ILLINOIS STATE BAR ASSOCIATION

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The Globe

The newsletter of the Illinois State Bar Association's Section on International & Immigration Law

Editor's Comments

BY LEWIS F. MATUSZEWICH

Susan Brazas Goldberg as chair of the International & Immigration Law Section Council is demonstrating excellent support for *The Globe.* In this issue is her second chair's column and she has also actively recruited a wide range of articles for our consideration.

This issue has the third installment of "Made in China" by Ralph E. Guderian, a member of the ISBA International and Immigration Law Section Council. We have pointed out that opinions expressed by an author in any of the articles are the author's opinion and not necessarily that of the ISBA, the editor of *The Globe*, nor the members of International & Immigration Law Section Council.

In the first issue of *The Globe* for this year appeared an article by Kristen E. Hudson and Micaela L. Glass, entitled "Navigating The International Waters of a Commercial Dispute: What Law Will Apply to a Commercial Dispute in Arbitration?" In this issue we have their article titled "Navigating the International Waters of a Commercial Dispute: Tips for Selecting Arbitrators in an International Arbitration." This article had also appeared initially in the *Alternative Dispute,* the

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From the Chair

BY SUSAN M. GOLDBERG

We are pleased to bring you our second issue of "The Globe." We present articles on different aspects of immigration law and international law. If you have written and article—or would like to write an article—related to these topics, please feel free to submit it for publication. And we welcome you to join our section—go to the ISBA main page to indicate your request for membership in our section. Several of us on the Section Council do not practice in these areas of law but nonetheless have a personal or professional connection which has drawn us to the topics.

On a personal note, as of January 1, 2022, I am ending my 12-year stint as the author of the State Court Case Digests, which appear in the ISBA daily newsletter known as "E-Clips." For the past 12 years, I have read and summarized every published court decision of the Illinois Supreme Court and appellate courts. My successor will continue this work which provides ISBA members with quick access to current case law.

In this season of giving, please consider making a year-end monetary donation

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Editor's Comments

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newsletter of the ISBA Section on Alternative Dispute Resolutions.

Alice Denenberg's article, "Expedited Changes Coming to the Canadian Trademark Office: A Comparative Overview With the U.S. System," first appeared in the *Intellectual Property* newsletter of the ISBA. Another article from *Intellectual Property* newsletter is "Vietnam: Evidence on Ownership & Damage in Copyright & Related Rights Litigation" by Yen Vu and Trung Tran. Both articles appear in this second issue of *The Globe.* Thank you to Daniel Kegan, the editor of the *Intellectual Property* newsletter for finding articles of interest to ISBA members that are concerned with international trade issues.

Articles appearing concerning international trade or business issues in the newsletters *Alternative Dispute Resolution* and *Intellectual Property* are further evidence of the widespread interest in international matters by attorneys throughout the state of Illinois.

Susan Brazas Goldberg has followed John Rottier's blog on immigration issues and obtained his permission to include excerpts from two of his blogs. The blog does express his opinions so that we emphasis that such opinions expressed by an author are the author's opinion and not necessarily that of the ISBA, the editor of *The Globe,* nor members of the International & Immigrations Section Council.■

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From the Chair

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to the charitable organization of your choice. I serve on the Board of Directors of Northern Illinois Justice for Our Neighbors, a nonprofit legal aid clinic providing free immigration law services to persons in need. Take a look at their website to become better informed about the work they do and how you can help. Another excellent charitable organization is the Illinois Bar Foundation which provides funding to worthwhile legal aid organizations and assists lawyers, and their families, in times of need. Their website is also quite informative, and tells how you can become a "Champion" of the Bar Foundation.

I encourage readers to send me an email (susango@uawlsp.org) or give me a call (815/544-2525, ext. 1415) if you have any ideas, questions or comments about this newsletter. Best wishes for a happy holiday season!■

Susan M. Goldberg (susango@uawlsp.org) is the current chair of the ISBA Immigration and International Law Section Council and is a member of the ISBA Assembly. Susan is a former member of the Illinois Bar Foundation Board of Directors. Susan is the managing attorney for the UAW Legal Services Plan in Belvidere, Illinois.

The Globe

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‘Made in China’: Part 3

BY RALPH E. GUDERIAN

Statements or expressions of opinion appearing herein are those of the author and not necessarily those of the Illinois State Bar Association or the editor of the Globe or the members of the International & Immigration Law Section Council.

The first portion of this article appeared by Ralph Guderian in the May 2021 issue and the second part appeared in the November 2021 issue of *The Globe*.

PRC Chairman Mao Zedong. The PRC (Peoples Republic of China) was established in 1949 by the CCP (Chinese Communist Party) on October 1, l949. Chairman Mao Zedong (1893-1976) proclaimed the founding of the PRC in Tiananmen Square in Beijing. In 1954 the PRC enacted a state constitution and elected a National People’s Congress (NPC).

The CCP was founded in Shanghai, China’s largest city and trading port in July 1921.

The CCP in 1949 defeated “The Republic of China” (ROC) (also known as the Nationalist or Chinese Nationalist government) which was formed by Dr. Sun Yak-sen (1866-1925) and has been dominated by Sun’s Chinese Nationalist Party (Kuomintang (KMT))

The ROC in 1912 overthrew the Qing Dynasty (Manchus) (1644-1912) which had been founded by the Manchus, an ethnic group from Manchuria (northeast China) and it was China’s last Imperial Dynasty.

The Qing Dynasty in 1644 overthrew the Han Chinese Ming Dynasty (1368-1644) whose Han ethnic Chinese comprise the vast majority of the population of China.

Chairman Mao Zedong in 1949 was serious about bringing real change to the Chinese society—“Some classes triumph, others are eliminated. Such is history….” And such was the political philosophy of Mao. Landowners and rich peasants were squatting on the country, fattening themselves on the toil of China’s poor. Mao himself had estimated that “one tenth of the peasantry” would have to be “destroyed “ to allow the fresh start that was needed. Mao’s campaign was titled “land reform.” The bloodshed was horrendous. Western scholars estimate the massacre at around 5 million.

If its victims were not “innocent” in strict socialist terms, they were hardly all that guilty—only the tiniest proportion could seriously have been seen as “rich.” For the most part, they had little more than those around them—enough to make them feel like stakeholders with property and a position to defend.

Mao was also the first ruler since the unification of China by the first emperor to tear apart Chinese traditions as a deliberate act of state policy. He proclaimed: “The thought, culture and actions which brought China to where we found her must disappear, and the thoughts, customs and cultures of proletarian China, which does not yet exist, must appear.”

