

# The Globe

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

## Editor's comments

BY LEWIS F. MATUSZEWICH

Welcome to the first issue of *The Globe* for 2016, the fifth issue of the 2015-2016 ISBA year.

Tejas Shah, as Chair of the International and Immigration Law Section Council, in his "Message from the Chair," describes some of the activities of the Section Council so far this year.

Michael Lied serves as the liaison between the International and Immigration Law Section Council and the Continuing Legal Education Committee of the ISBA. Michael contributes articles to *The Globe* from time to time, primarily

in the employment law area, and his current article is, "Staffing Company May Selectively Use E-Verify."

Howard Stovall, who concentrates his practice in commercial law matters involving the Middle East, has contributed many articles to *The Globe* over the years. Our current issue includes, "Use of Foreign Governing Law in Arbitration Clauses in Arab Commercial Agency and Distributorship Agreements."

Since I began editing *The Globe*, I have benefited from receiving electronic

*Continued on next page*

Editor's comments

1

Message from the Chair

1

Staffing company may selectively use e-verify

3

Use of foreign governing law and arbitration clauses in Arab commercial agency and distributorship agreements

4

Taking a default

6

Professor David J. Gerber elected president of the American Society of Comparative Law

10

Recent cases

11

## Message from the Chair

BY TEJAS SHAH

Dear Readers:

I welcome you to the first issue of our newsletter, the *Globe*, for the 2016 calendar year. 2015 was a turbulent year that produced many novel international and immigration law developments. Terrorist attacks in Paris and other countries dominated headlines for much of the year. The end of the year produced a significant (and perhaps surprising) global climate change agreement that many argue is absolutely essential to prevent a global 2-degree increase in temperatures. The agreement centers on a series of voluntary

emission-reducing commitments by the signatories and is a significant international agreement.

On the domestic front, 2015 bore witness to numerous immigration developments that we will summarize in our annual webcast Immigration Roundup on January 22, 2016, from 12-1:30 pm.<sup>1</sup> Most, but not all, of these changes were the product of the President's executive actions. The Omnibus Appropriations and Budget Bill that passed in late 2015 added new restrictions to the Visa Waiver

*Continued on next page*

If you're getting this newsletter by postal mail and would prefer electronic delivery, just send an e-mail to Ann Boucher at [aboucher@isba.org](mailto:aboucher@isba.org)

## Editor's comments

CONTINUED FROM PAGE 1

copies of all newsletters of the various ISBA Sections and Committees. This has allowed us to select articles from other publications and request permission from the authors to include their articles in *The Globe*. As readers, you have seen anywhere from two to six such articles per year. For whatever reason, the ISBA staff no longer makes all newsletters available to editors. Therefore, we have lost this source. Daniel Kegan forwarded to me his article, "Taking a Default," which first appeared in the *Intellectual Property* newsletter of the ISBA Section on Intellectual Property Law. Daniel Kegan of Kegan & Kegan, Ltd. in Chicago is a member of the Intellectual Property Section Council and is editor of its newsletter. I appreciate his forwarding the article to me, not only for its content, but also for his effort to keep communication between the Section Council newsletter

## Message from the Chair

CONTINUED FROM PAGE 1

program and extended the EB-5, CONRAD 30 and Special Religious Workers program through September 2016. Meanwhile, the status of the expanded DACA and DAPA program remains uncertain; the U.S. Court of Appeals for the Fifth Circuit ruled in favor of the plaintiff states in November 2015, and the Department of Justice quickly filed a Writ of Certiorari with the Supreme Court. A decision by the Supreme Court on this Writ is anticipated in January 2016, setting up a potentially blockbuster decision in the middle of a Presidential election cycle (in June 2016). Finally, we also saw the intersection of international law, domestic events, and politics in the calls by numerous Presidential candidates for a moratorium on the admission of Syrian refugees and the refusals by numerous state Governors, including IL Governor Bruce Rauner, to admit Syrian refugees.

editors.

Chicago Kent College of Law provided the information on Professor David Gerber, Co-Director of the Program on International Comparative Law at Chicago Kent College of Law, who was recently elected as President of the American Society of Comparative Law.

We have also included in this issue "Recent Cases" taken from the ISBA's E-Clips.

As always, thank you to all of our contributors.

Lewis F. Matuszewich  
Matuszewich & Kelly, LLP  
Telephone: (815) 459-3120  
(312) 726-8787  
Facsimile: (815) 459-3123  
Email: lfmatuszewich@mkm-law.com

2015 was also an active year for our section council. As this newsletter's regular readers know, Illinois passed a new consular notification bill in 2015 codifying criminal procedures to implement the Vienna Convention on Consular Relations' guidelines. The passage of this bill is a testament to the hard work of present and past section council members, particularly Professor Cindy Buys from the Southern Illinois University School of Law. The new law becomes effective in 2016. We are focusing on education and outreach to judges, law enforcement, and consular corps organizations so that all stakeholders are aware of the new law's requirements. Our December 10<sup>th</sup> program, which included Judge Israel (Izzy) Desierto and Professor Cindy Buys as speakers, focused on considerations for criminal defense lawyers, changes to the criminal procedure

## The Globe

Published at least four times per year. Annual subscription rates for ISBA members: \$25.

To subscribe, visit [www.isba.org](http://www.isba.org) or call 217-525-1760.

