THE GLOBAL GAVEL™

The Informative E-Newsletter for the International Practice Section of the Washington State Bar Association
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In this issue:

Final Thoughts from the Outgoing Editor-in-Chief and Section Chair

~ Jacqueline F. Pruner, Chair 2009-2010 ~

As our summer has arrived — almost, at least — I am please to present my final edition of *The Global Gavel* as its editor-in-chief and outgoing International Practice Section Chair for 2009-2010. This latest (belated) Winter 2009-2010 & Spring 2010 issue of *The Global Gavel* (available on our blog — or "blawg" — at www.globalgavelnews.org).

As one who has been involved in the International Practice Section since my time as a law student at the University of Washington School of Law, I have come to realize that there are many reasons to be proud of our International Practice Section.

Not only is it one of the most active of all of the WSBA sections, but arguably one of the most active bar sections in the nation.

We offer CLEs which take place on a monthly basis — this past year, we held a total of 10 CLEs and offered a total of 13.5 CLE credits — with one a unique CLE never

before attempted by WSBA: our "International Express" Cross-Border Train CLE which took attendees from Seattle, WA, to Vancouver, BC! A big thank you to Executive Committee (EC) member Charles Rendina, Boughton Law in Vancouver, and all of our instructional and informative CLE speakers this year.

In addition to our vibrant CLE program, we offer our two keystone annual events: our 6th Annual Law Students Reception, which took place this past November, and our Annual Foreign Lawyers Reception, which took place this past February. Thanks goes out to Executive Committee members Randy Aliment and Anamaria Turlea for their coordination on the Law Students Reception; to Shahzad Qadri, Max Yoshimura, and Gilberto Alonso Gomez Arce for their coordination and planning of the Foreign Lawyers Reception; and to our sponsor, Williams Kastner, for hosting these events.

In addition to all of our usual deliverables, I am pleased to announce two more successes this year: 1) membership that is now 250 members and growing and 2) a revitalization of our *Doing Business in Washington* publication, with our 5th edition coming soon in electronic form. Governor Chris Gregoire plans to take this valuable resource with her and distribute it to business industry professionals throughout Asia this fall. Thanks to Krista Wittman for her diligent work on our membership and Randy Aliment for his leadership in driving the *Doing Business in Washington* revitalization project.

Although impressive, these successes could not be possible without the dedication, hard work, and perseverance of our fabulous EC. As a result, I wish to thank each of them individually:

Glen Yaguchi, Chair-Elect, 2009-2010
Krista Wittman, Treasurer
Gilberto Alonso Gomez Arce, Secretary
Anamaria Turlea (EC Position #1)
Max Yoshimura (EC Position #2)
Randy Aliment (EC Position #3)
Charles F. Rendina (EC Position #4)
Alvaro Alvarez (EC Position #5)
Shahzad Qamer Qadri, CLE Coordinator (EC Position #6)
Bernel Goldberg, *Ex-Officio*

Finally, I also wish to thank Brandon Chan, this year's Student Liaison Correspondent/ Coordinator and recipient of our Huneke Award, as well as all of those attorneys and legal staff who have helped make this section and its events run so smoothly and with such panache.

I will end with a thank you to Thomson Reuters, Williams Kastner, and Tsongas Litigation Consulting for their sponsorship of our section this year and a challenge to the 2010-2011 Executive Committee of the International Practice Section: that it meets *and* exceeds our successes thus far.

I invite each and every one of you to join us in what promises to be an exciting endeavor this upcoming year!

Sincerely,

Jacqueline F. Pruner
Editor-in-Chief and Chair
International Practice Section
2009-2010

A Brief Note on International Law for General Aviation Pilots[1]

~ David F. Shayne ~

Few economic activities entail so many different aspects of international law as does aviation. Numerous treaties and multilateral and bilateral agreements exist, touching on most aspects of aviation-related commercial enterprises. But not all aircraft operations are commercial in nature, far from it: According to AOPA (Aircraft Owners and Pilots Association), more total hours are flown in aircraft for personal, non-aviation business reasons (commonly referred to as "general aviation" or GA) than in aircraft flown by scheduled airlines.[2] While

[1] David Shayne wishes to thank his colleague, Scott Morris who provided assistance in preparation of this note.

