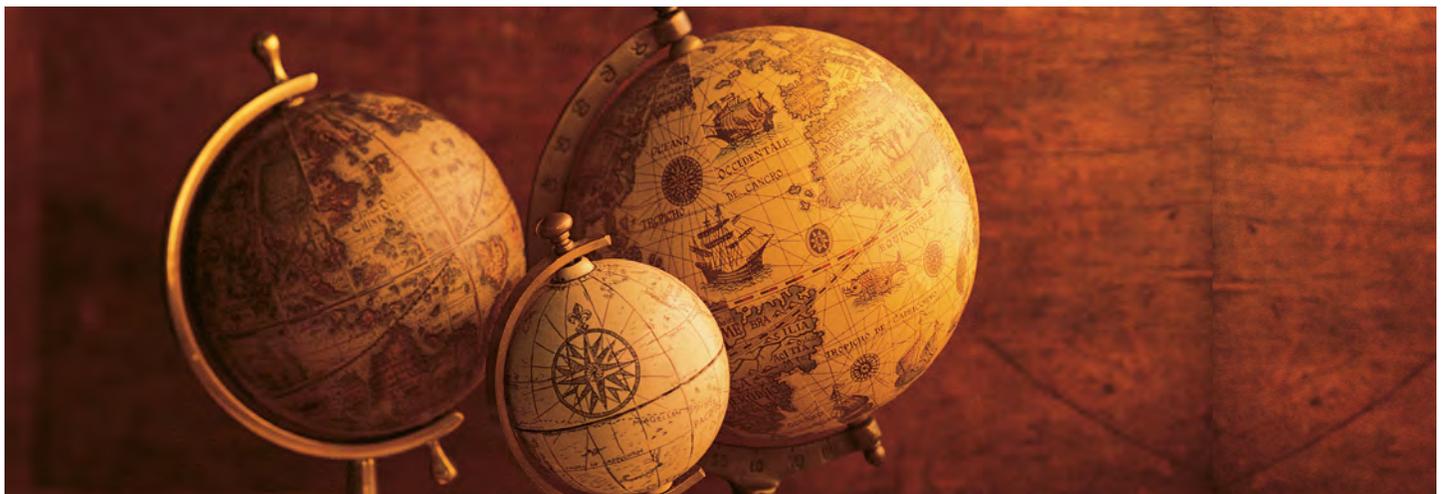
After three years in the Peace Corps in Ecuador and then law school at Illinois, I wanted to go back overseas to apply my legal, language and cultural experience in Latin America so I accepted a Fletcher School Latin American Teaching Fellowship to teach law at the Universidad Catolica Andres Bello in Caracas which included an internship with Ford Motor Company's Venezuelan affiliate.

Q: Where did you go to law school?

I went to law school at the University of Illinois College of Law.

Q: What would you want people who know you professionally to know about you personally?

I used to be a Yankee fan but have recovered. 🌍



Minutes of the Council of the International Law Section of the State Bar of Michigan

A meeting of the Council (“**Council**”) of the International Law Section (“**Section**”) of the State Bar of Michigan (“**State Bar**” or “**SBM**”) was held on September 12, 2013 at the University of Michigan Law School, Room 1020, South Hall, 701 South State Street, Ann Arbor, MI 48109-3091.

The following officers of the Council were present in person: Jeffrey F. Paulsen, Chairperson; A. Reed Newland, Chair-Elect; David B. Guenther, Secretary; and Daphne A. Short, Treasurer. A quorum of voting members of the Council were present in person. Names of each of the attendees will be filed with these meeting minutes.

Call to Order

Jeffrey F. Paulsen, Chairperson of the Section, called the meeting to order at approximately 12:50 pm.

Approval of Agenda

The Chairperson circulated an agenda for the meeting, which was approved as presented.

Notice and Quorum

David B. Guenther, Secretary of the Section, presented a written notice of the meeting that was mailed or delivered to all members of the Council and to Members of the Section in accordance with the Section’s Bylaws. The Secretary said that the notice will be filed with the minutes of the meeting.

Approval of Meeting Minutes

The Secretary circulated a draft of the minutes of the Council meeting held on May 15, 2013. Upon motion made and supported, the Council approved of the minutes without correction. The Secretary reported that approved minutes of the Section Council meetings are regularly posted on the Section website at www.michbar.org and that the approved minutes would also be posted to the Section website.

Treasurer’s Report

Daphne A. Short, Treasurer of the Section, presented the unaudited financial statement of the Section for the eleven months ending August 31, 2013 and the related detailed trial balance for the same period, prepared by the Finance & Administration Division of the State Bar. As of the eleven months ending August 31, 2013, the revenues of the Section were \$13,135.00, and expenses for the same time period were \$9,709.90, resulting in Net Income of \$3,425.10. The Section’s ending fund balance as of August 31, 2013 was \$20,693.95. The Chairperson noted that the Section’s financial statements are generally reprinted in the *Michigan International Lawyer*.