Thought, culture, customs must be born of struggle and the struggle must continue for as long as there is still danger of a return to the past. Also Mao’s China was, by design, a country in permanent crisis.

Mao was able to implement his policies at home since he proclaimed continuous revolution and exercised total control. Abroad world revolution was only a long-range objective. Thus, he recognized he lacked the means to challenge the prevailing international order and thus implemented his policies by ideological means. He proposed to achieve psychological equivalence to the superpowers by calculated indifference to their military capabilities.

An example of such Chinese strategic tradition is when a commander notices an approaching army far superior to his own. Since resistance guarantees destruction, and surrender would bring about loss of control over the future, the commander opens the gates of his city and places himself there in a posture of repose and behind him shows a normal life without any sign of panic or concern. The general of the invader army interprets this as a sign of the existence of hidden reserves, stops his advance and withdraws.

Images of the Party Chairman Mao looked down from the wall in every government office, council chamber, classroom and public facility. Marxism—Leninism was given a Chinese rebranding. Its identification with Mao in person gave Communism a Chinese face.

CCP Communism. Marxism—Leninism, as modified by Mao, replacing “peasantry” for “the proletariat” since China was basically an agricultural rather than industrial country at the time, is the basis for today’s CCP communism. Proletariat are the laborers. Bourgeoisie are the owners of the means of production.

Marxist—Leninists support a socialist democracy as opposed to a liberal democracy. A two-stage communist revolution is needed to replace capitalism. A vanguard party organized hierarchically through democratic centralism would seize power “on behalf of the proletariat” and establish a communist party-led socialist state, which it claims to represent the dictatorship of the proletariat. The state would control the economy and means of production, suppress the bourgeoisie, counter revolution and opposition, promote collectivism in society and pave the way for an eventual communist society, which would be both classless and stateless.

Of course, this has to be modified further by Deng Xiaoping’s inconsistent allowance of entrepreneurs with their profit motive. However, they are under state supervision.

And it has to further be defined by the government’s banning anything deemed “subversive.” Any comment or action that can be construed as critical of the state can be declared a crime. The government exercises total control over all news media and publishing to make sure that the media and books served the goals of the state.

The state’s lawyers and judges are viewed as representatives of the government, not the accused, and are expected to uphold the so-called Four Cardinal Principles of the Communist Party—adhering to socialism, the dictatorship of the Party, the leadership

of the Party, and the thoughts of Marx, Lenin and Mao.

As to TV the government's view is that the programs should be uplifting as well as entertaining and it bans almost everything else. And as to the internet the Golden Shield Project (known as the great firewall of China) allows "unacceptable" content to be excluded. It equips an army of 50,000 censors. Thus, barring social media websites—face book and twitter.

The state also bans the construction of oversized xenocentric, weird buildings. The government's focus has been on building "suitable, economic, green and pleasing to the eye structures." It bans the book Alice in Wonderland since it portrays talking animals which was thought to be an insult to humans. It also bans the Jasmine flower.

Confucius revived. At the early stages of the 21st century the Chinese leaders again turned to traditional wisdom. As Mao had feared, the Chinese DNA had reasserted itself. They described their reform aspirations as building a xiaokang (moderately well-off) society—a term with Confucian connotations. They oversaw revival of the study of Confucius in Chinese schools and a celebration of his legacy in popular culture. In January 2011, China marked the rehabilitation of the ancient moral philosopher by installing a statue of Confucius at the center of Tiananmen Square in Beijing.

The seeds of modernization could be found in Chinese history and Confucian precepts, with their emphasis on education, moral motives, and community. However the Chinese leaders stressed the Confucius authoritarian values rather than the Confucius obligation of intellectuals to criticize officials who abuse their power or engage in unfair treatment of the population.

Superstitious beliefs. Generally, the Chinese government leaves the people to their own beliefs. The Chinese have faith in astrology, almanacs, dream interpretation, geomancy, witchcraft, phrenology, palmistry, and recalling of the soul, fortune telling in all forms, charms, magic and many other varieties of superstition.

One superstition "The Dragon's Breath" relates to the construction of a building—is it within the breath of a dragon? (In Chinese mythology dragons are revered for their power and grandeur. They are not fire—breathing monsters except when someone steps on their toes. Then their fury knows no bounds.) Early Chinese believed there was a spiritual as well as a magnetic connection between everything in nature, and for nature to work "right" there had to be harmony between these energy forces. It has to be determined which way the cosmic breath of the dragon flows. This is determined by the rise and fall of the land and anything else that would alter its direction of movement. Hills are regarded as the bodies of dragons—and one place you don't want to build is on the eye of the dragon.

The wind and water had to be channeled in the right direction. Each room in a building and the building itself has to face in the direction that prevents the entry of "bad breath" and invites the entry of "good breath." The next time you are in the lobby of a building or in front of a building and everything about it—the landscaping, the direction the building faces, the architecture, everything—just "feels" right and good, you are basking in the "breath of the dragon."

A superstitious belief can be seen in the Chinese' approach to gambling or games of chance. It should be noted that gambling revenue in Macau, which has mostly ethnic Chinese customers, has exceeded Las Vegas. Most prefer roulette, a dice game called da xiao (big-little) and most of all baccarat. Felt covered tables for baccarat occupy most of Macau's gambling space. There is a widespread belief among Chinese gamblers that there are "hot" and "cold" tables and much of the skill of gambling involves telling them apart.

Superstition is also reflected in the famous "Door Gods"—the images of fearsome-looking military figures printed on paper and posted alongside of temples, palaces, public buildings and homes to keep evil spirits out.

Escape or enlightenment. The Chinese also sought escape or enlightenment. The Buddhists had a theory of dharmas which is actually a theory of elements or atoms, according to which an entity does not exist in itself but is made up of all its parts. The old Buddhist monks believed that man himself is composed merely of these many parts or dharmas; he has no personality, soul, or self. The dharmas are of several types. Some relate to form and substance, others to sensation, and others to mental activity. Taken together, they make a neat explanation of experience and form a basis for the denial of the existence of self. This is just what the Buddhist sought, as a way of escaping life's misery.

One approach to this escape or enlightenment was "meditation." This was developed by an Indian monk named Bodhidharma and brought to China around AD 500. His is famous for having meditated for nine years facing a wall—during which he is said to have become so sensitive to his surroundings that he could hear ants communicating with each other.