### OFFICE

ILLINOIS BAR CENTER  
424 S. SECOND STREET  
SPRINGFIELD, IL 62701  
PHONES: 217-525-1760 OR 800-252-8908  
[WWW.ISBA.ORG](http://WWW.ISBA.ORG)

### EDITOR

Lewis F. Matuszewich

### MANAGING EDITOR / PRODUCTION

Katie Underwood  
✉ [kunderwood@isba.org](mailto:kunderwood@isba.org)

### INTERNATIONAL & IMMIGRATION LAW SECTION COUNCIL

Tejas N. Shah, Chair  
Patrick M. Kinnally, Vice Chair  
Michelle J. Rozovics, Secretary  
Lynne R. Ostfeld, Ex-Officio

David W. Aubrey  
Kenny Bhatt  
Juliet E. Boyd  
Susan M. Brazas  
Cindy G. Buys  
Philip N. Hablutzel  
Alexander W. Konetzki  
Shama K. Patari  
David N. Schaffer  
Mark E. Wojcik  
Sofia M. Zneimer

Chantelle A. Porter, Board Liaison  
Melissa Burkholder, Staff Liaison  
Michael R. Lied, CLE Committee Liaison  
Scott D. Pollock, CLE Coordinator

**DISCLAIMER:** This newsletter is for subscribers' personal use only; redistribution is prohibited. Copyright Illinois State Bar Association. Statements or expressions of opinion appearing herein are those of the authors and not necessarily those of the Association or Editors, and likewise the publication of any advertisement is not to be construed as an endorsement of the product or service offered unless it is specifically stated in the ad that there is such approval or endorsement.

Articles are prepared as an educational service to members of ISBA. They should not be relied upon as a substitute for individual legal research.

The articles in this newsletter are not intended to be used and may not be relied on for penalty avoidance.

Postmaster: Please send address changes to the Illinois State Bar Association, 424 S. 2nd St., Springfield, IL 62701-1779.

code, and implications of the new law on Illinois criminal proceedings.

Finally, I would be remiss to not include a brief note on the ISBA General Assembly's passage of the Syrian Refugee Resolution at the Dec. 12<sup>th</sup> midyear meeting. The resolution, simply stated, reminds our lawmakers that we must comply with our international obligations under international conventions relevant to

the status of refugees and the Immigration and Nationality Act. At a time of posturing and populism, this resolution is a welcome reminder that we must follow our obligations under international law not just when it is easy, but also when it is more difficult to do so.

Sincerely,

Tejas Shah

Franczek Radelet  
300 S Wacker Drive, Suite 3400  
Chicago, Illinois 60606  
Phone: (312) 786-6503 Fax: (312) 986-0300  
Email: tns@franczek.com

1. Visit <[www.isba.org/cle/upcoming](http://www.isba.org/cle/upcoming)> for more information and to register.

# Staffing company may selectively use e-verify

BY MICHAEL R. LIED

**Meghan Dressier, General Counsel of the PGC Group**, requested guidance on whether a staffing agency could, consistent with the anti-discrimination provisions of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1324b, selectively use the E-Verify program with respect to referrals for employment to one client but not others. PGC Group is a staffing agency that does not currently use E-Verify, but a client company requested that it run temporary employees assigned to work for that client through E-Verify.

Alberto Ruisanchez, Deputy Special Counsel of the Office of Special Counsel for Immigration-Related Unfair Employment Practices responded.

The INA's anti-discrimination provision and E-Verify's terms and conditions prohibit treating individuals differently in the E-Verify process based on their citizenship status or national origin. An employer that selectively creates E-Verify cases for employees based on citizenship status or national origin may violate the anti-discrimination provision. For example, an employer should not designate participating hiring sites for E-Verify based on the citizenship status or national origin of the employees hired at those locations. Ruisanchez recommended against selective use of E-Verify based on client demands because it could create the appearance of

prohibited citizenship status or national origin discrimination, which may lead to workers filing discrimination charges with the Office. However, to the extent that an employer or E-Verify employer agent uses

E-Verify selectively for reasons wholly unrelated to an individual's citizenship status or national origin, that selective use would likely not violate the anti-discrimination provision. ■

## *FREE to ISBA members*

### **Your research isn't complete until you've searched ISBA section newsletters**

Fourteen years' worth of articles, fully indexed and full-text searchable...and counting.



**The ISBA's online newsletter index organizes all issues published since 1999 by subject, title and author.**

More than a decade's worth of lawyer-written articles analyzing important Illinois caselaw and statutory developments as they happen.

**[WWW.ISBA.ORG/PUBLICATIONS/SECTIONNEWSLETTERS](http://WWW.ISBA.ORG/PUBLICATIONS/SECTIONNEWSLETTERS)**

# Use of foreign governing law and arbitration clauses in Arab commercial agency and distributorship agreements

BY HOWARD L. STOVALL

**This article summarizes certain contractual drafting issues** that confront Western (*e.g.*, U.S. or European) companies that do business through commercial agents or distributors in the Arab Middle East. (For ease of reference, the term “commercial agency” in this article will also generally include “distributorship”). In particular, this article addresses the use of contract clauses that specify the particular law to govern the commercial agency, and that provide for disputes arising from that contract to be resolved by arbitration.

Depending on the circumstances in any case, our general recommendation to Western companies usually is in favor of foreign (non-Middle Eastern) governing law and foreign arbitration clauses in Arab commercial agency agreements. However, this general recommendation is subject to a number of related Arab Middle Eastern legal issues, as discussed below.

## 1. General Background

For present purposes, we are limiting our analysis to contract clauses in commercial agency agreements, *i.e.*, virtually always “private sector” contracts. Contracts with Middle Eastern governmental parties are often subject to special rules and regulations. For example, decrees have been issued in Saudi Arabia and Kuwait which generally prohibit all ministries and government departments from agreeing to foreign governing law or foreign dispute resolution in their procurement contracts, subject to some narrow exceptions and special approvals.

There are a number of reasons why Western companies may wish to contract for foreign governing law and/or foreign dispute resolution in Arab commercial

agency agreements. For example, some local laws (like in Saudi Arabia) are based on Shariah (Islamic law). In this regard, one legal scholar observed that:

One of the modern criticisms of the classical shari’a is that simply finding an answer to a legal problem in the medieval law books is usually difficult and time-consuming. The classical treatises ... have an organization and style that make them cumbersome, if not impossible, for specialists to use in administering justice.

Perhaps most importantly, Western companies prefer to avoid agreeing to Arab governing law when such law contains so-called “dealer protection” rules favoring the local commercial agent. (This aspect of the matter is discussed further below).

Western companies also often seek foreign dispute resolution clauses in order to avoid what is perceived to be expensive and difficult litigation in Arab jurisdictions. Local court proceedings and documents submitted therein are required to be in Arabic, the process (including appeals) can be quite lengthy, and local litigation attorneys charge fees based on a percentage (usually 10-15%) of the total amount in controversy, which can be quite high when a commercial agent is claiming unfair termination or non-renewal of the commercial relationship.

