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The newsletter of the ISBA's Section on International & Immigration Law

Editor's comments

By Lewis F. Matuszewich

While international and immigration law practices are often viewed as narrow and not affecting the vast majority of Illinois practicing attorneys, the Illinois State Bar Association's own List Serve provides evidence to the contrary.

Practitioners throughout the state, sole practitioners as well as those from small and medium size firms use the ISBA List Serve. As you review the questions posted on the general or transaction list serve, you quickly appreciate that attorneys throughout the state have questions concerning immigration and/or international practice.

The following items were recently posted (all of which I have paraphrased and oversimplified the content):

1. For an estate opened in Illinois whose legatees live in and are citizens of a foreign country, what steps must be taken to comply with the Patriot Act with the distribution of funds to the legatees?
2. A referral request for an attorney who practices in Cape Town, South Africa relative to receivership or bankruptcy law and corporate law.
3. A Polish speaking attorney to explain marital and estate matters.
4. Can a foreign national who is driving on a foreign drivers license involved in an accident in Illinois be ticked for failure to have a valid drivers license?
5. In a probate when the decedent obtained a "quickie" divorce in a foreign country, remarried and divorced in this country, how do you sort through the family for estate distribution purposes? Even for notice requirements.

Other questions have been raised regarding taking depositions outside of the U.S., validating foreign documents to be used in U.S. litigation, and foreign ownership of real estate.

As a reader of *The Globe* you know the importance of immigration and international law. Please consider encouraging a friend or an associate to join our Section this year, encouraging them to support international and immigration law.

The articles included in this issue are: "Message from the Chair" by Juliet Boyd; "Where's the Beef" by Donald L. Uchtmann; "*Noble Ventures Inc. v. Romania*" by Violeta I. Balan; "Proposed Amendments to the Investment Canada Act" by Cliff Sosnow; "International Commercial Arbitration" by Jason B. McGary; and "The Pledge in French Secured Transaction Law" by Sac'i Nakano. Thank you to all of the authors.

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IN THIS ISSUE

Message from the Chair: Judge Diane Wood and Judge Robert Vinnekor speak at successful Asylum CLE

By Juliet Boyd

The continuing legal education (CLE) seminar on asylum jurisprudence sponsored by the Section Council on November 11, 2005 proved to be a great success. This was the first CLE program conducted by the Section Council in a number of years and paves the way for equally successful programs in the future.

I would like to thank all the partici-

whole cuts of boneless beef from Japan. "Importation of Whole Cuts of Boneless Beef From Japan; Final Rule." 70 Fed. Reg. 73905 (Dec. 14, 2005).

Undoubtedly, science played an important role in these beef import decisions. However, USDA Secretary Johanns gave special credit to President Bush "for being personally and directly engaged in the effort." Johanns also thanked Secretaries Rice (State), Snow (Treasury), and Gutierrez (Commerce), U.S. Trade Representative Rob Portman, and Ambassador Howard Baker (Japan) for making the beef import ban a centerpiece of their discussions. Where's the imported beef? The answer, it seems, is determined by a combination of modern science and old-fashion politics.

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Noble Ventures Inc. v. Romania — Bilateral investment treaty claim against Romania dismissed

By Violeta I. Balan *

Romania won an important arbitration in front of the International Center for Settlement of Investment Disputes (ICSID) on October 12, 2005. See ICSID Case No. ARB/01/11.[1] The ICSID Tribunal unanimously dismissed all claims that Romania's actions violated certain provisions of the 1992 United States—Romania Bilateral Investment Treaty (BIT) and held that Romania was not responsible for a foreign company's failed investment in a privatized steelwork.

The dispute was initiated by an American company, Noble Ventures Inc., that offers business consulting services for steel companies in Eastern Europe. The U.S. company invested in a privatized steel mill, Combinatul Siderurgic Resita (CSR), located in Resita, Romania. In August 2000, the American company entered into privatization agreements with a Romanian agency in charge of privatization of state-owned enterprises called the State Ownership Fund (SOF). The privatization agreement provided for the acquisition, management, operation and disposition of the CSR steel mill. At the time, CSR had a significant amount of debt to other government entities and Noble Ventures alleged that the government promised to initiate the rescheduling of the mill's debts. Six months after the acquisition took place, however, political control changed to the opposition party. The change of government was reflected in the replacement of the SOF by a different entity, the Authority for the Privatization and Management of the State Ownership (APAPS). After the acquisition of CSR by Noble Ventures, a number of problems arose. Mainly, the rescheduling of the mill's substantial debt never occurred and that allegedly caused the mill to became inoperable and eventually led to the new government retaking control. Noble Ventures initiated arbitration proceedings in August 2001.