Along this same line opium was in the eighteenth century demanded by the Chinese people. It had been accepted for its pleasurable effects as well as its use as an escape. An English writer who had purchased some laudanum, a solution of opium and alcohol, for a toothache wrote:

I took it: and in an hour, O heavens! what a revulsion! what a resurrection, from its lowest depths, of the inner spirit! what an apocalypse of the world within me! That my pains had vanished was now a trifle in my eyes; this negative effect was swallowed up in the immensity of those positive effects which had opened before me, in the abyss of divine enjoyment thus suddenly revealed. Here was the panacea…for all human woes; here was the secret of happiness…

Religious beliefs. In regards to religion, the majority of China's people have worn a Confucius crown, a Taoist robe, and a pair of Buddhist sandals for they have accepted all three systems as different roads to the same destination.

In Judaism, Christianity and Islam, God himself (in whatever form he was envisioned by these groups) established the guidelines of good and evil and set the standards for human behavior. There was no such God in Chinese heaven. All things, all acts, had a positive or negative character but neither was seen as inherently right or wrong, good or bad, because both were essential for existence and both were circumstantial.

The clearest expression of existing religious beliefs is to be found in "Treatise of

the Most Exalted One on Moral Retribution," which is part of the Taoist canon, and "The Silent Way of Recompense" which, though largely Taoist, reflects the teachings of Confucius and Buddhist also.

In the former The Most Exalted one said: "Calamities and blessings do not come through any (fixed) 'gate; it is man himself that invites them." The man of good fortune speaks good, sees good, and does good. Every day he has three kinds goodness. At the end of three years Heaven will send down blessings on him. The man of evil fortune speaks evil, sees evil, and does evil. Every day he has three kinds of evil. At the end of three years Heaven will send down calamity on him. Why not make an effort to do good? Also one can repent for an evil deed already done.

In the latter the Lord says: For seventeen generations I have been incarnated as a high official, and I have never oppressed the people or my subordinates. I have saved people from misfortune, helped people in need, shown pity to orphans, and forgiven people's mistakes. Refrain from doing any evil, but earnestly do all good deed. Then there will never be any influence or evil stars upon you, but you will always be protected by good and auspicious spirits. Immediate rewards will come to your own person, and later rewards will reach your posterity.

Saving. China has by far the highest national savings in the world. China's saving rate is a staggering 50 percent. The savings rate is the net share of national output either exported or saved and invested for consumption in the future. India's saving rate is 5 percent and the United States' saving rate is zero or below. Although the average family's saving rate is very high, much of China's national income is "saved" almost invisibly and kept in the form of foreign assets—mostly in the United States. (It should be noted that the United States has never before been so deeply in depth to one country.)

Eating. Chinese are obsessed with eating. The country has been overpopulated for centuries and their food has always been scarce. For the people, food is heaven.

The four main cuisine styles being Peking (Mandarin) (North), Shanghai (East), Cantonese (South) and Szechwan (West). Each has at least one hundred distinctive dishes. One interesting, colorful and satisfying Cantonese meal is made of little hearts (dim sum) which are miniature fixings of several dozen dishes that range from tiny "custard pies' to meat or vegetable—stuffed buns that have been steam-cooked. Other common ingredients are crab, shrimp, lotus kernels, bean and nut paste, and chicken.

Traditionally guided by the ancient yin—yang principal everything in the universe is either positive or negative, hot or cold, wet or dry, etc., and the foods people eat must be a harmonious balance of these cosmic forces if they are to stay physically, emotionally and spiritually healthy. Yin foods are thin, bland, cooling and low in calories (boiling foods make them yin). Yang foods are rich, spicy, warming and high in calories (frying foods makes them yang).

The Chinese may have been the first humans to change non-alcoholic drinking from being just a nutritional necessity to being both a nutritional and recreational activity. The most common social drink in China is, of course, tea. There is green tea, brown tea and black tea. Oolong is the cheapest and most common tea. Jasmine tea is one of China's most aromatic teas.

The importance of tea in Chinese life is shown by the following: tea before your eat; tea afterwards; tea before you leave; tea when you return; tea before you start (to work); a tea break in between; tea when no one is home; tea when company comes. The Chinese claim their tea—drinking is one of the reasons very few Chinese are fat.

Many Chinese restaurants have adjoining apartment—type accommodations available by the hour. And they have attractive young women to act as hostesses and companions available to male diners. There are also "mistress contracts" Bao Qi Lai made to book an exclusive mistress for three months or more at great expense. A billionaire paid off his mistress with a blank check, which challenged her to avoid greed because she did not know how much was in the account.

Shopping. Shopping is a pleasant experience in exotic and captivating Hong Kong with its narrow streets filled with stalls and goods of all types. There are designer shirts, and blue jeans at rock bottom prices (all fakes, of course), excellent leather goods and silk fabrics together with endless stalls with Chinese jade. In the central market there is a four-story Victorian building that sells meat, fish, vegetables and poultry. There are fish vendors on the first floor, sorting through their large woven baskets searching for just the right catch for you. On another floor is a meat market where they slaughter animals in front of the customer "to be sure it is fresh."

There is also what is known as "Egg Street" where you can buy every sort of egg you care to eat. There are chicken eggs, duck eggs, salted eggs and the famous 100-year-old eggs. They really aren't 100 years old but about three weeks old, and they have been treated with tea leaves, salt ginger, rice and lime. There is also another street famous for its Snake Shops. Here you will see live snakes being prepared for various delicacies. Snake meat is also mixed with Chinese wine and sold as a cure for rheumatism and is reported to be especially good for potency in the male.

Migration. Over the years Chinese have migrated to the United States. In 2018, 2.5 million Chinese immigrants lived in the United States. 67,000 came in that year.

Xi Jinping. Xi Jinping took power as the Chinese Communist Party's General Secretary in November 2012 and as President in March 2013. He has focused on China's tradition. CCP being the protector of an intangible cultural heritage—physical sites as well as music, cuisine, theater and the like. He regularly invokes Chinese culture to bolster the CCP's rule, louting the nation's "great civilization" and the CCP's efforts to preserve and uphold it. Thus projecting China as a peaceful friendly rising power.

In mid 1913 Xi proclaimed the "China Dream." It consisted of a personal dream and the country's dream. Both dreams being interdependent. The personal dream would result in the Chinese person having happiness, a successful life, good health, safety, and a good job earning enough to support his or her family. The country's dream consisted of 2 parts: one that in 2021 China would be a well-off society and two by 2049 China would develop into socialist modern state.

