Editor’s comments

By Lewis F. Matuszewich

Lynne Ostfeld’s Message from the Chair emphasizes her request for Section Members, and other readers of The Globe, to apply to be appointed to the International and Immigration Law Section Council for the 2015-2016 ISBA year. Lynne has also provided Practice Tips concerning intellectual property, family law and international probate.

In the last issue of The Globe, we included the first installment of Joshua Nygren’s article, “Reform of the Foreign Corrupt Practices Act.” This issue includes the second installment of that article, and a third installment will appear in the next issue.

Susan Brazas is a member of the International and Immigration Law Section Council and she has provided to us her book review of Federal Judge Manuel Barbosa’s “The Littlest Wetback: From Undocumented Child to United States Federal Judge.”

Cindy Buys, former Chair and current member of the International and Immigration Law Section Council, in addition to encouraging Joshua Nygren to submit his article concerning the Foreign Corrupt Practices Act, has provided her article, “New Business Opportunities in Cuba.”

Henri Spehar is an attorney practicing in Boca Raton, Florida. At the suggestion of Lynne Ostfeld, Chair of the International and Immigration Law Section Council, he has provided us an introductory article, “Legal System of the Republic of Finland.”

Thank you to all the authors and those who have encouraged authors, and we are currently looking for material for the sixth issue of The Globe.

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Message from the Chair

By Lynne Ostfeld

As we get ready for the start of a new year, I extend my best wishes to all of you.

ISBA Int’l & Immig Section Council - Please consider submitting an application to be appointed a Council member for the 2015-2016 year. Together we can show potential clients that there is a vibrant community of international lawyers between the East and West Coasts. There is an on-line form which must be submitted by February 2, 2015 at: <www.isba.org/member-groups/nominations/form>.

We will have no small amount of work ahead of us in thinking how immigration issues and a relaxing of relations with Cuba will involve us. Tejas Shah and Scott Pollock, Council members, will be joined by Mike Lied, our CLE liaison, to present a webcast on Immigration Changes on January 15, 2015 from 12:00-1:00 p.m. Check it out.

Another topic in the news serves as the basis for the book review which follows.

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Message from the Chair

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of a moot court debate for the Jessup International Law Moot Court Competition. The problem addresses “treaty violability and countermeasures in the face of a potential fundamental change of circumstances and, the procedural and substantive issues raised by the secession of a province from one country and its annexation by a neighbor.” The competition will be held at Loyola University School of Law, in Chicago, on February 21 and 22, 2015. If you would like to participate as a judge of an oral round, or written briefs, please contact Chad M. Lawler, J.D., Government Affairs, Wisconsin Legislative Strategies, Inc., 14 W.Mifflin St., Ste. 207, Madison, WI 53703; tel: (608) 807-1303; e-mail: chad@ wiscls.com. Illinois CLE credit is available and you will be given the bench briefs.

One of the things I did this fall was attend the annual Congress of the International Association of Lawyers (UIA) in Florence, Italy. This group brings together attorneys from all over the world dealing with both matters of private law, such as the UNCISG, and public law, such as rights of people in many countries today. I am Secretary of the International Sale of Goods Commission and the presentations are both informative and sometimes even eye-opening. If you want to attend next year’s congress, it will be held the end of October in Valencia, Spain.

More recently I took staff from several consulates in Chicago to meet with staff of the Cook County Clerk’s Office and the Cook County Recorder of Deeds to learn how these agencies work, particularly given the work that the consulates have to do for their own citizens here and abroad. I learned that the Cook County Clerk’s Office receives requests from all over the world for copies of vital documents and can now respond within a few days. The work can be done on-line but costs must be paid by credit card. The Recorder of Deeds pointed out that they have set up a way to protect real estate ownership from scams that are going international. Property owners can sign up for Property Fraud Alert at: cookcountypropertyfraudalert.com

I am thinking of organizing a group of Section members to host tours for consular staff of the criminal courts in whichever county the volunteering Section members come from. The idea would be to help consular staff understand what happens in the criminal court as well as to make the criminal courts know that foreign nationals require a little special care. Please let me know if you would like to work on this project.