Noble Ventures claimed that Romania violated Article II(2) of the BIT by failing to provide international law standards of treatment such as good faith and fair and equitable treatment. Romania's actions and inactions were allegedly arbitrary and discriminatory and prevented the American company from exercising its rights to manage and control its investment. It was also claimed that Romania engaged in misrepresentation about key assets in the tender book prepared for the privatization and it failed to honor the terms of several agreements related to the control of CSR. Further, Romania allegedly failed to provide full protection and security during a period of extreme labor unrest in the spring and summer of 2001. Noble Ventures also claimed that Romania failed to carry out its good faith obligations regarding negotiation of debt rescheduling with state budgetary creditors. Lastly, it was claimed that Romania's initiation of judicial bankruptcy proceedings violated article III(1) of the BIT which prohibited direct or indirect expropriation. Noble Ventures sought $3.1 million in damages.

All of the allegations were contested by Romania. In sum, Romania contended that Noble Ventures simply failed to respect and accept the limits of the agreement it entered into with SOF. It was argued that Noble Ventures knew or should have known that when CSR was privatized, it was burdened with substantial debt and, under Romanian law, the SOF did not have the authority to forgive this debt. Romania contended that the parties' share purchase agreement did not guarantee that CSR's debts would be restructured. Further, Romania asserted that after failing to obtain the debt restructuring it sought, Noble Ventures simply stopped paying CSR employees' wages and refused to invest capital in CSR, resulting in a labor strike. In May 2001, the government authorized substantial debt restructuring for CSR, but Noble Ventures rejected the restructuring package. In July 2001, CSR's budgetary creditors filed a judicial reorganization petition in Romanian courts. Romania contended that Noble Ventures' claim that the judicial reorganization was arbitrary, discriminatory, unfair and expropriatary was groundless as a matter of fact and law. Further, it argued that Romanian authorities reacted reasonably and exercised appropriate due diligence in response to alleged isolated acts of violence against Noble Ventures' agents. Romania asked to be reim-

bursed for legal fees, costs and expenses totaling $8.9 million.

Preliminary, the Tribunal dealt with the issues of the umbrella clause and attribution. The first related to a provision in the BIT that provided that "[e]ach Party shall observe any obligation it may have entered into with regard to investments." Noble Ventures claimed that this is the type of umbrella clause present in other similar treaties which brings contractual obligations under the treaty umbrella. Thus, it was argued that a breach of an investment contract can be construed as a breach of a treaty and, consequently, international law. After noting that the wording is different that similar provisions in other treaties and a fresh interpretation was required, the Tribunal agreed with Noble Ventures' reading of the clause and found that found that "Article II(2)(c) would be very much an empty base unless understood as referring to contracts." The Tribunal supported its conclusion by an examination of the wording itself and by reliance on an object-purpose analysis.

The second preliminary question was whether the acts of the SOF and APAPS (the Romanian governmental agencies in charge of privatization) were attributable to Romania. Relying heavily on the ILC Articles on State Responsibility, the Tribunal held that the acts of the Romanian institutions were attributable to Romania "for purposes of assessment under the BIT." Further, because the BIT contained a valid umbrella clause, Romania was deemed to be a party to the privatization agreement.

Turning to the merits of the dispute, the Tribunal found that all the claims were meritless. It noted that the duty to provide full protection and security guaranteed in Article II(2)(a) of the BIT "is not to be understood as an absolute standard providing for strict liability but as a due diligence standard." The Tribunal found that Romania had not failed to exercise due diligence in protecting Noble Ventures' investment and, in any case, Noble Ventures did not prove that its alleged injuries would have been prevented had Romania exercised due diligence. Another issue was whether judicial proceedings initiated by Romania due to Noble Ventures' insolvency could be regarded as arbitrary, discriminatory, unfair, and inequitable treatment and whether they amounted to expropriation at all. In this regard, the Tribunal rejected all these claims and observed that the

purpose of the judicial reorganization was to preserve, rather than to destroy, the ability of Noble Ventures to revive CSR as an economic steel producer. Further, it questioned whether Noble Ventures was capable of meeting the promises made, including to the workforce of the CSR, and suggested that the restructuring proceedings were the "short term solution of the 'social crisis" that had engulfed Resita as the result of [Noble Ventures'] inability to pay CSR's workforce." Finally, the tribunal held that each party would bear the expenses incurred in connection with the arbitration.