[2] See the AOPA website, specifically http://www.aopa.org/whatsnew/stats/activity.html.

managers of aviation companies are presumably well aware of the impact international agreements and legal requirements have upon their operations, I suspect that many GA pilots do not give much thought to the necessity of familiarizing themselves of the various situations pilots may find themselves in that implicate international law.

In this note I intend to briefly address the Convention on International Aviation (ICA) (commonly called the "Chicago Convention") and Federal Aviation Administration (FAA) rules as they apply to common GA operations involving international operations as well as some references to resources for pertinent information.

ICA

The ICA was first negotiated and codified in Chicago during World War II and is only one of numerous international agreements pertaining to aviation. Shortly after the war, the administrating body, known today as the "International Civil Aviation Organization" (ICAO), became part of the UN. ICAO's mission is to create international standards for aviation safety and to facilitate international aviation. To that end, ICAO has enacted 18 governing documents it calls "Annexes" that create standards for its members. The Annexes cover a range of topics that cover most of the issues that a national regulatory body (such as the FAA) would be likely to address, including licensing, registration of aircraft, airworthiness, and safe operations. One hundred ninety nations are signatories (or parties) to ICAO. The national governments are responsible for enacting laws and promulgating rules that govern the issues, but do have obligations as treaty members when doing so. This, of course, includes the United States.[3] For the most part, the ICA has little direct impact on GA pilots, even if engaged in international transit. There are instances when it does, however, one of which will be discussed below. But, generally, many of the rules and procedures with which a pilot must become familiar in order to travel internationally have their origins in the ICA.

The Federal Aviation Administration

The FAA promulgates rules governing every aspect of aviation operations. Its ability to enforce its rules extend to U.S.-registered aircraft and U.S.-licensed personnel (holders of FAA-issued "Airman Certificates") even when operations occur outside the territorial boundaries of the United States, under certain circumstances.[4] When U.S.-licensed pilots operate aircraft over international waters, they may be held liable for safety-related violations in accordance with standards that are set forth in Annex 2 of the ICA.[5] For example, if a pilot flew his aircraft out past the 12-mile territorial limit of the Washington coast and nearly caused a mid-air collision with another aircraft, the FAA could suspend or revoke his certificate pursuant to the authority provided by the 14 CFR 91.703, but only to the extent that rule incorporates by reference rules contained in the ICA Annex 2—in this case, Section 3.2.2.1. (failing to yield right of way), Section 3.2.1 (flying too close to another aircraft), and Section 3.1.1 (recklessness).

Conversely, the FAA may exercise authority over pilots and aircraft licensed in other countries when they are operating within United States territory. For example, validly licensed Canadian pilots may fly aircraft over U.S. territory and may land and take off from U.S. airports, but only if they first obtain a "special purpose authorization"[6] which, in turn, can be obtained only because Canada is also an ICAO member. Any Canadian pilot who ignores this requirement is subject to all of the penalties that pertain to anyone who operates an aircraft in the U.S. without a valid U.S. certificate (and which can include criminal punishment) even though the pilot does not reside in the U.S.

International Transit

[3] See *British Caledonia Airways v. FAA et al,* 665 F.2d 1153, 214 U.S.App.D.C. 335 (1981).

[4] *See FAA v. Landy*, 705 F.2d 624 (2nd. Cir 1983).

[5] See 14 CFR 91.703.

[6] See 14 CFR 91.75 and 91.77, addressing requirements for issuance of special authorizations for private and commercial pilots.

Many nations have bilateral agreements to facilitate cross-border travel. There are numerous resources on the Internet that can provide practical information to any GA pilot who wishes to fly to another country bordering or in close proximity to the United States. The FAA website includes an "International Flight Information Manual," and the ATO (Air Traffic Organization) has a separate section on international travel, including links to the ICAO site. AOPA has a "Guide to Cross Border Operations," but it is available only to AOPA members. Transport Canada, the Canadian counterpart to the FAA, has a section on its website entitled "Flying to Canada," with practical information for U.S. pilots wishing to take up the offer. Likewise, the U.S. "CBP" (Customs-Border Patrol) in the Homeland Security Department website has a section entitled "private flyers" with information for pilots entering the United States.

David F. Shayne is licensed in Washington, and currently practices law as a general attorney in the Federal Aviation Administration (FAA) at the Northwest Mountain Regional Counsel's Office, located in Renton, Washington. Mr. Shayne has a background in aviation law, administrative law, and criminal law. This article is his own personal analysis and does not necessarily reflect the views of the Northwest Mountain Regional Counsel's Office, the FAA, or the United States.