Events of potential interest are:

- UIA 10th Winter Seminar - Cross Border Business Partnering 2015; Feb. 21-28, 2015; Breckenridge, CO; organized by the UIA with the support of the ABA Section of Litigation; more info at www.uianet.org
- UIA, Commission on International Sale of Goods - Seminar on Drafting Effective International Contracts, May 29-30, 2015, Rome, Italy
- EXPO Milano 2015; May 1 - October 31, 2015; organized by the International Chamber of Commerce, ICC Arbitration & ADR Events: www.iccwbo.org, arbecnts@iccwbo.org
- UIA 59th Annual Congress, Oct. 28 - Nov. 1, 2015, Valencia, Spain; principal themes: mobility and the globalization of immigration, rights, trademarks in sport - business or law; www.uianet.org

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Federal successor liability law is complex to follow, and the reasoning behind it was to stop a company from eluding liability by reconstituting itself as another company. It has its roots in state law as an equitable remedy against formalistic attempts to circumvent contractual or statutory liabilities rules. The laws can differ from state to state. To determine if successor liability can be imposed it must be addressed if the successor company expressly agrees to assume the liability, or if a merger or acquisition was fraudulently entered into to escape liability. Courts have looked at if to see if is in the public's best interest to impose such liability. See generally United States v. Cigarette Merchandisers Ass'n, Inc., 136 F. Supp. 214 (S.D.N.Y. 1955). This case determined that it was appropriate, based on public policy, that Central National Bank three to four years before the merger with Alamo Bank was held liable for its debts. The Alamo Bank was prosecuted under the Bank Secrecy Act which had been committed by Central National Bank. The Court ruled, “Central National Bank continues to exist, albeit now as part of Alamo. Thus, Alamo is Central National Bank, and it is Central National Bank now named Alamo which is responsible for Central National Bank’s actions and liabilities. This includes criminal responsibility.” Alamo attempted to use the defense of not knowing however, it did not convince the Court that it should not be held accountable for successor liability. Criminal successor liability with the FCPA has not been tested in court and no business has been charged on such a theory of liability and put the government to the test in a court room. Sufficient due diligence will depend on the inherent risks in a merger or acquisition and if the target company does significant business in areas that are known for corruption including the complexity of the planned merger. Due diligence should not require a full in-depth internal investigation and use of a vast amount of resources and financial costs.

Section 8 BB2.1. Effective Compliance and Ethics Program (a) and (b) of the United States Sentencing Guidelines defines due diligence and required steps for its method or procedure

The "willfulness" provision in the statute which provides that an individual's action must be willfully committed but, does not have any language limiting it for operations, which now extends the scope of corporate criminal liability. This leaves the provision open for interpretation of the enforcement agencies to allege violations of the FCPA if the business and its employees did not know its conduct was in violation of the statute or wrong at all. Ibid. Bryan v. United States defines what the government must prove to prove willfulness, it must be shown the "defendant acted with knowledge that his conduct was unlawful." 524, U.S. 184, 191-92 (1998). Unfortunately, this now allows enforcement agencies to attack corporations but not individuals through whom they act. The corporations should be held to the same...
level of mens rea if defined as legal persons, as what a person would be. 112

Allowing a corporation to be held liable for acts of its subsidiaries that it has no knowledge of is not within the intent of the drafters of the FCPA. 113 No legislative history shows that the FCPA was to allow a parent company to be held liable for criminal violations for the provision by another company if it had no knowledge of improper payments. It was noted that if a parent company’s ignorance of the foreign subsidiary was a result of conscious avoidance or looking the other way that it could be in violation of section 102 for a company to maintain adequate accounting controls. 114 The enforcement agencies have developed theories now that would lock companies in for criminal liability for violations in situations where the company has no knowledge of improper payments and no knowledge that United States law applies to the actions. 115 An example of this is the Siemens case. The DOJ charged a subsidiary in Bangladesh with conspiracy to violate the FCPA on bribes that did not happen in the United States and involved only foreign entities. 116 The DOJ came up with the theory that because some of the money was at some point passed through United States bank accounts that the FCPA applied. 117

If Congress amended the statute and the willfulness requirement, it would reduce the amount of FCPA violations within the company that had no direct knowledge of the violations or that the company had no idea that United States law would apply. It would also allow the de minimus contact with the United States as predicated for the jurisdiction: the defendant should either have to know of such contact or the contact, if unknown, should have to be substantial and meaningful to the bribery charged and foreseeable. 118