These dreams are inspirational and call upon the Chinese people to try to realize them. Dreams can be a powerful force in achieving hopes and aspirations.

China struggled over the years to be independent and more advanced industrially

and equal to other countries in the world. These dreams reflect this aspiration. And they also reflect the Chinese people's aspiration to get more respect.

Conclusion. Chinese fortune cookies are given out at the end of a meal and accordingly they are mentioned here, even though they are not a traditional Chinese custom. Many have contained sayings of Confucius such as: a man who does not think far ahead in whatever he does, is sure to be troubled by worries much closer at hand, never do to others what you would not like them to do to you, our greatest glory is not in never falling, but in rising every time we fall, choose a job you love, and you will never have to work a day in your life, to know what you know and what you do not know, that is true knowledge and before you embark on a journey of revenge, dig two graves. ■

Ralph E. Guderian is a member of the GMT Law Firm LLC, a general practice firm with focus in domestic relations, criminal, immigration, landlord/tenant, bankruptcy, employment, civil litigation, and probate law. He may be contacted at ralphguderian@sbcglobal.net.

Navigating the International Waters of a Commercial Dispute: Tips for Selecting Arbitrators in an International Arbitration

BY KRISTEN E. HUDSON & MICAELA L. GLASS

This is the second installment in a series of articles exploring international arbitration policy and procedure.

Welcome back to the next installment of "Navigating the International Waters of a Commercial Dispute." In this article, we discuss the composition of the arbitral tribunal and some best practices for how to select an arbitrator.

Recall our prior example of a Canadian manufacturer who purchases component parts from a Vietnamese supplier pursuant to an agreement containing an arbitration clause with arbitration to be held in Chicago, Illinois, and a Canadian choice-of-law provision. Upon receiving delivery of non-conforming component parts from the Vietnamese manufacturer, the Canadian purchaser requests a return of the purchase price, or in the alternative, replacement component parts. The Vietnamese supplier declines to issue a refund or replacement. The parties realize they are at an impasse and the Canadian buyer makes a demand for arbitration. Once the demand is made, the race is on to select arbitrators who will govern all procedural and substantive aspects of the dispute, including ultimate determinations of facts, credibility, admissibility, and weight of the evidence. The stakes are high for both sides in making good choices. In this article, we address the sources of authority and rules applicable to arbitrator selection and offer some practice tips on how to select the best arbitrator for the job.

Unlike the courtroom, parties have significant authority in selecting arbitrators—which is the hallmark and benefit of arbitration as a private system of adjudicating disputes. And like any fact finder, the quality of the arbitrators can have significant impact on the ultimate success of the arbitration. With limited means to appeal an arbitral award, parties to an international arbitration must select their arbitrators wisely, and with an understanding of the many under currents at play.

Who Are the Arbitrators and How Are They Selected?

How Are the Arbitrators Selected?

Because arbitration is a creature of contract and the parties are free to craft their own dispute resolution procedures, the first source for understanding who will arbitrate the dispute is the parties' agreement. The arbitration clause will often provide guidance on both the number of arbitrators and method of selection of arbitrators. While the parties are free to craft the arbitrator selection process to meet their specific needs, a typical international arbitration has three arbitrators. In such cases, each party selects a party-appointed arbitrator, and the two party-appointed arbitrators select a third arbitrator to serve as chairperson.

Another source of guidance as to the number and method of selection of arbitrators is the rules of the arbitral institution or guidelines the parties agree to govern the arbitration. As set forth in the UNCITRAL Rules, Article 7[1], for example, in the absence of agreement by the parties to have a sole arbitrator, three arbitrators is the default choice. By contrast, both the International Chamber of Commerce (ICC) rules and the American Arbitration Association's International Dispute Resolution Procedures provide for a sole arbitrator as the default choice, unless other factors are present that warrant the appointment of three arbitrators.[2]

In addition to the parties' contract and

the arbitral rules, there are other sources of law to look to for guidance on arbitrator selection that may impact the ultimate enforcement of the arbitral award. Article V(1)(d) of the New York Convention allows for the refusal of an arbitration award if "[t]he composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place."[3] If the seat of the arbitration is located in the United States, for example, the Federal Arbitration Act provides guidance for the selection of arbitrators. Section 5 of the Act provides:

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.[4]

So the question of selection of the arbitrators is important not only to compliance with the terms of the parties' agreement, but may also impact enforcement of that award at the conclusion of the process. As discussed further below, selection of arbitrators is important to ensuring that an efficient and appropriate remedy resolves the merits of the parties' dispute.

Who Are the Arbitrators?

Understanding and maximizing the process of selection of the arbitrators is important because arbitrators are key to the success of the arbitration. The quality of the arbitrators is critical because arbitrators make binding decisions and have broad discretion to fashion remedies. And the parties have a limited ability to challenge or appeal an arbitration decision if the arbitrators do not do their jobs well. An arbitrator's credibility is therefore crucial to maintaining the parties' faith in the overall arbitration process and to securing those benefits that make arbitration attractive as a method of dispute resolution, such as efficiency and enforceability.

At a minimum, arbitrators must be impartial and independent. In this context, impartiality means that the arbitrator is not biased in favor of or against any party to the case or towards any particular issue in the case. In this regard, there is a tension between the concept of a party-appointed arbitrator—in the sense that the party selects the arbitrator it believes will best understand and support that party's legal position—and the requirement that the arbitrator not be obviously biased in favor of that party. To balance these tensions, an arbitrator is required under arbitration and ethical rules to disclose any circumstances that may give rise to justifiable doubts[5] concerning their impartiality.[6] These disclosures include any past or present relationships with any of the parties. This duty is continuing, arising when a new witness, party or issue is introduced to the proceedings.

Independence refers to the financial dependence of the arbitrator. Notwithstanding the compensation received for the arbitrator's services, the arbitrator must be free from any financial stake in the outcome or any financial stake in any of the parties and not professionally tied to the outcome of the proceeding. This would include obvious situations where the arbitrator is a legal representative or executive level manager of the party or would profit from the outcome of the arbitration, and also less direct situations where the arbitrator provides legal advice to an affiliate of the party or is associated with a law firm that does so. An arbitrator also has a continuing duty to disclose all such financial circumstances at all stages of the arbitration.