In our experience, most litigation is initiated (or threatened) by the local commercial agent, rather than the Western principal. By comparison, a well-advised principal can usually structure the commercial agency so that the principal is

less likely to need recourse to local (Arab Middle Eastern) courts. For example, the Western principal should register its trademarks locally, and might also insist on advance payment for goods sold, or payment by irrevocable documentary letter of credit confirmed by a bank in its home jurisdiction.

## 2. Permissibility of Governing Law/ Arbitration Clauses

Most (if not all) of the Arab Middle Eastern countries influenced by European civil law expressly allow contractual parties to agree on governing law and arbitration clauses. Legal support is often contained in the particular Arab country’s civil code and commercial procedure code. In addition, most Arab countries are signatories to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958). Thus, foreign governing law and foreign arbitration clauses are generally permitted in those jurisdictions, subject to certain exceptions (some of which are discussed further below).

Notably, at least a few Arab Middle Eastern countries have revised their commercial agency laws to expressly recognize the parties’ freedom to agree upon resolution of disputes *through arbitration*. For example, the Bahraini Commercial Agency Law was amended in 1992, with Article 30 stating that “[i]f a dispute arising from an agency contract is referred to arbitration, the arbitration award shall be final.” Similarly, the Qatari Commercial Agency Law enacted in 2002 grants jurisdiction to the Qatari courts “provided there is no agreement otherwise,” and also states that “any arbitral award in a

dispute arising out of the agency agreement shall be deemed final.”

In comparison, many Arab Middle Eastern courts will likely accept jurisdiction and proceed to hear a commercial agency dispute despite a clause in the parties’ contract selecting a *foreign court* to hear all disputes between the parties. Arab Middle Eastern law generally gives local courts jurisdiction to hear cases brought against a non-resident foreign party in certain instances, including if the action concerns an obligation which arose locally. Arab Middle Eastern courts are unlikely to cede jurisdiction to a foreign court (as opposed to a foreign arbitral tribunal) in these circumstances.

### 3. Protection for Commercial Agents

Arab Middle Eastern ministries and courts are unlikely to enforce contractual provisions between private parties (including foreign governing law and dispute resolution clauses) which are deemed to violate local “public policy.”

Such public policy is almost certainly reflected in the so-called “dealer protection” laws which exist throughout the Arab Middle East. Those laws give local commercial agents certain special statutory rights, including grounds for claiming compensation in the event of unfair termination (and, in some cases, unfair non-renewal) of the commercial agency. Many of those laws also explicitly grant exclusive jurisdiction to local courts over any commercial agency dispute.

For example, the UAE Commercial Agency Law empowers a local Commercial Agencies Committee and the UAE courts to resolve any dispute arising under a UAE commercial agency registered in accordance with that law. (Under Article 6, “no effect shall be given to any agreement contrary hereto”). Based upon these provisions, we believe the UAE Committee/courts would exercise jurisdiction over any such dispute presented to it, regardless of a foreign forum selection clause in the agreement. Similarly, the UAE Committee/courts would likely apply at least local public policy (such as the dealer protections in the UAE Commercial Agency Law),

regardless of a foreign governing law clause in the commercial agency agreement.

Similarly, Article 5 of the Lebanese Commercial Representation Law provides:

Notwithstanding any agreement to the contrary, the courts of the place where the commercial agent performs his activities shall have jurisdiction in disputes arising from the commercial agency agreement.

Lebanon’s highest court (the Court of Cassation) has interpreted this provision to be a matter of public policy, giving exclusive jurisdiction to the Lebanese courts over such commercial agency disputes, notwithstanding any contrary dispute resolution clause that might be contained in the parties’ agreement.

### 4. Effect on Contract Registration

Arab Middle Eastern commercial agency laws require the registration of commercial agency agreements in a special register, usually maintained by the local Ministry of Commerce. Administrative practices developed by registry officials in each Arab Middle Eastern country can affect the contractual parties’ drafting of their commercial agency agreement.

For example, many years ago, the Saudi Ministry of Commerce insisted that a commercial agency agreement submitted for registration state that it was governed by Saudi Arabian law. Moreover, that Saudi Ministry also required such agreements to state that disputes between the parties be submitted to arbitration in Saudi Arabia in accordance with Saudi arbitration regulations or to resolution by the appropriate Saudi judicial tribunal. However, the Saudi Ministry’s position has changed from time to time over the years, and it has been possible recently to register Saudi commercial agency agreements which contain foreign governing law and/or foreign arbitration clauses.

In the past, relevant commercial agency registries in other Arab countries have also sometimes refused to register commercial agency agreements containing provisions for foreign governing law. The more recent general administrative trend has been to register commercial agency agreements

with such foreign governing law clauses. Nonetheless, as discussed above, such foreign governing law clauses are unlikely to be enforced if the effect is to violate local public policy.

### 5. “Defensive” Value to Such Clauses

Despite the limitations and caveats discussed above, there are a number of reasons for us to customarily recommend the use of foreign governing law and arbitration clauses in Arab Middle Eastern commercial agency agreements. For example, the local commercial agent might abide by a contractually-agreed foreign arbitration clause (and/or have assets outside the local jurisdiction which could be used to satisfy an award). In addition, such clauses could be very useful “defensively” if the local commercial agent sues the Western principal in local courts, the Western principal decides not to make an appearance, and the commercial agent subsequently attempts to enforce the resulting local default judgment against the principal in another court, *e.g.*, the courts of the latter’s place of residence.

In general, the contractually selected foreign governing law should be that of a jurisdiction with which the Western principal has some connection (such as its place of incorporation and/or headquarters). However, if the parties also agree to resolve disputes through arbitration, then it may be acceptable to select the law of the situs of the arbitration as the governing law. ■

---

Mr. Stovall is a Chicago-based attorney, devoting his practice exclusively to Middle Eastern commercial law matters. He is a regular contributor of material to *The Globe*. He may be reached at [Howard@Stovall-Law.com](mailto:Howard@Stovall-Law.com).