The SEC charges parent companies on a routine basis with civil violations for the FCPA based on foregoing subsidiaries of which the parent company has no knowledge of. 119 This is opposite to the statutory language of the FCPA act that requires “evidence of knowledge and intent for liability.” 120 It is also not within the drafter’s intent that recognized “inherent jurisdictional enforcement and diplomatic difficulties raised by the inclusion of foreign subsidiaries of United States companies in the direct prohibitions for the bill.” 121 The drafters made it clear that they should only be held liable for actions of a “foreign subsidiary if the issue or domestic concern engaged in bribery by acting ‘through’ the subsidiary.” 122 This is also does not coincide with the governments state position regarding a parent corporation “may be held liable for the acts of [a] foreign subsidiary [y] [only] where they authorized, directed, or controlled the activity in question.” 123 The SEC has not explained how a parent company can be liable for the subsidiary’s actions of violating the statute. 124 If the activity was not “authorized, directed or controlled by the parent or where the parent did not itself act through the subsidiary, but to the contrary where the subsidiary’s improper acts were undertaken without the parents knowledge, consent, assistance or approval.” 125

Some recent examples are the United Industrial Corporation which is an aerospace defense contracting company. 126 The SEC charged the company with bribery allegations in connection to a subsidiary ACL Technologies, Inc. 127 The subsidiary allegedly made $100,000 in payments to a third-party and that parts of those payments went to Egyptian Air force government officials to secure a contract to build a military depot in the country. 128 However, there was never any direct knowledge that United Industrial Corporation was aware or ignored these alleged payments. 129 Based on the SEC created theory of the violations was that United Industrial Corporation was liable for the anti-bribery provisions of the FCPA for failure to have proper controls over subsidiaries and its employees along with the books and records. 130 The allegations never mentioned if the subsidiary’s employees had knowledge or should have known that they payments were illegal or wrong under the law. 131

Another example of this is a 2005 allegation against Diagnostics Product Company which the subsidiary of Diagnostics Products is an United States company, had violated the FCPA by improper commission payments to a state controlled hospital doctors from 1991 and 2002. 132 The SEC based their theory on the fact that they were a subsidiary, therefore Diagnostics Product Company could be charged, despite nothing stated that they were aware of any payments. 133 Within the complaint it states that when the parent company learned of the violations they immediately stopped them. 134 These theories by the enforcement agencies once again have not been tested in court and are only their interpretations of the statute. Like other companies they settled and were forced to pay disgorgement and prejudgment interest reaching $350,000 and had to have independent monitoring for three years costing $2 million and prejudgment interest of $750,000. 135

The definition of foreign official in the FCPA defines it as:

any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization. 15 U.S.C. §§ 78dd-1(f)(1)

However, the statute does not define instrumentality and is unclear on the types of entities that are instrumentalities of a foreign government. 136 Therefore, where it does not define instrumentalities it should not be within the reach of the FCPA and hold companies in violation of this if the company has no knowledge that its actions are wrong. Contrary to this, the DOJ and SEC, through the secrecy of their agency, lack of transparency and lack of knowledge have provided no explanation to what they interpret as instrumentalities. 137 However, their enforcement of the statute is extremely broad and affects state owned or state controlled and all employees of the entity no matter what level of position they hold within it. 138 Once again, these allegations have not been challenged within the courts therefore; it leaves for only one view of the statutes definition. 139

Examples of the DOJ and Sec actions regarding this issue can be seen in the following cases. Control Components, Inc. was charged in 2009 by the DOJ and SEC for payments to entities in China, Malaysia, South Korea, and United Arab Emirates. 140 The enforcement agencies defined the Chinese entities as state owned entities. 141 They believed that the definition of foreign officials by the FCPA as vice-presidents, engineering managers, and purchasing officers. 142 Baker Hughes settled with the SEC and DOJ for $44.1 million and was at one time the largest FCPA settlement ever. 143 The enforcement agencies alleged that Baker Hughes and its subsidiaries provided illegal payments to Kazahholl, and that it was an instrumentality of a foreign government and alleged controlled the Government of Kazahholl; therefore, all of its employees were foreign officials. 144 Lucent Technologies in 2007 was charged by the SEC for violations of the books and
records of the FCPA due to trips that Lucent had paid for employees of Chinese customers during 2000-2003. The SEC claimed that because the customers were employed by state-owned or controlled entities that they fell within instrumentalities of the government of China and within the FCPA guidelines of a foreign official. They settled the claim and paid $1.5 million in fines and agreed to a non-prosecution agreement with the DOJ. The DOJ and SEC alleged against a United States construction company KBR (formerly Kellog, Brown & Root) that illegal payments were made to employees of Nigeria LNG Limited. The enforcement agencies allege from their interpretation of the FCPA that the Nigeria LNG were foreign officials despite that 51% of the company is owned by private multinational oil companies that are Shell, Total, and Eni.