While this award is a resonant victory for Romania, there are other ICSID cases against Romania brought by disappointed foreign investors. They include a case filed by EDF in August 2005, an Israeli-American investor, over duty-free retail operations at Romanian international airports and allegations that a government official demanded a $2.5 million bribe. In July 2005, Rompetrol Group NV (TRG) notified the Romanian government that it intends to bring an ICSID arbitration based on the investment treaty between Netherlands and Romania. An Italian group of investors, Gavazzi Steel, has also made known its intentions to bring an ICSID claim over similar facts as in the *Noble Ventures* proceedings regarding another steel mill, Combinatul Siderurgic Otelu Rosu. The company Cross Lander USA declared in September 2005 that it intends to bring an ICSID claim against Romania over the privatization of ARO—a car manufacturer and the only producer of Support Utility Vehicle in Romania. The Romanian government, through its Ministry of Public Finance, is currently in the process of selecting the law firms which would represent Romania in front of ICSID. These cases, as well as the perception of corruption, tarnish the image of Romania and have a negative effect on the foreign investment in Romania. These consequences are particularly important in light of Romania's accession to the European Union, scheduled to be consummated in early 2007.

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1. A copy of the arbitral award is available online at: <http://www.investment-claims.com/decisions/Noble-Ventures-Final-Award.pdf>.

Proposed amendments to the Investment Canada Act

By Cliff Sosnow

Overview

This past summer, the Minister of Industry announced intended amendments to Canada's foreign investment review legislation, the Investment Canada Act (ICA), that if permitted to become law would allow the government to modify or disallow foreign investments when the government believes they may compromise Canada's national security. The ICA currently allows for review of foreign investment but this review is expressly limited and the factors to be considered are set out in the ICA. These limits and factors reflect those set out the North American Free Trade Agreement (NAFTA) Investment Chapter under Annex I, certain provisions of the World Trade Organization (WTO) General Agreement in Services (GATS), and the Trade Investment Measures (TRIMs) Agreement. This combined transparency provides certainty and predictability in decision making and affords a clear level of protection to investors. In our view, the proposed national security amendments, contained in "Bill C-59", would remove this certainty and protection. The amendments do not define national security, do not set out the criteria to be used to make a decision, and inevitably reduce the justiciability of decisions to reject foreign direct investments.

The Investment Canada Act Amendments

Recognizing that increased capital and technology would benefit Canada, the ICA was originally established to encourage investment in Canada that contributed to economic growth and employment opportunities, ensuring a "net benefit" to all Canadians.

When the Minister is making a decision as to whether the investment will be of net benefit to Canada, certain listed economic factors, known as the net benefit test, must be considered. These factors are reflected in Annex I to Chapter 11 of the NAFTA, the Schedule of Canadian Commitments appended to the GATS, and the TRIMs Agreement. They include the effect of investment on domestic competition; on Canada's ability to compete in world markets; and on the compatibility of the investment with national and provincial economic and industrial policies.

Currently, the ICA differentiates between investments in cultural businesses and other investments. Investments in cultural businesses are subject to the net benefit test regardless of their asset value. Other investments are reviewable by the Minister of Industry (the "Minister"), but only when the asset value exceeds an established threshold: $250 million in direct acquisitions for WTO members. A lower threshold applies for investments in the uranium industry, certain financial services and transportation services or where both the buyer and the seller are not from countries or entities that are members of the WTO.

Under the proposed amendments, national security reviews will be required for investments by a "non-Canadian" that (i) establish a new "Canadian" business; (ii) acquire control over a Canadian business; or (iii) establish or acquire control over a business that has operations in Canada, or employees or assets in Canada where the Minister has "reasonable grounds to believe that an investment