# Taking a default

BY DANIEL KEGAN

## **Defaulting has pejorative connotations, but sometimes accepting a default judgment may be a wise decision.**

A default is “Failure to perform a task or fulfill an obligation, especially failure to meet a financial obligation; Law Failure of a party in a case to make a required court appearance; The failure of one or more competitors or teams to participate in a contest” (American Heritage Dictionary of the English Language, 5th ed, 2011).

Typical consequences of failing to respond to a plaintiff’s civil complaint include the court accepting as true the assertions of the complaint, awarding the plaintiff’s requested monetary and injunctive relief, awarding attorneys’ fees, and reachable assets of the defendant being transferred to plaintiff. In Internet cases, the defendant’s websites may be taken down and money in Internet accounts, such as PayPal, may be transferred to plaintiff.

If you discover you have been sued, usually you should read the complaint and other associated documents, note any deadlines for responding, jot down your initial responses and defenses, such as false assertions, assertions taken out of context, and documents you may have to contradict the complaint’s assertions. Breathe, and calm down. Then consult an attorney. If you do not have a relationship with an attorney, do local bar associations have referral services.

But sometimes, a rational evaluation indicates it likely is more efficient to accept the default judgment.

## **Class Actions**

You may receive notice that you may be involved in a class action lawsuit, and will be bound by the court’s decision unless you opt out of the class (FRCP 23). Class actions typically assert that a large number of people have been injured by the same defendant(s) in the same way. Instead of each injured person bringing their own separate lawsuit, the class action permits

all the claims of all class members to be resolved in a single case. Often many prospective class members may be unaware they have been injured. Often the financial amount of the harm to each class member is small, a few dollars, and thus not worth individual efforts to reclaim it. However, by consolidating the small individual claims, the potential damage awards may be sufficient incentive to encourage the defendants to appropriately invest in ensuring safe products.

For a low-cost consumer product where the alleged harm is only a few dollars per purchase, the potential recovery may not be worth the effort of retrieving years-old purchase invoices. Class actions involving serious health injuries are quite different, and deserve careful consideration. If you remain a member of the class, your remedies against the defendant(s) will be limited to that case outcome.

## **Notice to Defendants Across Jurisdictions**

The ubiquitous and pervasive Internet has shrunk the world and sped communications. It has also spawned diverse forms of Internet misbehavior: including Cybersquatting trademarks and domain names (15 USC § 1125(d)), online copyright infringement (17 USC § 512) with its safe harbor during take-down actions, over broad demands of patent infringement, as well as traditional criminal theft and fraud.

With Internet commerce, buy and seller are often separated by miles and court jurisdictions. Many Internet site End User License Agreements, typically not read by users, specify the jurisdiction for dispute resolution between the consumer and the Internet vendor. The Internet consumer shopping site may buy its goods from a business-to-business (B2B) Internet distributor or manufacturer with its own EULA, or may buy inventory by purchase orders.

In the United States, the Uniform

Commercial Code (UCC), as enacted by each state, provides substantial uniformity in state commercial laws and disputes. In federal and state law, a defendant in a lawsuit is entitled to notice of the allegations and of court deadlines. Typically the defendant, individual or corporate entity, needs to be served with the summons, complaint and associated documents (service of process). Specific rules provide how, where, and to whom delivery of the complaint and documents is accepted service (FRC 4, 4.1, 5).

The plaintiff needs to prove service of process. For service on a defendant within the United States, the server’s affidavit, or statement by a US marshal or deputy marshal suffices, if service has not been waived (FRCP 4(l)(1)). Service outside the United States can be proved as provided in an applicable treaty or convention, or by a receipt signed by the addressee or by other evidence satisfying the court that the summons and complaint were delivered to the addressee (Id 4(l)(2)).

Foreign service of process may be governed by several laws, including Hague Service, Inter-American Convention Service Convention, Foreign Sovereign Immunities Act, US state law, and the Federal Rules of Civil Procedure.

## **Hague Service**

The Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Hague Service Convention) established a simpler means to make service in other contracting states. It was adopted 15 November 1965, superseding the 1905 Civil Procedure Convention. Before the Hague Service Convention, and currently for service to entities in states not party to the Hague Service Convention, diplomatic channels were generally used to serve legal documents, such as Letters Rogatory (FRCP 4(f)(B), 28(b)(B), 28 USC § 1782.

As of June 2015 the Hauge Service Convention had 68 contracting state

parties. These included the USA, Canada, China, Mexico, United Kingdom, and excluded Afghanistan, Iran, Iraq, North Korea, Saudi Arabia, and Singapore. For the full list of contracting states, <[http://www.hcch.net/index\\_en.php?act=conventions.status&cid=17](http://www.hcch.net/index_en.php?act=conventions.status&cid=17)>.

### Inter-American Service

The Inter-American Convention on Letters Rogatory and Additional Protocol (IACAP) are a pair of international agreements designed to facilitate judicial assistance between countries. The United States interprets those agreements as limited to covering service of process and countries must be a party to both agreements in order for a treaty relationship to exist. Replacing the traditional letters rogatory process, the IACAP provides a mechanism for service of documents by a foreign central authority. The Department of Justice is the U.S. Central Authority under the IACAP. Requests from the United States are transmitted via a private contractor carrying out the service functions of the U.S. Central Authority on behalf of the Department of Justice. <<http://travel.state.gov/content/travel/en/legal-considerations/judicial/service-of-process/iasc-and-additional-protocol.html>>.

Members currently are Argentina, Brazil, Chile, Colombia, Ecuador, Guatemala, Mexico, Panama, Paraguay, Peru, USA, Uruguay, and Venezuela. Neither the Convention nor the Additional Protocol expressly provide for service by mail. Litigants should consult local counsel to determine if mail or other methods of service are available, and what effect the use of alternative methods might have on later efforts to have a U.S. judgment locally enforced.