The foreign official part of the FCPA seems to be an increasing area of allegations filed by the DOJ and SEC and has been two-thirds of actions brought against companies since 2009. The government has created its theory of instrumentalities within the FCPA to fall within entities that are directly owned, directly controlled, controlled by members, and ones that are only partially owned by a foreign government. Within the government’s theory General Motors or AIG employees therefore would be considered foreign officials because the United States government owns parts of the company. Bloomberg Media would also fall within this theory because 85% is owned by the former Mayor of New York City, Michael Bloomberg. The government’s theory is damaging United States companies and hurting our export capacity. There is no way for companies to comprehend the definition of a foreign official and the lack of transparency and secrecy by the enforcement agencies is only making it harder for companies to follow. Percentages of government ownership in a company should be defined within the FCPA and what the status of an employee defines a foreign employee.

There are differing views of the FCPA and that the statute is without imperfections and they have their own interpretation to it. There are many countries that have followed the FCPA and its landmark legislation which has led to the global market to reduce corrupt business practices dealing with governments. There is the view that the Chamber of Commerce report will turn back the clock on bribery and set it back to the days before the 1977 statute was created.

The idea that the DOJ prosecutorial overarch is just a myth and that enforcement actions under the FCPA have remained “consistent and modest.” The authors of Busting Bribery argue that creating an affirmative defense to knowingly and intentional violations would no longer allow criminal liability and a compliance program would protect companies from their knowing and intentional illegal actions. The authors believe that in 1988, when Congress amended the statute and eliminated liability based on when a company has reason to know which would not coincide with criminal liability that requires proof beyond a reasonable doubt the actions were knowledgeable and there was a corrupt intent to influence a foreign government to a company’s advantage. The authors argue that an affirmative defense of “adequate” or “good faith” compliance does not coincide with the standards of corporate criminal liability within the FCPA and is within the Congressional Report in 1988. Arguments to support this rationale are pulled from statements made by Congress in the Congressional Conference Report in the 1988 amendments. Support to this argument believes that any compliance program that knowingly permits, facilitates, or turns away from intentional violations are not sufficient or within good faith and they believe that a compliance defense would eliminate criminal liability.

The authors believe to remove the successor corporate criminal liability for violations prior to a parent company acquiring the subsidiary would deter looking at past violations and be a possible a way to hide them or companies could restructure themselves to avoid FCPA violations. The authors argue that without being able to hold companies responsible and allowing for investigations of these companies after mergers or consolidations it would open companies up to more bribery that has not been discovered or leave it unaddressed for possible continuance.

To incorporate a willfulness requirement that would require a company who did not knowingly and intentionally know of the alleged illegal acts, is argued by the authors that it would give company’s a green light to commit bribery with the excuse of ignorance or simply hiding the issue. It is that the mens rea now is effectively applied by the DOJ and SEC for individuals and corporations.

Elimination of civil liability by the Chamber for corrupt activities of subsidiaries is argued by the authors that it would give a way out from enforcement and a parent company to property monitor its subsidiaries actions. Congress has understood that parent companies will engage in illegal activities through subsidiaries and allow the parent company to hide behind and willful remain ignorant and facilitate illegal activities.

The authors of Busting Bribery argue that that a narrow interpretation of the foreign official would undermine the statute’s purpose and go in the opposite trend of global business and enforcement of illegal activities. For Congress to clarify the foreign official it could lead to be over and under inclusive in its definition.

The argument regarding a compliance defense is not within the 1988 FCPA amendments and respondat superior principles of corporate criminal liability. There was no standard for corporate criminal liability before the 1988 amendments regarding a company’s failure to eliminate which it had “reason to know” it was occurring. The FCPA was enacted to prohibit things of failure to “any person, while knowing or having reason to know that all or any portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official.” This left companies unaware of what constituted their responsibility for suspicious payments by their foreign agents despite companies thought they had created reasonable protections and safeguards regarding foreign agents. The reform efforts that began in 1980 and 1988 were revolving around revising the “reason to know” in relation to third-party payments. Johnathan Rose, an Assistant Attorney General stated during a 1983 House FCPA Hearing third party payments was to “simple negligence standard” and “is plainly inappropriate and inconsistent with the general approach of modern criminal law to state-of-mind requirements.”