Chairperson’s Report

The Chairperson presented the proposal of the Section’s officers to increase annual dues for Section members from \$30



Left to right, David Guenther, Chair-Elect; Tim Kaufmann, Council member; Daphne Short, Secretary; Neil Woelke, Council member; Reed Newland, Chair; and Troy Harris, Council Member.

to \$35; to decrease annual dues for law students from \$5 to \$0; and to decrease annual dues for Section members with less than two years in practice from \$5 to \$0. The proposed changes were summarized in a handout. The goals of the dues changes were to bring the Section more into line with other sections of the State Bar of Michigan, to increase law student and young lawyer membership and participation in the Section, and to continue to have funds to provide interesting and educational programming. The Chairperson noted that the proposal had been published as required in the most recent *Michigan International Lawyer*. A motion to approve the proposal was made, seconded and unanimously approved.

A. Reed Newland, the Chair-Elect of the Section, reported on proposed amendments to the Section's bylaws. A summary of the proposed amendments and updated bylaws reflecting the proposed amendments were handed out. The Chair-Elect said that the intent of the proposed amendments was to make the Section more nimble. The proposed amendments related to the annual dues changes just approved, reducing the quorum requirement for meetings from 20 to 15 members, to permit establishment of Section committees by the Executive Committee as well as by petition of at least 10 of the Section's members, and to permit amendment of the Section's bylaws at a Council meeting as well as a membership meeting. The Chair-Elect noted that the proposed amendments had been approved at the most recent Council meeting and would be submitted to the Board of Commissioners of the State Bar of Michigan as required for ratification. A motion to adopt the proposed amendments as drafted was made, seconded and approved unanimously.

Report of Nominating Committee

Mr. Paulsen turned the meeting over to Mr. Newland. The Chair-Elect circulated the Nominating Committee's report. The members of the Nominating Committee were Reed Newland, David Guenther, and Daphne Short, each of whom were appointed to the Committee by the Chairperson, Jeff Paulsen, pursuant to Section 3 of Article IV of the Section's bylaws.

Pursuant to the Section's bylaws, the Chair-Elect of the Section, Reed Newland, automatically becomes the Chairperson at the end of the term of the current Chairperson, making Reed Newland the Chairperson for the coming year.

Mr. Newland then advised that the Nominating Committee recommended, in accordance with the Bylaws and past practice, that the following members of the Section be nominated for election as officers of the Section for the coming year:

David Guenther	Chairperson-Elect
Daphne Short	Secretary; and
Lara Phillip	Treasurer

Mr. Newland then indicated that the Nominating Committee recommended, in accordance with the Bylaws and past practice, that the following members of the Section be nominated for election to the Council of the Section for 3-year terms ending in 2016: Troy Harris; Timothy Kaufmann; and Aaron Ogletree.

Mr. Newland said the Nominating Committee also recommended that Neil Woelke be nominated for election to the Council for a two-year term ending in 2015 to replace Lara Phillip.

Continued on next page



From left to right, Richard Goetz, Frederick Frank, Jeff Paulsen, Stephen Guittard, Stuart Deming, Reed Newland, Bruce Thelen & Logan Robinson.

Pursuant to the Section's Bylaw, the Chair-Elect of the Section appointed the following ex-officio law student members of the Council with the approval of the Executive Committee:

- Cooley Law School–TBD
- MSU–TBD
- UDM–TBD
- UM–TBD
- Wayne State–TBD

Election of Officers and Council Members

Mr. Newland then presided over the election of the officers and council members for the 2013-2014 year. Upon motion made and supported, all members of the Council in attendance voted in favor of the nominated persons who were thereupon elected to the positions so designated.

Committees

Mr. Newland noted the Section had the following Committees, headed by the person(s) indicated opposite the Committee:

- Business & Tax–Colleen Freeburg
- Emerging Nations–Richard Goetz & Timothy Kaufman
- Employment & Immigration–Debra Clephane & Linda Armstrong
- Human Rights–Andrew Moore
- International Dispute Resolution–Troy Harris
- International Trade–Christina Howard & Aaron Ogletree
- Mentor-Mentee–Gregory Fox & Jillian Berndt

Mr. Newland said the Section would welcome a co-chair of the Business & Tax Committee.

New Business

Mr. Newland reviewed and handed out the 2013-2014 Section schedule, including Officer and Council conference calls at 10:00 am on the first and third Fridays of each month; and proposed quarterly meeting dates on November 13, 2013 and on the third Wednesday of January, March and May, or January 15, 2014, March 19, 2014 and May 21, 2014.

Mr. Newland noted with approval the goals and tactics identified by Mr. Paulsen, many of which had been achieved during Mr. Paulsen's tenure as chair. Mr. Newland presented the goals and tactics for 2013-2014, noting they were largely the same or a continuation of the 2012-2013 goals and tactics. The 2013-2014 goals and tactics were summarized in a handout, together with a summary of the goals accomplished in 2012-2013.

With the approval of the Executive Committee, Mr. Newland appointed Aaron Ogletree to the newly created position of diversity coordinator.

Mr. Newland noted that the Section would make a presentation to Mr. Paulsen during the afternoon's symposium as a token of the Section's thanks and appreciation for Mr. Paulsen's leadership during 2012-2013.