### Foreign Sovereign Immunities

The Foreign Sovereign Immunities Act defines the jurisdiction of United States courts in suits against foreign states, the circumstances in which foreign states are immune from suit and in which execution may not be levied on their property, and for other purposes (90 Stat 2981; 28 USC §1330, §1391(f), §1441(d), §1602-11, 19 January 1977).

Issues to consider when considering serving under a convention or treaty include:

- whether the convention is the exclusive means of service;
- whether contracting states can limit service in their jurisdiction;
- types of lawsuits covered;
- the proper methods for serving process.

The Hague Service Convention only applies when the defendant's address is known (Article 1). See FRCP 4(f)(2).

### Alternatives to Traditional Service

When after plaintiff's diligent search and inquiry a defendant cannot be readily located and served, a court may permit service by publication or other means. Publication may be in a newspaper in the court's jurisdiction or when the defendant is considered to reside. Service may also be permitted on defendant-relevant social media or by email. With today's Internet commerce, a defendant's website address (Uniform Resource Locator, URL) may be known while not knowing the location of the defendant.

If the defendant is the URL or email domain registrant, their address, phone, and email contacts may be disclosed in a WhoIs registry. However, despite the Internet rules for providing accurate WhoIs information, many domain registrants don't, or register under privacy services, which conceal the registrant's information.

When a defendant's WhoIs record does not fully identify them and their contact information, a plaintiff can seek to compel the privacy service, domain registrar, internet service provider, and Internet shopping site host to disclose. This compelled disclosure requires additional requests to the court, and is not automatically granted. There is a First Amendment right to anonymous speech on matters of public policy. Commercial speech has narrower rights. Likely illegal activity has few protected speech rights.

### Internet Suits with Many Defendants

Complaints of trademark, copyright, or patent infringement on the Internet now may involve hundreds of defendants. Some

may be identified not by a personal name and postal address but by website URL or email address or John Doe standing names until additional discovery reveals the true name for an amended complaint.

Multi-defendant Internet cases may include major manufacturers and distributors of infringing goods as well as numerous small businesses which bought the questioned goods for retail resale. Some purchases likely are innocent, other vendors know they are buying infringing goods.

For a foreign defendant in a multi-defendant Internet suit, it may be more efficient to accept the possibility of an adverse default judgment than to hire the attorneys (likely both in the foreign jurisdiction and in the court's jurisdiction) to gather the required evidence and defend against the complaint.

Suits against infringement often seek immediate relief, a court order to takedown websites and to freeze financial accounts such as PayPal. A temporary restraining order (TRO) can be issued without notice to defendant if specific facts clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition. (FRCP 65(b)).

### Settlement

For a particular defendant to settle the lawsuit, plaintiff will likely want to know and see supporting documents at least for:

- defendant's purchases of the accused goods—
  - showing full contact information for the entity selling to you and
  - the number and cost of items defendant bought, and the purchase dates;
- the different items defendant sold, numbers of each, and sales price and profit;
- number of the goods remaining in inventory;
- number of goods still on order or in transit to defendant;
- samples of the infringing goods;
- certification that defendant no longer is selling any unauthorized items plaintiff claims rights to.

The plaintiff typically uses this information to support its claims against the larger upstream infringer and to determine the post-hoc royalty to demand from the settling defendant.

A plaintiff may seek statutory damages, which may be available without proof of defendant's sales and profit, nor of plaintiff's lost profits. Copyright, \$750 to \$30,000 in the court's discretion, up to \$150,000 for willful infringement, all sums per "work" (17 USC § 504(c)); Trademark counterfeiting, from \$1,000 to \$200,000 per counterfeit mark per type of goods or services, if willful up to \$2,000,000, as the court considers just (35 USC § 117(c)).

### Federal Default Rules

US courts and administrative tribunals prefer to decide cases on their merits, after courteous adversary presentations of evidence and legal argument. Courts tend to give defendants reasonable opportunities to appear and defend on the merits, at times even after a judgment by default.

A careless plaintiff may make procedural errors that can be grounds to set aside a default judgment and begin an active defense. Is the amount of the requested judgment supported by competent evidence. Was service of process properly performed and adequately documented.

For the court clerk to enter a judgment by default, any financial award must be for a sum certain or a sum that can be made certain by computation (FRCP 55(b)(1)). Additionally, plaintiff must show that the defendant is neither a minor nor an incompetent person. (FRCP 55(b)(1): <[https://en.wikipedia.org/wiki/Age\\_of\\_majority](https://en.wikipedia.org/wiki/Age_of_majority)>).

"On the Internet, nobody knows you're a dog," or an adult above a jurisdiction's age of majority (Peter Steiner's 1993 New Yorker cartoon). In most jurisdictions, the age of majority is legally set somewhere between 18 and 21 inclusive. Many minors are computer and Internet literate; a number have initiated financially successful Internet businesses.

Defendants actively serving in the US military may have state and federal judicial and administrative actions that

might adversely affect their civil rights temporarily suspended. (Servicemembers Civil Relief Act (SCRA), 50 USC §§ 501 et seq.

Less quickly and with more evidence, a court may enter a judgment by default. FRCP 55(v)(2). A default judgment may be entered against a minor or incompetent person only if represented by a general guardian, conservator, or other like fiduciary who has appeared. Id. For "good cause" a court may set aside an entry of default. FRCP 55(c).

In evaluating good cause, courts typically consider three factors: 1) was the default willful; 2) will plaintiff be prejudiced by setting aside the entry of default; and 3) does defendant have a meritorious defense to plaintiff's claims.

Defendant Nick Steiner in the United Kingdom knowingly misrepresented in a takedown notice that plaintiff's principal published on its website material infringing defendant's copyright. USA-based plaintiff served defendant using the designated central authority under Article 18 of the Hague Convention, in accord with FRCP 4(f)(1), as demonstrated by proof of service, copy of USM-94 request for service abroad, and certificate establishing that service was delivered by the designated UK central authority, stating "method, the place and the date of the service and the person to whom the document was delivered. Automatic Inc v Steiner, 115 USPQ2d 1710 (ND CA 2014).