During a 1987 House Committee on Energy and Commerce hearing on a FCPA reform bill that revising the third party knowledge standard regarding “reason to know standard under current law has been criticized as unclear” and “some business interpret the standard as tantamount to “reason to suspect that an agent will pass on a briber, or negligence standard.” The House later revised that “clearly such an interpretation was not intended by Congress . . .” After the amended version in 1988, the Conference
Report stated that "Congress intended to retain the 'knowing' requirement for payments to third-parties, to delete the House bill's reference to 'reckless disregard' and to include concepts of 'conscious disregard' or willful blindness."175

A willfulness requirement will not lead to more corruption it only places that a corporation has knowledge of the act and has not turned away from addressing the issue. The size of companies today, it is impossible for them to control all of their employees and regulate every activity the enforcement agencies imply. Incorporating a willfulness requirement will help companies with compliance and the requirements of mens rea for a person or company to be held culpable for its actions.

The author, Joshua Nygren, submitted his article on the Reform of the Foreign Corrupt Practice Act to Professor Michael Koehler at Southern Illinois University School of Law. The above is the second installment of this article. The first installment appeared in the December issue of The Globe.

Mr. Nygren graduated from Indiana State University in May of 1999 with a Bachelors in Science. He majored in Criminology with a minor in Psychology. Mr. Nygren then attended graduate school at Indiana State University and graduated in December of 2000 with his Masters in Science in Criminology, with an emphasis in Law Enforcement and administration. He was a graduate assistant during his Masters. Mr. Nygren is now a third year law student at Southern Illinois School of Law with an emphasis in Transactional Law. He may be reached at joshuan517@yahoo.com.

96. Ibid. at 18.
97. Ibid.
98. Ibid.
99. Ibid.
100. Ibid.
101. Ibid.
102. Ibid.
103. Ibid.
104. Ibid at 830.
105. Ibid at 830.
106. Weissmann and Smith at 18.
107. Ibid.
108. Ibid.
109. Ibid.
110. Ibid at 20.
111. Ibid.
112. Ibid at 21.
113. Ibid.
114. Ibid.
115. Ibid.
116. Ibid.
117. Ibid at 22.
118. Ibid.
119. Ibid.
120. Ibid.
121. Ibid.
122. Ibid.
123. Ibid.
124. Ibid at 23.
125. Ibid.
126. Ibid.
127. Ibid.
128. Ibid.
129. Ibid.
130. Ibid.
131. Ibid.
132. Ibid.
133. Ibid.
134. Ibid.
135. Ibid.
136. Ibid.
137. Ibid at 25.
138. Ibid.
139. Ibid.
140. Ibid.
141. Ibid.
142. Ibid.
143. Ibid.
144. Ibid.
145. Ibid at 26.
146. Ibid.
147. Ibid.
148. Ibid.
149. Ibid.
150. Ibid at 27.
151. Ibid.
152. Ibid.
153. Ibid.
154. David Kennedy, Manley Hudson Professor of Law at Harvard Law School and Dan Daniels, Professor of Law at Northeastern University School of Law, Busting Bribery: Sustaining the Global Momentum of the Foreign Corrupt Practices Act, September 2011, at 6.
155. Ibid.
156. Ibid.
157. Ibid.
158. Ibid.
159. Ibid.
160. Ibid at 7.
161. Ibid.
162. Ibid.
163. Ibid.
164. Ibid.
165. Ibid.
166. Ibid.
167. Ibid.
169. Ibid.
170. Ibid.
171. Ibid.
172. Ibid.
173. Ibid.
174. Ibid.
175. Ibid.
BOOK REVIEW: The Littlest Wetback: From Undocumented Child to United States Federal Judge by Manuel Barbosa (State Street Press, Elgin, IL, 2014)

Reviewed by Susan M. Brazas, Rockford, IL.

The title of this newly-published book may have caught your attention. The author expected that it would. Thus appears, right after the Dedication and Acknowledgement, a section called “About the Title.” The author, Manuel Barbosa, describes his process of seeking out opinions and advice before finally settling on his title to include “the W word.” He explains that in the Spanish language the term is not derogatory, but connotes adventure and determination. However, the term is little-used today, as it still retains the stigma dating to the 1940s and 1950s, when the U.S. Attorney General, under three administrations, named their deportation programs “Operation Wetback.” Still, Barbosa chose to bring the term to the front page—literally—remarking that the meaning in Spanish “is a reality that Spanish speakers are in some form familiar with, and thus view with compassion.”