Impartial and independent arbitrators are important to the validity of the process. One reason for this is because bias of an arbitrator may be grounds to refuse enforcement of the arbitration award under Article V(1)(d) of the New York Convention. That section allows for refusal of enforcement of an award where "[t]he composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place." Therefore, the award could be challenged if bias of an arbitrator is grounds for vacatur of an award under the law where the arbitration took place. Under section 10 of the U.S. Federal Arbitration Act, for example, a court may vacate an arbitral award where there was "evident partiality or corruption in the arbitrators."[7] Short of challenge to an award, parties should take care to avoid challenges to and disqualification of arbitrators as it is costly and delays an ultimate resolution on the merits.

Impartiality and independence are the minimum requirements for arbitrators, however. The following is a non-exclusive list of arbitrator qualities that in addition to impartiality and independence contribute to the success of an arbitration:

1. Nationality: Many parties and arbitral institutions require that the presiding arbitrator be of a different nationality than the parties. This is because nationality provides one easy and effective litmus test for measuring and preventing bias.
2. Subject matter expertise: At a minimum, the arbitrator should be familiar with international law and procedure and have experience in managing or litigating complex commercial disputes. Depending on the nature of the dispute, it may be important to have experience in a particular industry, for example, in cases involving construction or investment disputes. While legal experience is not a requirement to serve as an arbitrator, as noted below regarding case management skills, it is often preferred to ensure an orderly efficient arbitration procedure.
3. Language capability: Obviously, it is important for the arbitrator to have the capability to read documents relevant to the proceeding, to

effectively communicate with counsel and the parties, witnesses and experts, and to write reasons for decisions and awards. Thus, language fluency based on the needs of the case is an important quality.

4. Case management skills: To achieve two of the goals of arbitration—time and cost efficiency—the importance of the case management skills of the arbitrators cannot be overstated. This is where a skillful and experienced legal practitioner can make a difference. Lawyers experienced in complex commercial litigation and arbitration have the skill set necessary to streamline the pre-hearing phase of the case, to quickly resolve pre-hearing and discovery disputes, to set the case on a timeline that allows for parties to adequately prepare their case for presentation while maximizing efficiency, and to allow for the orderly introduction of evidence. With the rise in popularity of virtual hearings and electronic discovery, proficiency with technology is an equally important characteristic.
5. Diversity: Diversity of perspectives in the constitution of the arbitral tribunal is valuable as it is in most human endeavors. It appears to be settled as a principle that diverse bodies make better decisions than non-diverse ones. Scholars agree that "[d]iversity in arbitration serves an important role in enhancing the quality of the substantive decision-making in the arbitration process."[8] Diverse arbitrators bring fresh and unique cultural perspectives to the fact-finding process. In addition to enriching the quality of the legal analysis, diversity is intrinsically valuable to the system of arbitration in providing equal access and equal treatment for all participants, reflecting the global economies that international arbitration serves.
6. Availability: Scheduling conflicts and the availability of an arbitrator for a timely hearing is critical to achieving the efficiency goal of arbitration. Until more diversity (as noted above) is achieved in the composition of arbitral tribunals, arbitrators are often selected from the same small pool of candidates, which result in long-lead times for scheduling a hearing. It is important to find the best arbitrator with the earliest and most flexible availability. If travel is necessary, it is important to ensure that the arbitrator you are considering is able to do so.

Tips for Researching Potential Arbitrators

Key to party autonomy in arbitration is the ability to select the fact finder before the dispute resolution process begins in earnest. This is not a luxury afforded to parties and their counsel when working within a national court system, and care should be taken in researching and making the selection.

Parties should consider a variety of sources when selecting a potential arbitrator. These include the arbitrator's curriculum vitae, which should be made available through the arbitral institution or upon request. Of particular interest on the CV is the arbitrator's work experience and education; focusing on the qualities noted above and specialized training and experience in arbitration, complex commercial litigation, and case management technology. Although not always available publicly because of the private nature of arbitration, if possible, parties should try to find extracts or copies of decisions and awards issued by the arbitrator. This will give the party insight into the arbitrator's fact-finding approach and legal reasoning. Publications authored by the arbitrator and presentations given by the arbitrator offer further insight into both the arbitrator's experience and expertise, as well as their scholarly leanings. It is important to know whether the arbitrator has expressed a view on the industry or issues in the arbitration. Do the key issues in the arbitration turn on a particular interpretation of a legal principle, for example? It is important to know in advance whether your arbitrator candidates have expressed any relevant views. If you don't know or cannot find information important to your selection process, ask the questions directly of the arbitrator candidate. Many arbitral tribunals will facilitate the exchange of interview questions for potential arbitrator candidates, which may be preferred to directly interviewing the candidate so as not to create an appearance of bias where none existed previously.

Last but not least, word of mouth is important. Poll your colleagues about the skill and temperament of arbitrators under consideration. This is often the most important source of information available in making an arbitrator selection. In doing so, however, keep in mind the key qualities noted above and be cognizant of confirmation bias and the bias inherent in solicited feedback. Like your arbitrator, you want your research and selection of an arbitrator to be free from partiality and dependence.

Conclusion

In sum, the quality of the arbitrators and the composition of the arbitral tribunal are crucial to the success of the arbitration, and critical to ensuring confidence in the private system of adjudication. Selection of the arbitrators begins with the arbitration clause itself. Examine what your arbitration provision says about arbitrator selection and see if there are ways to shore it up in a way that makes the most sense for your business and the qualities you are seeking. Care should also be taken in selecting an arbitral institution to govern the procedural aspects of the arbitration to ensure that the procedure selected in the arbitration clause is in harmony with the rules of the chosen arbitral institution, and that the selected institution places a premium on transparency and diversity in the selection of arbitrators and the on-going disclosure obligations of the arbitrators to ensure that conflicts of interest do not interfere with the timely and fair adjudication of the merits of the dispute. While there is a global push to increase transparency and diversity, some institutions are further along in their development of these processes. Finally, don't skimp on researching potential arbitrator

candidates; the selection of the arbitrators could be the most important strategic decision you make in the arbitration. ■