In adopting the report of Magistrate Judge Spero, Judge Hamilton concluded (Id at 1726):

Although defendant was not served with the report and recommendation, and thus did not file any objections, the court is satisfied by Judge Spero's detailed findings that the summons and complaint were properly served on defendant. There is no clear requirement in 28 U.S.C. § 636(b) that a report and recommendation be served on the opposing party. However, the court normally requests that the moving party do so, out of an abundance of

caution. In this case, given that defendant was properly served (notwithstanding the difficulty of service in the U.K. under the Hague Convention) yet chose to default, the court will require no further expenditure of resources.

The court finds the report correct, well-reasoned and thorough, and adopts it in every respect. Accordingly, plaintiffs' motion for default judgment is GRANTED. Judgment shall be entered for the plaintiffs, and the court awards plaintiffs damages in the amount of \$960.00 for Hotham's work and time, \$1,860.00 for time spent by Automattic's employees, and \$22,264.00 for Automattic's attorney's fees, for a total of \$25,084.00.

For certain specified reasons, a defendant may move, generally within a year, for relief from a judgment or order. FRCP 60(c). Some of the reasons are newly discovered evidence that could not have been discovered with reasonable diligence in time to move for a new trial under FRCP 59(b); mistake, inadvertence, surprise, or excusable neglect; fraud, misrepresentation, or misconduct by an opposing party; the judgment has been satisfied or is no longer equitable; or for another reason that justified relief. FRCP 60(b).

However, just because a jurisdiction is a Hague Service Convention party doesn't mean service, discovery, and collection become a breeze. China is a convention party, yet has the reputation of rejecting or delaying discovery requests under the Convention. *Tiffany (NJ) LLC v Qi Andrew* (SD NY, 2010-cv-09471, Doc 104, 15 June 2015); *Gucci America v. Weixing Li*, 768 F3d 122 (2d Cir 2014). Reportedly a Chinese court has rarely if ever enforced a USA judgment against a Chinese firm, and US court rarely recognize a Chinese judgment against a US firm. (Marc Davis, "The great Firewall of China," 101 ABA J 17, 18 (Nov 2015).

### Considerations

If the infringing goods are a small,



incidental part of defendant's business and if the takedown webstore and frozen financial account are small and incidental, and if defendant is not personally yet identified, it might be efficient to accept the losses without contest.

When these conditions are not met—the defendant is personally identified, large sums of money are frozen or at risk, reputation as an infringer may harm future business or restrict travel—then the consequences of default become more severe, and settlement or active defense become more favorable options.

Defendants should consider consulting with a local attorney in their own jurisdiction, to advise on:

- likely consequences and costs of default, of settlement;

- possible redress from the vendor of the infringing goods;
- how to reduce the likelihood of a vender selling defendant counterfeit goods;
- how important the taken-own Web site is to defendant's expected future businesses;
- how salient the infringing goods are to defendant's whole business and life.

It generally is prudent for a defendant to monitor the case. Federal court dockets and those of many states are now freely available to the domestic and international public.

If settlement appears the preferred resolution, then an attorney experienced in the legal subject area (such as intellectual property infringement) can be engaged to negotiate a mutually acceptable resolution

as quickly and inexpensively as feasible. Defendant's name will likely be disclosed to plaintiff's attorneys, but might be negotiated to exclude from the public record.

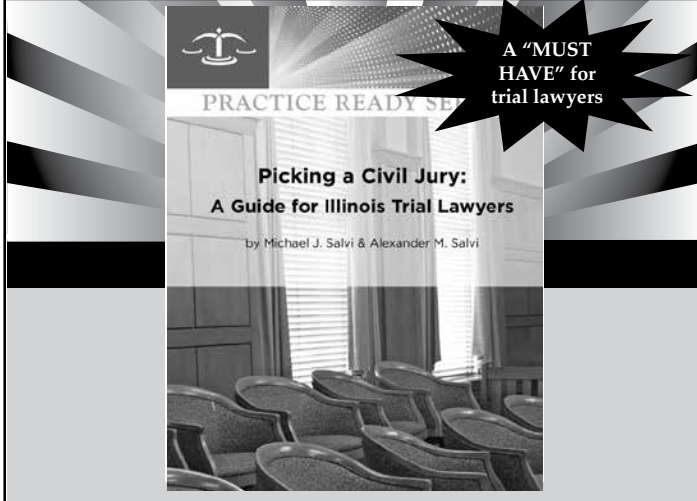
If the complaint contains material falsehoods or mischaracterizations, significant funds are at risk, or defendant's reputation and future prospects are at bothersome risk, then an active defense may be warranted. ■

---

Daniel Kegan, <daniel@keganlaw.com>  
Copyright © Daniel Kegan 2015. All Rights Reserved.

This article was originally published in the November 2015 issue of the ISBA's Intellectual Property newsletter.

*Don't miss this invaluable guide to jury selection!*



## PICKING A CIVIL JURY: A GUIDE FOR ILLINOIS TRIAL LAWYERS


*Bundled with a free Fastbook PDF download!*

*As part of the ISBA's Practice Ready Series, this book is specifically designed to be a must-have resource for new attorneys and others wishing to brush up on their jury selection skills. It concisely walks you through each stage of picking a jury, from making the initial jury demand to challenging jurors during trial. The guide not only covers the procedural mechanics of jury selection, but also includes chapters on voir dire strategies, the psychology of picking a jury, and using the Internet in jury selection. Statutory and case law citations are provided throughout and most chapters include a list of helpful practice tips. The book is written by respected trial lawyer Michael J. Salvi and his son, Alexander. Order your copy today!*

Order at [www.isba.org/store](http://www.isba.org/store) or by calling Janet at 800-252-8908  
or by emailing Janet at [jlyman@isba.org](mailto:jlyman@isba.org)

### PICKING A CIVIL JURY: A GUIDE FOR ILLINOIS TRIAL LAWYERS

\$27.50 Members / \$45 Non-Members  
*(includes tax and shipping)*



Illinois has a history of  
some pretty good lawyers.  
We're out to keep it that way.