The book chronicles the life’s journey of the author, beginning in 1947 when his father and sister brought him—then an infant of just two months old—across the Rio Grande River on a makeshift raft. His mother and other family members waited on the shore for the raft to return, as the raft was too small to carry them all on one crossing. Many more adventures, and much hard work, awaited him as his family first made their living in America as farm workers. Barbosa recounts one instance when he was working in the beet fields of Nebraska as a young boy, alongside his parents and sister. The farm owner became angry with the workers, believing that they had intentionally destroyed some of the beet plants while working. Fortunately, the young boy’s English was good enough to explain the misunderstanding, to the satisfaction of the owner. From that moment on, Barbosa was called “el abogado,” “The Lawyer” by his fellow workers. This event, Barbosa says, was the seed in that field of dreams.

Barbosa did study law, and after many years in private practice was named as the first-ever Director of the Illinois Human Rights Commission, serving in that role for 18 years. He was then appointed U.S. District Court Bankruptcy Judge, and presided in Rockford for many years until his recent retirement.

Throughout the book Barbosa makes insightful comments on the political climate in the U.S. and Mexico and the challenge of immigration reform. His book contains vivid accounts of his many adventures, chance encounters, detours, rejections, and successes. He recounts his journey with humor and wonder, in equal measure. The reader is left with the sense that it was Barbosa’s quiet determination that served him so well on this journey. “El abogado” has lived up to his name.

Susan Brazas is a sole practitioner and a general practice attorney licensed in Illinois and Wisconsin, state and federal courts. Her practice includes personal injury, family law, guardianships, probate and wills, school law, election law, DCFS appeals, and general civil litigation. Susan is the author of the state court case digests for the daily “ISBA E-Clips,” and is a member of the International and Immigration Law Section Council and the Illinois Bar Foundation Board of Directors.

SPECIAL NOTE: All proceeds from sales of the book go to the Club Guadalupano Scholarship Fund.
New business opportunities in Cuba

By Cindy G. Buys

On December 17, 2014, President Obama made headlines when he announced that he would begin the process of re-establishing formal diplomatic relations with Cuba after more than 50 years. Acknowledging that decades of U.S. isolation of Cuba has failed to accomplish the goal of a democratic Cuba, the President also announced that he would further loosen restrictions on financial transactions, travel, and trade with Cuba to allow greater engagement between people from the United States and Cuba.

President Obama’s new Cuban policy comes in response to many positive changes in Cuba. Over the last several years, Cuba has adopted a series of market-oriented reforms that have resulted in a significant increase in foreign investment, private real estate transactions, and private ownership and operation of small businesses in Cuba. These reforms and the loosening of the U.S. economic sanctions hold tantalizing promises for U.S. investors and business persons who may want to do business in Cuba now or in the future.

When Raul Castro took office as President of Cuba in 2008, he began a series of economic reforms in an attempt to stimulate the Cuban economy. He started small by allowing consumer sales of home appliances and electronics, including computers and DVD players. Shortly thereafter, the Cuban government began allowing Cuban consumers to purchase or rent cell phones and to buy prepaid mobile phone cards. Today, approximately 2 million out of 11 million Cubans own or rent a cell phone.

In 2010, the Cuban government began greatly expanding the list of small businesses that Cubans could operate privately to include almost 200 different types of businesses. Today, approximately 500,000 Cubans now have a license to operate a small, private business (as compared to 150,000 persons working in the private sector three years ago). When I visited Cuba this past spring, I met with owners of small private businesses ranging from restaurants, to party planning businesses, to cleaning services, to cell phone repair businesses.

In 2011, the Cuban government began allowing Cubans to engage in private transactions to buy and sell cars and houses. These home sales have led to the development of an active private real estate market and informal real estate brokers. The Cuban government is beginning to make small loans to private persons for home repair and for small businesses, using real estate as collateral. As a result of these changes, the average Cuban has more options and more freedom now than in several decades past.

From the perspective of foreign businesspersons, the biggest development in 2014 was Cuba’s adoption of the new Foreign Investment Law No. 118. The new law cuts in half taxes on profits from foreign investment from 30% to 15%. It also creates a tax exemption for new foreign investments for eight years. It allows foreign investors to invest in real estate for the purpose of developing housing and tourism industries. It also creates a timeline for government approvals of foreign investment in an attempt to end long delays that foreign investors had sometimes experienced under the old law. The law guarantees free repatriation of profits after taxes. With the adoption of this new foreign investment law, the Cuban government hopes to attract $2 billion in new investment to spur economic growth to 5-7% from the current 2-3%.