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1. See, *e.g.*, https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration.
2. See, *e,g.*, ICC Article 12 https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/#article_12; *see also* Article 11 of the AAA's IDRP, https://www.adr.org/sites/default/files/ICDR_Rules.pdf.
3. See https://www.newyorkconvention.org/english.
4. 9 U.S.C. § 5.
5. The International Bar Association's Guidelines on Conflicts of Interest in International Arbitration, although non-binding, offer widely accepted guidance on conflict of interest situations. As defined by the International Bar Association's Guidelines on Conflicts of Interest in International Arbitration, "Doubts are justifiable if a reasonable third person, having knowledge of the relevant facts and circumstances, would reach the conclusion that there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision."
6. *See https://www.ibanet.org/MediaHandler?id=e2fe5e72-eb14-4bba-b10d-d33dafee8918*. The IBA Guidelines provide helpful definitions and explanations of impartiality and independence, and specific lists of situations that may give rise to justifiable doubts. The guidelines describe "red" list situations most likely to lead to a conflict, "orange" list situations where, depending on a the facts, may give rise to justifiable doubts requiring disclosure, and "green' light situations that do not objectively lead to a conflict of interest situation.
7. 9 U.S.C. § 10(a)(2).
8. For a discussion of diversity in arbitration, *see* Naimeh Masumy, "Is Increasing Gender and Ethnic Diversity in Arbitral Tribunals a Valid Concern and Should Arbitral Institutions Play a Greater Role Ensuring Diversity?" Fordham International Law Journal, blog post, available at https://www.fordhamilj.org/iljonline/2020/11/23/is-increasing-gender-and-ethnic-diversity-in-arbitral-tribunals-a-valid-concern-and-should-arbitral-institutions-play-a-greater-role-ensuring-diversity. For a discussion of recent survey results on diversity in arbitration and efforts to improve diversity, *see https://www.whitecase.com/publications/insight/2021-international-arbitration-survey/diversity-arbitral-tribunals*.

Expedited Changes Coming to the Canadian Trademark Office: A Comparative Overview With the U.S. System

BY ALICE DENENBERG

The summer of 2019 was a busy year for the Canadian Trademark system. Canada updated its trademark laws, adopted the Nice classification system, and joined the Madrid Protocol. This meant that Canada could now be designated in an International Registration. However, even before the update to its laws, the Canadian Intellectual Property Office ("CIPO") was plagued with significant examination delays that have exasperated both attorneys and IP owners.

Citing a marked increase in Canadian trademark filings, CIPO has finally taken steps to improve timeliness of trademark examinations. Unfortunately, the updates to its processes and changes to its technological systems have not been sufficient to allow CIPO to keep up with the huge influx of filings. It can be argued that CIPO has merely enacted policies that shift the burden to applicants. For example, the CIPO system allows for online trademark applications and instant filing receipts, but unlike the U.S. does not have a dedicated online form to accept office action responses, rather there is a means of filing an amended application with a miscellaneous form for substantive responses. Recently, CIPO enacted an online submission form for "general correspondence" that may be used for submissions that were previously submitted by a centralized fax number. Certain types of submissions to CIPO are still commonly made by fax.

One newly enacted change to expedite examinations has already been underway as of the last few months. CIPO has recently increased the types of amendments that can be resolved with the Examiner over the telephone. Telephone responses have been a longstanding policy of the U.S. Patent and Trademark Office ("USPTO"), which allows for non-substantive amendments such as disclaimers, amendments to goods and services, translation statements and other minor issues to be made either over the phone or by email. Nonetheless, in some cases the requirement remains that the applicant must submit a revised application through the CIPO online system, rather than having the Examiner enter the amendment directly.

At the current timeline, a trademark application filed directly in Canada has an

expected wait time of 24 - 30 months before the application is reviewed by a Canadian Trademark Examiner [1]. This is in stark contrast to the USPTO, which is currently experiencing delays due to a high volume of filings, but still having applications examined between 5-6 months, rather than its usual 3-4 months.

There are several consequences of these extreme delays:

- It is more difficult to enforce against infringement of an unregistered trademark in Canada, rather than a registered one.
- French language laws in Quebec require that trademarks be translated into French, unless they are registered. Quebec appears to be headed away from its previous position on recognizing common law trademark rights.
- In some cases, the delays are so extreme that the applicant may lose interest in the mark before registration.
- U.S. applications (and other foreign applications) that rely on a Canadian trademark as an underlying foreign registration basis cannot perfect their trademark registrations [2].
- Entities without a Canadian presence would not be able to register a .CA domain name that incorporates the trademark until registration.

To address this immense backlog, CIPO has recently issued 2 separate practice notices, each with a different purpose.

Practice Notice #1

The first Practice Notice, "Measures to Improve Timeliness in Examination" is intended to minimize delays for new filings going forward.

1. Examiners will offer less guidance in identifications of goods and services

In the initial office action, except if the ID of goods and services can be resolved over the phone, Examiners will not provide examples of acceptable goods and services. Examiners will only provide guidance after the first response is filed. The intention is likely to leave the applicant to rely less on the Examiner and to come up with an acceptable identification on their own. In the U.S., Examiners routinely provide detailed and specific proposals for the identification of goods and services. To encourage the use of wording from the U.S. Manual of Goods and Services, the per class official fee is $100 less expensive per class.

Unlike the U.S., Canada has only recently adopted the Nice Classification system. This means that the Canadian Office and its Examiners are generally less experienced with Nice identifications and classifications. The Canadian Goods and Services Manual is far less detailed than its U.S. counterpart [3], and there isn't a large cadre of registered Canadian trademarks to use as a point of reference. Further frustration emanates from applications filed in Canada that use the identical identification of goods and services from a U.S. trademark application/ registration. In some cases, the U.S. Nice compliant identifications are commonly acceptable in other foreign jurisdictions (without requiring significant changes) but are rejected as misclassified or misworded in the Canadian Trademark Office. Many of CIPO's proposed amendments are unreasonable or impossible to understand, especially when the identifications are already narrowly tailored.

It is generally well known that the USPTO is one of the strictest countries when it comes to identifications of goods and services, so rejections of acceptable identifications in the U.S. that are identically filed in Canada can leave experienced trademark practitioners flabbergasted.

2. Expedited examination for applications that use the CIPO Goods and Services Manual

CIPO has expressed a commitment to move applications up in the examination queue if they rely on goods and services listed in the Canadian Goods and Services Manual. This is similar to the USPTO's system, but without the financial incentive of a reduction in official filing fees.

3. Final Refusals Currently, under Canadian Trademark law, it is possible to submit an infinite amount of responses to the same refusal, sustained repeatedly. Some office action practice may go on for years without a resolution. Under U.S. law, a refusal is made final if the basis for the refusal is not resolved through argument and no new issues are brought up during examination. Canada will now encourage its Examiners to similarly issue final actions if the refusal has not been overcome. As such, applicants are encouraged to put forth their 'best and final' arguments at the outset. If an application is finally refused, it must be appealed to the Canadian Federal Court. Unlike the U.S., Canada does not have an administrative body to review appeals to register trademark applications. For most applicants, such appeals will be untenable due to their significant expense.