Adjournment

There being no further business to come before the Council, the Chairperson adjourned the meeting at approximately 1:15 pm.

Lunch and Program

The Section provided lunch, followed by an afternoon program celebrating the five-year anniversary of the International Transactions Clinic at the University of Michigan Law School and the 25-year anniversary of the Section and featuring three panels of speakers on "Growing the Next Generation of International Deal Lawyers: Lessons Learned from the ITC's First Five Years," "Doing Good by Doing Deals: The Art of Lawyering Deals that Generate Social and Financial Returns (at home and abroad)," and "Graceful Exits: How to Structure Equity Exits from Double Bottomline Enterprises." The program was followed by a reception at the University of Michigan Museum of Art.

Respectfully submitted,

David B. Guenther
Secretary 2012-13
International Law Section
State Bar of Michigan

International Law-Theme Introduction

By Jeffrey Paulsen

This International Law theme issue of the *Michigan Bar Journal* recognizes the growing importance of international relationships to Michigan citizens and the growing importance of international law to Michigan lawyers. The recognized efforts of state and county governmental entities, non-profit organizations and law schools are but a small sampling of the activities occurring on a daily basis to improve and expand the international relationships of individuals, businesses, governmental entities and others that see the potential opportunities for Michigan in the global economy.

These Michigan globalization efforts are being supplemented, supported and led by members of the *SBM International Law Section*. With over 460 members led by 4 elected Officers, 9 elected Council Members and 7 Committee Chairs, the Section is providing extensive international educational learning and mentoring opportunities by offering programs and seminars and by publishing the *Michigan International Lawyer* journal. The Section also strives to provide beneficial networking opportunities for members and non-members alike. Not only has the Section reached out to the various state-wide constituents that share an interest and passion for international matters, it has made a concerted effort to reach the younger lawyers and law students that see International Law as a career possibility. By appointing a Diversity Coordinator and providing free membership to law students

and lawyers with less than 2 years of practice, the Section is encouraging new diverse members and Section leadership opportunities.

We have featured five articles—one that highlights the efforts of internationally minded organizations and lawyers, one that highlights the international efforts of Oakland County, and one that highlights the international efforts of the Detroit Chinese Business Association. To supplement these fact-filled articles, we have added articles that highlight the efforts being made and the challenges that exist in educating law students in an ever expanding global economy as well as a recent U.S. Supreme Court case that highlights the ever-changing challenges that exist in understanding and practicing law in the international community.

We hope you enjoy these glimpses of the international relationships and international law being practiced by lawyers across the state of Michigan. If you want to learn more, we encourage you to join the *SBM International Law Section*, attend the quarterly and annual meetings, and read the *Michigan International Lawyer*.

Having just celebrated the 25th “silver” anniversary of the Section with many of our former Chairpersons, we look forward to the next 25 years of new leadership initiatives from those that have an interest and share a passion for International Law. 🌐

ILS Council Meeting and Program

Wednesday, November 13, 2013, 4:30 – 7:30 p.m.

Miller Canfield, 150 West Jefferson, Suite 2500, Detroit, MI 48226-4415

(313) 963-6420

Program Topic

*Middle East and Israel: Post-Arab Spring
Economic Dependencies, Troubled Economies Amid Conflict, Oil Politics,
Embargo and Trade Sanctions*

Presented by: Dr. Mordechai Kreinen, Michigan State University

Meeting Schedule

4:30 pm Council Meeting for International Section
5:30 pm Speaker – Dr. Mordechai Kreinen
6:30 pm Networking - Complimentary Hors D’oeuvres & Beverages



Dr. Mordechai Kreinen

Registration

There is no charge to attend the program and meeting, but registration is appreciated. Please RSVP by phone or e-mail to Ms. Virginia Herrick, (313) 496-7548, herrick@millercanfield.com by Friday, November 8, 2013.

Michigan International Lawyer

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2013-2014 Roster, State Bar of Michigan, International Law Section



Officers

Chair: A. Reed Newland
Chair-Elect: David Guenther
Secretary: Daphne Short
Treasurer: Lara Phillip
Immediate Past Chair: Jeffrey Paulsen

Committee Chairs

Business and Tax: Colleen Freeburg
International Trade: Aaron Ogletree & Christina Howard
Emerging Nations: Richard Goetz & Timothy Kaufman
Employ and Immigration: Debra Auerbach Clephane & Linda Armstrong
Human Rights: Andrew Moore
International Dispute Resolution: Troy Harris
Mentor-Mentee: Gregory Fox and Jillian Berndt

Diversity Coordinator: Aaron Ogletree

Commissioner Liaison: Margaret Costello

Council Members

Linda Armstrong (2014)
Sonia Salah (2014)
Douglas Duchek (2014)
Timothy Attalla (2015)
Debra Auerbach Clephane (2015)
Neil Woelke (2015)
Troy Harris (2016)
Timothy Kaufmann (2016)

Law Students Representatives

WSU- Shahar Ben-Josef, J.D./M.A. candidate 2015

Michigan International Lawyer

Professor Gregory Fox
Shahar Ben-Josef, Senior Editor
Carly Colombo, Student Editor
Corey Neil, Student Editor