Theoretically, there are three forms a foreign investment may take under the new law: a joint venture, an "international economic association contract," and a "totally foreign capital company." While the law allows for a 100% foreign-owned investment, historically, the Cuban government has required foreign investment projects to be 51% owned by the Cuban government. It is not clear whether this informal requirement will change. Unfortunately, the new law also does not change the rule that requires Cuban employees to be hired and paid through a government agency.

Some remaining challenges for the Cuban government to improve the economic climate include increasing access to the Internet and developing appropriate regulations for private businesses, such as real estate brokerage, accounting, and taxation. Most small business owners in Cuba are paying taxes for the first time this year and many are still figuring out how that system will work. According to Cuban government figures, only about one quarter of the Cuban population has access to the Internet, although access may be greater on the black market. Cuba also is still adjusting to international banking systems and is considering getting rid of its double currency system.

The Illinois General Assembly has responded to these changes and opportunities by creating an Illinois Cuba Working Group (ICWG). Members of that group have engaged in lobbying to improve the business climate between the United States and Cuba and have been working to promote U.S. business opportunities in Cuba. The U.S. embargo against Cuba has long contained exemptions for trade in agricultural products which allowed the United States, and Illinois in particular, to be a major supplier of soy beans to Cuba in the past. Today, Brazil and Argentina are the major suppliers of soy beans to Cuba. The ICWG would like to see Illinois return to that position.

Improving business opportunities for U.S. investors will require further changes to the economic sanctions the United States currently maintains against Cuba. Under U.S. law, Cuba is still officially considered a “State Sponsor of Terrorism,” which results in certain economic and financial sanctions on Cuba. However, President Obama has announced that he will begin the six-month review process to determine whether that designation may be removed for Cuba.

The U.S. economic sanctions on Cuba also currently prohibit persons subject to U.S. jurisdiction from engaging in transactions in which Cuba or a Cuban national has an interest, with certain exceptions for items like informational materials, donated food, and medical supplies. One of those exceptions is for sales of agricultural products to Cuba, however, the financial transactions must be made through third countries and payment must be in cash up front, making such sales cumbersome and expensive. Thus, as a result of the embargo, U.S. persons and businesses are largely prevented from taking part in the reforms happening in Cuba. President Obama’s recent announcement of changes with respect to financial transactions with Cuba is an important step in the right direction. However, President Obama cannot fully
lift the economic sanctions on Cuba alone. Congress has codified the U.S. embargo against Cuba in federal statutes, such as the Cuban Democracy Act of 1992 and the Helms-Burton Act of 1996, which must also be changed if trade and business with Cuba is to be normalized.

Many foreign investors are taking advantage of the friendlier business climate in Cuba. Venezuela is Cuba's largest foreign partner, accounting for almost 40% of all foreign investment in Cuba. Investors from China, Canada, Spain, and Brazil are also among the top five foreign investors. For example, Brazil has been the largest investor in the development of the $900 million Mariel Special Development Zone and Port 30 miles west of Havana. The Port is designed to accommodate bigger, deeper-draft vessels that will begin passing through the expanded Panama Canal in 2015. If the United States Congress does not follow President Obama's lead and act quickly to ease economic restrictions on Cuba, U.S. businesses and investors will be left far behind.

Cindy G. Buys, Professor of Law and Director of International Law Programs at Southern Illinois University School of Law. Professor Buys is a member of the International and Immigration Law Section Council and the Women and the Law Committee of the ISBA. She has been to Cuba three times in the past eight years with her most recent trip occurring in March 2014.

7. International Trade Law, at art. 36. There are special exceptions that apply to investments in natural resources.
8. Foreign Investment Law No. 118, at art. 17.
9. Id. at art. 22.
10. Id. at art. 9.
12. Id. at art. 13.
14. The White House Press release states that “Cuba has an internet penetration about 5%—one of the lowest rates in the world.” See Press Release, note 1, supra.
17. See id.

Legal system of the Republic of Finland

By Henri Spehar

Republic of Finland is a member state of the European Union. All of the EU law is binding in Finland. The following presentation focuses on the older layers of the legal system, that pre-date the EU.