Practice Notice #2

The second Practice Notice, "Requests for Expedited Examination" is intended to minimize delays for currently pending applications.

To clear out the current backlog of applications, applications meeting certain criteria can now be prioritized upon request. The request must be in the form of an affidavit or statutory declaration, and must clearly set out how the criteria is met. There is currently no fee for the request. If granted, the examination of the application will be 'expedited' (though it is not clear how quickly).

One of the following four requirements must be met to be granted expedited examination:

1. There is either an expected or currently pending court action in Canada, affecting the applicant's goods or services; or
2. The applicant is dealing with counterfeit goods at the Canadian border in respect to the pending application; or
3. The applicant requires a registered trademark to protect its trademark rights from being severely disadvantaged in an online marketplace; or
4. The priority claim with a deadline cannot be perfected absent a trademark registration in a foreign trademark office.

As a practical matter, this means that certain applications will be backlogged even further while others have a basis to jump the queue.

While well intentioned, some of the

proposed changes will simply cause further confusion and frustration. Even with these measures designed to speed up application processing, it is unlikely that these changes will improve Canada's reputation as a "go to" filing jurisdiction. Without fundamental changes, such as being able to access trademark documents electronically, allowing for a dedicated office action response form, and more and better trained Examiners4, Canada will likely not be viewed as an innovative jurisdiction for trademark filings.■

[1] In the author's own experience, trademark applications filed directly with CIPO in October of 2018 have only just received their first office actions, exceeding the 30 month period.

[2] Thankfully, the USPTO is fairly understanding in allowing suspension in these cases.

[3] On May 10, CIPO issued a new practice notice that it intends to add 100 entries each week to the Canadian Goods and Services Manual. Hopefully these updates will obviate some of the issues discussed in this article.

[4] In Canada, unlike in the U.S., Trademark Examiners are not required to be attorneys.

Vietnam: Evidence on Ownership & Damage in Copyright & Related Rights Litigation

BY YEN VU & TRUNG TRAN

We discuss two recent notable court rulings on the proof of ownership & damages. For many years, questions have been asked on the role of the Court in IP disputes in Vietnam. Although setting up an IP Court is still a long-term plan, we have started to see an increasing number of copyright and related rights lawsuits initiated in Vietnam. Vietnam (Economic) Courts have gradually gained more experience in handling IP disputes, with their resolution of complicated cases that may be beyond the capacity of administrative authorities. It is also interesting to see more careful analyses made by the Court in ruling copyright and related rights litigations. This article discusses two recent notable court rulings on the proof of ownership and damages, which may be of many right holders' concerns.

Ownership Evidence

Under Vietnam's IP Law, copyright and related rights are established automatically upon creation and fixation of the works with no registration required. However, owners of unregistered works shall bear the burden of proving their title in a dispute. The mandatory evidence of ownership over a work that is not registered includes but is not limited to: (i) the original or a copy of the work; and (ii) other documents evidencing its creation, publication, or dissemination. [1] The Court's specific request for the documents under (ii) may differ from case to case and be rather unpredictable in practice. Holders of unregistered works tend to be in a position of disadvantage.

In a recent related rights litigation, an IT engineer (the Plaintiff) who produced video lectures lost the case to a media company (the Defendant) at the first instance due to the issue of ownership evidence [2]. The Plaintiff's claims of related rights infringement were against the Defendant's unauthorized upload of his 387 video lectures to their website. The first-instance court rejected the claims, reasoning that by failing to submit the drafts of the video lectures, the Plaintiff could not prove his right holder status over the unregistered related rights. The appellate court reversed such ruling and recognized the ownership evidence the Plaintiff submitted, i.e. (1) video recordings of the lectures, (2) the Plaintiff's registration certificate for the domain name of the website where he first published his lectures on, and (3) information about his upload of the video lectures to his YouTube channel with his own account and to his website. This shows inconsistency in the practice of assessing ownership evidence among different courts.

In the implementation of its relevant commitment under the EVFTA, Vietnam introduced the concept of the presumption of rights ownership in the 2020 Draft IP Law Amendment. Accordingly, unless there is evidence to suggest otherwise, those who are named in a usual manner [3] as authors, performers, producers, broadcasters shall be considered as the right holders of the works, performances, audiovisual recordings, and broadcasts [4]. This proposed provision, if enacted, can significantly facilitate the proof of titles of protection in disputes.

Proof of Damages

A plaintiff in a copyright or related rights litigation also bears a heavy burden of proving damage. For a claim of damages to be accepted by the Court, evidence on actual loss caused by the infringement is strictly required. To establish actual loss, the evidence must demonstrate that: (1) the lost benefit has directly come from the infringed rights, and the right holder is the beneficiary, (2) the right holder could have gained the lost benefit if it were not for the infringement, and (3) the right holder had obtained the benefit before the infringement

occurred and has suffered a decrease or loss of benefit as a result of the infringement (i.e. the infringement has been a direct cause of the decrease or loss).[5]

Fulfilling such criteria is not straightforward. In the related rights litigation presented above, the Plaintiff claimed damages for a loss calculated based on the efforts spent to make the creations and a hypothetical income from the infringed videos, by referring to a relevant contract between him and another party (which involved another subject matter). The appellate court held that there was no actual loss based on these calculations. Another claim made in this lawsuit was for the Plaintiff's loss of opportunity to exclusively license his videos to a potential partner, in which the Plaintiff submitted email correspondences between him and the potential partner as documentary evidence. The appellate court found these correspondences unable to prove an actual opportunity as they failed to show that (i) a licensing agreement was going to be reached, or (ii) the failure of the parties to reach the agreement was due to the Defendant's infringement.

Defendant's infringement.