# Professor David J. Gerber elected president of the American Society of Comparative Law

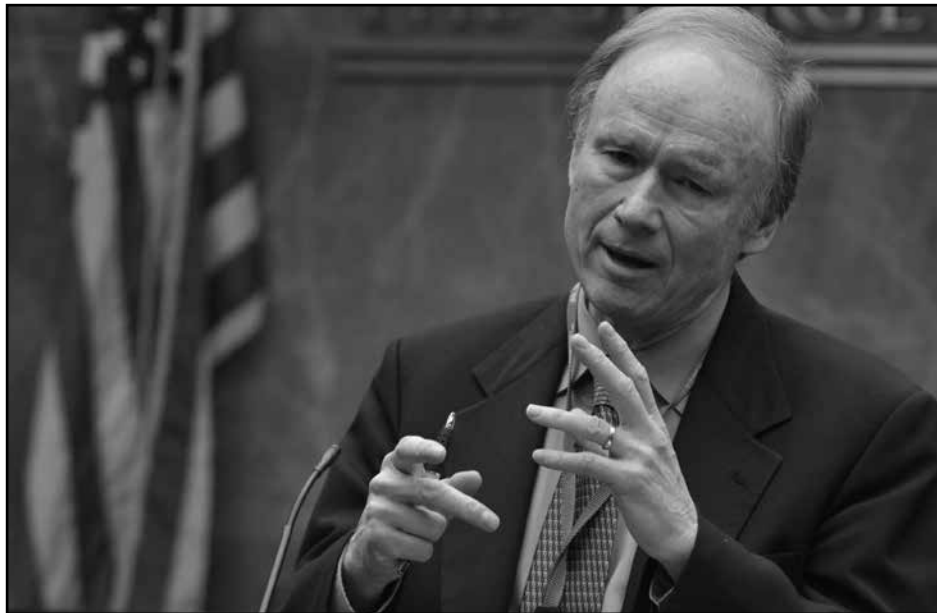
Chicago—November 4, 2015—

Distinguished Professor David J. Gerber, co-director of the Program in International and Comparative Law at Chicago-Kent College of Law at Illinois Institute of Technology, was elected president of the American Society of Comparative Law (ASCL) at the organization's annual meeting in October in Dallas.

"Professor Gerber is an eminent scholar in the law of global competition," says Professor Vivian Grosswald Curran, distinguished faculty scholar at the University of Pittsburgh School of Law and vice president of ASCL. "Proficient in many languages, erudite, creative and wise, he is an ideal leader for our society at this time of legal transnationalization."

Founded in 1951, the American Society of Comparative Law is the leading organization in the United States promoting the comparative study of law. As president, Professor Gerber plans to pursue outreach initiatives in Latin America and Asia designed to lead to deeper and more meaningful exchanges with scholars in those regions. He also hopes to pursue outreach initiatives that can strengthen ties with scholars in the social sciences, in particular, economics, sociology and the cognitive sciences.

"David believes deeply in finding ways to involve younger scholars in the life and governance of the society," says Richard Albert, associate professor of law at Boston College and a member of ASCL's executive committee. "He has been a champion for supporting the initiatives of younger scholars, for mentoring them, and for promoting their scholarly development. He continues to devote considerable time and energy to ensuring the vitality of the society. We are in good hands with him at the helm."



*Photo courtesy of George Washington University*

A member of Chicago-Kent's faculty since 1982, Professor Gerber teaches courses on comparative law, international and comparative antitrust law, and globalization issues. He has written more than 90 articles and book chapters. His books include *LAW AND COMPETITION IN TWENTIETH CENTURY EUROPE: PROTECTING PROMETHEUS* (Oxford University Press 1998, paperback 2001), *GLOBAL COMPETITION: LAW, MARKETS AND GLOBALIZATION* (Oxford University Press 2010, paperback 2012) and *COMPETITION LAW: A GLOBAL INTRODUCTION AND GUIDE* (Oxford University Press, forthcoming).

Professor Gerber holds a bachelor's degree from Trinity College, a master's degree from Yale University, a law degree from the University of Chicago, and an honorary doctor of laws degree from the University of Zurich, Switzerland.

Founded in 1888, Chicago-Kent College of Law is the law school of Illinois Institute

of Technology, also known as Illinois Tech, a private, technology-focused, research university offering undergraduate and graduate degrees in engineering, science, architecture, business, design, human sciences, applied technology, and law. Chicago-Kent offers a Certificate Program in International and Comparative Law for J.D. students and an LL.M. Program in U.S., International and Transnational Law for international attorneys and law graduates who wish to gain a broader understanding of the American legal system and international legal issues. ■

Jacqueline Seaberg is editorial, publications and SEO manager in the Public Affairs Office at Chicago-Kent College of Law at Illinois Tech. Chicago-Kent offers full-time and part-time JD, LLM and JSD degree programs in downtown Chicago's West Loop neighborhood. For more information, please contact Jacqueline at the Office of Public Affairs by phone at (312) 906-5257 or by email at [jseaberg@kentlaw.iit.edu](mailto:jseaberg@kentlaw.iit.edu).

# Recent cases

The following case summaries appeared in recent issues of the ISBA E-Clips:

## ***Darinchuluum v. Lynch*, No. 14-2212 (October 8, 2015) Petition for Review, Order of Bd. of Immigration Appeals Petition denied**

Record contained sufficient evidence to support Bd.'s denial of alien's asylum request, even though alien asserted that he was subjected to persecution in his native country (Mongolia) as result of his attempts to expose illegal smuggling operation.

While IJ found that alien was generally credible, IJ could still find that alien failed to offer sufficient corroborating evidence on key aspects of his claim in terms of newspaper reports mentioned by alien or medical reports to substantiate his claim of injuries. Moreover, Bd. could properly note that alien misled immigration officials as to purpose of him seeking visa into U.S. Also, while alien moved for remand for purpose of introducing supplemental evidence to support his claim, Bd. could properly find that alien could and should have submitted such evidence at original hearing.