The legal system of the Republic of Finland is part of the Scandinavian sub-group of Neo-Roman (Continental European) law. The system can be described as un-codified statutory law system. Main difference to Central European law is the absence of current code. The most recent comprehensive Code in Finland is from 1734.

The historical background to this is, that the Scandinavians did not follow codification trend of post 1848 (post-feudal) Central Europe. Most, if not all Central European Countries adopted a comprehensive civil code between 1900 and 1929. The model for the Codes adopted in this time period is the German Civil law code (Bürgerliches Gesetzbuch). Comprehensive codes, such as the Bürgerliches Gesetzbuch, have a general part and specific part(s). General part defines Concepts and Categories. General part is thus a codification of Jurisprudence. Specific part(s) use concepts and categories as defined in general part.

Finnish law does not have statutory general part of the code. The Law Book (Lakikirja) has individual laws (statutes) that define words as defined in that statute. There is no Code. The Law Book is just an editorial compilation of statutes, arranged by subject matter as determined by the Editors of the Law Book.

In other words, Central European system attempts to codify both law and jurisprudence. Scandinavian system has written un-codified law, but un-codified Jurisprudence.

Current legal work between Finland and the US

I see two entirely distinct levels of private law work. One is corporate practice, dominated by big law firms and accounting firms. This is centered in New York. A sub-group of corporate practice is law firms serving high tech firms on West Coast.

Another level is individual retirees (snowbirds) from Finland spending winter months in Florida. This group is mostly in Palm Beach County, Florida.

Henri Spehar is a private practice attorney in Boca Raton, Florida. He has Masters Degree in Jurisprudence (OKT) from Helsinki University, and a J.D. from Georgia State University. His current practice is focused on facilitating private transactions between Finland and the US. henri@speharlaw.com Tel. (561) 800-4012.
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### February

**Tuesday, 2/3/15** - **Teleseminar**—Estate Planning for Digital Assets. Presented by the ISBA. 12-1.

**Tuesday, 2/3/15** - **Webinar**—Introduction to Legal Research on Fastcase. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 11-12.

**Thursday, 2/5/15** - **Chicago, ISBA Regional Office (DNP)**—Lawyer to Lawyer Mentoring Orientation. 12-2 lunch included.

**Thursday, 2/5/15** - **Live Webcast (DNP)**—Lawyer to Lawyer Mentoring Orientation.

**Wednesday, 2/4/15** - **Teleseminar**—Buying and Selling Partnership/LLC Interests—Economic, Management & Tax Issues. Presented by the ISBA. 12-1.

**Friday, 2/13/15** - **Chicago, ISBA Regional Office**—Management Agreements in Real Estate. Presented by the ISBA. 12-1.

**Friday, 2/13/15** - **Chicago, ISBA Regional Office**—FOIA and OMA Update. Presented by the ISBA Education Law Section. 9-noon.

**Monday, 2/16/15** - **Chicago, ISBA Chicago Regional Office**—Advanced Workers’ Compensation. Presented by the ISBA Workers’ Compensation Section. 9:00am-4:00pm.

**Monday, 2/16/15** - **Fairview Heights, Four Points Sheraton**—Advanced Tips for Enhanced Legal Research on Fastcase. Presented by the ISBA. 8:30-4:30.

**Tuesday, 2/17/15** - **Teleseminar**—Drafting C and S Corp Stockholder Agreements, Part 1. Presented by the ISBA. 12-1.

**Wednesday, 2/18/15** - **Chicago, ISBA Regional Office**—Drafting C and S Corp Stockholder Agreements, Part 1. Presented by the ISBA. 12-1.


**Thursday, 2/19/15** - **Chicago, ISBA Regional Office**—Interpreters: Improving Language Access in Illinois Courts. Presented by the ISBA International & Immigration Law Section; co-sponsored by the ISBA Civil Practice and Procedure Section and the ISBA Bench and Bar Section. 12-2.

**Thursday, 2/19/15** - **Teleseminar**—Drafting Independent Contractor Agreements. Presented by the ISBA. 12-1.


### March

**Monday, 3/2-Friday, 3/6/15** - **Chicago, ISBA Regional Office**—40 Hour Mediation/Arbitration Training. Master Series Presented by the Illinois State Bar Association. 8:30-5:45 daily.

**Tuesday, 3/3/15** - **Webinar**—Introduction to Legal Research on Fastcase. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 3-4.


**Tuesday, 3/10/15** - **Webinar**—Fastcase Boolean (Keyword) Search for Lawyers. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 3-4.
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