Proof of actual damage should be far easier if there is a pre-determined royalty fee for the same subject matter. For example, in a recent copyright dispute, a local Collective Management Organisation (the Plaintiff) filed a lawsuit against a multimedia company (the Defendant) for the unauthorised use of songs that the Plaintiff managed in a music festival that the Defendant hosted. The Court accepted the Plaintiff's claim for damages based on its published royalty fee schedule, and were calculated as an equivalent to the lost royalty payment that the right holders would have received if the songs had been legitimately licensed to the Defendant.[6]

Developments to look out for:

The Draft IP Law Amendment has proposed to limit the types of IP infringements subject to administrative enforcement.[7] Under one of the proposed options[8], the administrative route will no longer be available against copyright and related rights violations, among others. If this option is chosen, copyright and related rights disputes will compulsorily be resolved via the civil route. It is also important to note that Vietnam has a civil jurisdiction and does not strictly embrace the doctrine of precedent. This means that the Court is generally not obliged to follow the decision of another Court in a similar matter. However, the Supreme Court has been taking a leading role in guiding the application of laws for Court across the country to harmonize the Court's practice nationwide.

Accordingly, the Council of Judges of the Supreme Court select key decisions issued by Courts across the country as "precedents". Courts at different levels must refer to and apply the "rule of law" in the precedents consistently. There are 43 precedents so far but none of the cases relate to intellectual property. More developments in the practice of evidence assessment are expected to be seen in copyright and related rights litigation.■

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[1] Article 24.3a, Decree No. 105/2006/ND-CP detailing and guiding the implementation of the Intellectual Property Law on the protection of intellectual property rights and on the State management of intellectual property, issues on 22 September 2006 by the Government.
[2] Mr. Dinh Cong ND v VGT Company – Judgment No.13/2020/KDTM-PT dated 27 May 2020, available on the database of the Supreme People's Court at: https://congbobanan.toaan.gov.vn/5ta617061t1cvn/ma_hoa_BA_KDTM_VU_DINH_CONG_nd.pdf [in Vietnamese].
[3] What constitutes a "usual manner" may remain to be guided further under an upcoming decree guiding the implementation of the laws.
[4] Section 74 of Draft IP Law Amendment on addition of Article 198a on Presumption of Copyright and Related Rights.
[5] Section I, Part B, Joint Circular No. 02/2008/TTLT-TANDTC-VKSNDTC-BVHTT&DL-BKH&CN-BTP of April 3, 2008, guiding the Application of a Number of Legal Provisions to the Settlement of Disputes over intellectual Property Rights at People's Courts.
[6] TQVN Centre v NV. Co., Ltd. – Judgment No. 19/2020/KDTM-ST dated 17 September 2020, available on the database of the Supreme People's Court at: https://congbobanan.toaan.gov.vn/5ta618199t1cvn/An_vietmedia_ma_hoa.pdf [in Vietnamese].
[7] Section 77 of Draft IP Law Amendment on amendment of Article 211 of the IP Law.
[8] Option 1.

Comments on Immigration

BY JOHN ROTTIER

The following are excerpts from John Rottier's Blog were he frequently comments on immigration related issues.

Statements or expressions of opinion appearing herein are those of the author and not necessarily those of the Illinois State Bar Association or the editor of the Globe or the members of the International & Immigration Law Section Council.

Record Death Toll in ICE Custody

Current administration's apathy towards refugees seeking asylum in America has resulted in great human casualty. It is reported that in the 2020 fiscal year 21 people died in ICE custody. That's more than double the 2019 and the highest annual death toll since 2005. The deaths are a sign of deteriorating conditions, serious problems with medical care, and ICE's flawed handling of the pandemic. More than a third of people in ICE custody have tested positive for COVID-19.

Source: https://www.cnn.com/2020/09/30/us/ice-deaths-detention-2020/index.html?fbclid=IwAR3Dddon8QGtzbvcQcAkZPy4zt315oFd9Oc0rpuSCh-YlPHGmySPJJW-DbE

Public Charge Rule Updates

December 2, 2020 the Ninth Circuit Court of Appeals upheld preliminary injunctions issued against the Department of Homeland Security's public charge rule issued by the Northern District of California and the Eastern District of Washington. However, the panel majority vacated the Eastern District of Washington's entry of a nationwide injunction, so the public charge rule is still in effect.

November 3, 2020 the Seventh Circuit issued an administrative stay on the Northern District of Illinois decision to vacate the Department of Homeland Security's Public Charge Final rule pending an appeal which is effective immediately. Therefore now all adjustment of status applications must be filed with the Form I-944.

Prior on November 2, 2020, the district court in *Cook County, Illinois, et al v. Wolf et. al.*, granted summary judgment in favor of Plaintiffs on their claim that the Department of Homeland Security's public charge rule violated the Administrative Procedure Act. The district court specifically ruled that the public charge exceeds the Department of Homeland Security's authority, is not in accordance with law, and is arbitrary and capricious. Therefore, the court set aside the Department of Homeland Security's public charge rule nationwide without staying its decision pending appeal.

We are guiding our clients through this ever changing news and helping them take advantage of the updates in advancing their cases. There is a lot of anxiety with clients over this public charge rule as many are worried they may not qualify with it.

Sources: https://www.aila.org, https://www.uscis.gov/i-485

United States Citizenship and Immigration Service Updates the Civics Educational Requirement for Citizenship

United States Citizenship and Immigration Services updated policy guidance regarding the educational requirements for citizenship on the knowledge and understanding of the fundamentals of the history, and of the principles and form of government, of the United States. This update became effective on December 1, 2020, and applies to citizenship applications filed on or after that date. They will adjudicate citizenship applications filed before the effective date based on the previous policy.

Changes

- Increased the amount of civics test questions from 100 to 128, the number of test questions for the exam from 10 to 20 , and the number of correct answers needed to pass the civics test from 6 to 12. The passing score of 60 percent correct will not change.
- USCIS will continue to administer 10 test questions (with required 6 correct answers) to applicants who qualify for special consideration, because they are age 65 or older and have been lawful permanent residents for at least 20 years.
- Officers now will ask all 20 test questions even if the applicant achieves a passing score earlier. Before they would stop once an applicant answered 6 correctly.

Immigration advocates are seeing this as another attempt of administration to create a barrier for immigrants. Our office has seen a huge increase in citizenship cases in the second half of 2020. The majority was due to clients being worried about the proposed filing fee hike (that thankfully blocked by the courts), but some were worried about more difficult questions on the civics test.

Sources: https://www.aila.org, https://www.uscis.gov/citizenship.

Follow us for latest in immigration at https://www.rottierlawchicago.com/news-and-resources. ■

John Rottier is licensed to practice law in Illinois and Indiana and various federal courts. He speaks English, Spanish, German, and some Chinese and French. In the past he has lived in Spain, Germany, Mexico, and Taiwan. He currently lives in Chicago.