## ***Rodriguez-Molinero v. Lynch*, No. 15-1860 (December 17, 2015) Petition for Review, Order of Bd. of Immigration Appeals Petition granted**

Record failed to support IJ's denial of alien's Convention Against Torture application for deferral of removal, even though IJ found that alien had failed to show likelihood that he would be tortured by Mexican drug cartel if forced to go back to Mexico. Record showed that alien had participated in drug trade involving Zeta drug cartel, and alien argued that he would be tortured by said cartel, since he owed it \$30,000 for prior meth purchase, and since he had reported his experiences with cartel to U.S. drug authorities. Moreover, govt. offered no testimony to counter expert's claim that instant cartel had pattern of torturing and killing individuals who

owed it large sums of money, and who had worked with U.S. drug authorities. Alien also asserted that Mexican police had beaten and stabbed him at behest of cartel member as means to test alien's loyalty to cartel, and that cartel members had kidnapped and killed his great-uncle during time frame when cartel was seeking alien's whereabouts. Ct. rejected IJ's belief that alien could not prevail on his application where alien had failed to show that entire Mexican govt. would likely acquiesce to cartel's torture of alien.

## ***Mendoza-Sanchez v. Lynch*, No. 15-2551 (December 23, 2015) Petition for Review, Order of Bd. of Immigration Appeals Remanded**

Ct. of Appeals remanded case back of Bd. of Immigration Appeals upon govt.'s motion for said remand for purpose of allowing Bd. to reconsider its denial of alien's eligibility for deferral of removal under CAT, where alien alleged that removal to Mexico would result in his death by members of La Linea drug cartel. Alien had presented evidence that while he was in U.S. prison on drug charges he had been attacked by member of La Linea cartel and had been told that other members of said cartel had believed that alien had snitched on them. Moreover, alien presented strong case for CAT relief, where Bd. did not reject IJ's finding that alien was generally credible, and where record contained evidence that Mexican police officers routinely collaborated with and protected members of La Linea.

## ***Estrada-Martinez v. Lynch*, No. 15-1139 (December 31, 2015) Petition for Review, Order of Bd. of Immigration Appeals Petition granted and dismissed in part**

In removal proceeding in which alien (native of Honduras) argued that he was entitled to withholding of removal and CAT relief based on claim that he experienced police torture in Honduras in 1994, Ct. of Appeals lacked jurisdiction to review Bd.'s

denial of alien's application for withholding removal, where Bd. found that alien's 1996 conviction for statutory rape was "particularly serious" crime, which in turn precluded alien from obtaining such relief. Section 1252(a)(2)(B)(ii) of INA prohibits review of Bd.'s discretionary determination that alien's conviction was particularly serious crime in absence of alien raising any constitutional or legal question, and alien's contention on review was nothing more than request to re-examine factors used to determine whether instant conviction was particularly serious crime. However, alien was entitled to remand for reconsideration of Bd.'s denial of alien's CAT application for deferral of removal, where: (1) IJ had initially granted such relief, after finding likelihood that alien would be tortured if removed to Honduras; and (2) Bd. improperly used de novo standard instead of clear error standard when reversing IJ's determination. Fact that Bd. identified one erroneous factual determination made by IJ did not entitle Bd. to use de novo standard for all factual determinations made by IJ, where correct finding on subject factual determination did not render IJ's order granting CAT relief implausible or illogical. ■



**ILLINOIS STATE  
BAR ASSOCIATION**

### **Now Every Article Is the Start of a Discussion**

If you're an ISBA section member, you can comment on articles in the online version of this newsletter

**Visit  
WWW.ISBA.ORG  
to access the archives.**

# THE GLOBE

ILLINOIS BAR CENTER  
SPRINGFIELD, ILLINOIS 62701-1779

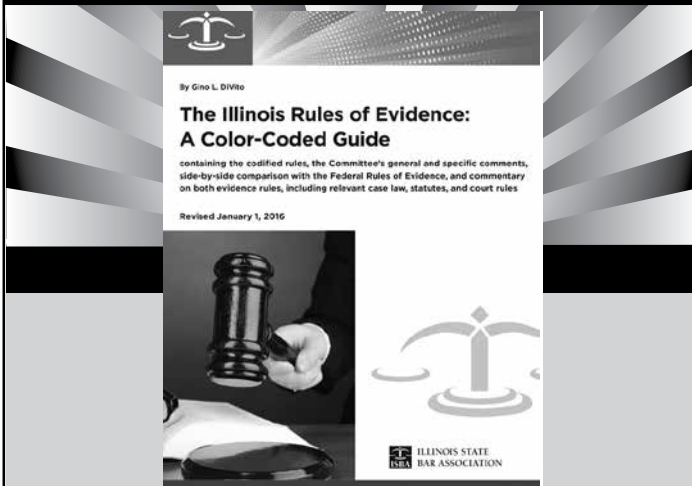
FEBRUARY 2016

VOL. 53 NO. 5

Non-Profit Org.  
U.S. POSTAGE  
PAID  
Springfield, Ill.  
Permit No. 820



*Get the evidence guide the judges read!*



## THE ILLINOIS RULES OF EVIDENCE: A COLOR-CODED GUIDE 2016 Edition

Still learning the intricacies of the Illinois Rules of Evidence? Don't be without this handy hardcopy version of Gino L. DiVito's authoritative color-coded reference guide, which is completely redesigned and updated through January 1, 2016. It not only provides the complete Rules with insightful commentary, including the latest supreme and appellate court opinions, but also features a side-by-side comparison of the full text of the Federal Rules of Evidence and the Illinois Rules of Evidence. DiVito, a former appellate justice, serves on the Special Supreme Court Committee on Illinois Rules of Evidence, the body that formulated the Rules approved by the Illinois Supreme Court. Order your copy of this ISBA bestseller today!

Order at [www.isba.org/store/books/rulesofevidencecolorcoded](http://www.isba.org/store/books/rulesofevidencecolorcoded)  
or by calling Janet at 800-252-8908 or by emailing Janet at [jlyman@isba.org](mailto:jlyman@isba.org)

**THE ILLINOIS RULES OF EVIDENCE:  
A COLOR-CODED GUIDE – 2016 Edition**

\$37.50 Members / \$55 Non-Members  
(includes tax and shipping)



Illinois has a history of  
some pretty good lawyers.  
We're out to keep it that way.