Justice and Human Dignity Under the Law of Afghanistan: An Imperative in the Ongoing War and a New Perspective on Shari'a

~ Brandon Chan ~

[The following is the first installment of a three-part series of *The Global Gavel*]

Disclaimer: This article describes inconsistencies between the principles of conservative Shari'a law and modern liberalism. It is not intended as a critique of the religion of Islam.

Introduction

The Afghan Constitution shows signs that Afghan law may be torn between its commitment to the principles of modern liberalism and traditional interpretations of *Shari'a* law. The reality on the ground in Afghanistan indicates that many vulnerable Afghans do not enjoy justice or dignity under Afghan law, and that the Afghan courts may be more inclined to a conservative view of *Shari'a* law after all. In this article, I argue that it is a moral and political imperative for the Coalition in Afghanistan to assist the Afghan government in developing and implementing a progressive version of modern Islamic law. To this end, I will set forth sources of inspiration that the Afghan judiciary can draw upon.

I. The Afghan Constitution

The Constitution of the Islamic Republic of Afghanistan, which came into effect in 2004, is unique among constitutions adopted by Islamic countries in that it expressly sets forth the duty of the Afghan state to protect civil liberties and human rights. Under Article 7, Afghanistan is obligated to abide by the Universal Declaration of Human Rights and any treaty or convention it has ratified, which includes the International Covenant on Civil and Political Rights that Afghanistan acceded to without reservation.[7] Article 22 prohibits any kind of discrimination and privilege among the citizens of Afghanistan and provides that all, regardless of gender, have equal rights and duties before the law.[8] In fact, the language of Article 60 indicates that both men and women are eligible to run for President of Afghanistan.[9] Although Article 2 states that Islam is the religion of Afghanistan, it declares that the adherents of other religions are free to exercise their faith and perform their religious rites within limits of the law.[10]

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[7] Afg. Const. art. 7 (2004).
[8] *Id.* at art. 22.
[9] *See Id.* at art. 60.
[10] *Id.* at art. 2.

Furthermore, as a sign of the drafter's intent to respect the rights of the minority *Shi'a* Muslims, Article 131 allows the application of *Shi'a* law in cases dealing with the personal matters of *Shi'a* followers.[11] Article 29 explicitly bans the use of torture and any punishment "contrary to human dignity,"[12] and Article 58 establishes an Independent Human Rights Commission to convey to the "authorities" complaints filed by citizens of human rights violations.[13] All of these provisions indicate the Afghan government's desire to establish a more progressive Islamic society that is free from the repression and extremism practiced under the Taliban.

II. Contradictions between traditional interpretations of Shari'a law and principles of modern liberalism

However, Article 3 of the Afghan Constitution states that "no law can be contrary to the beliefs and provisions of the sacred religion of Islam."[14] Although the term "beliefs and provisions … of Islam" is broad and vague, one can probably assume that they encompass the *Shari'a*, which comprises the *Quran* and the *Sunna*, and the *fiqh,* which, in the case of Afghanistan, would primarily be derived from *Hanafi* jurisprudence due to its acceptance among Sunni Muslims in the country. As argued by Professor Abdullah Ahmed An-Na'im, *Shari'a* law, as it is traditionally interpreted by Islamic scholars, propagates principles that conflict with those of modern constitutionalism and international standards for human rights.[15]

First, conservative *Shari'a* law relegates women to a position of inferiority as compared to men. Islamic jurists have based the principle of *qawama* — the guardianship and superior status of men over women — on verse 4:34 of chapter 4 of the *Quran*.[16] This principle, in turn, became the authority for a variety of other laws that are repressive to women, including the disqualification of Muslim women from public office requiring them to have authority over Muslim men;[17] restrictions on the mobility or dress of Muslim women;[18] the application of stricter requirements for divorce on Muslim women;[19] and the right of Muslim husbands to "lightly beat" their wives.[20]

Second, conservative *Shari'a* law traditionally deems non-Muslims, or *dhimmis*, to have inferior rights as compared to Muslims. For example, under the *Shari'a* law of evidence, the testimony of a *dhimmi* is considered inferior to that of a Muslim man,[21] and under *Shari'a* family law, a Muslim man is allowed to marry a non-Muslim woman, but a non-Muslim man is not allowed to marry a Muslim woman.[22] Finally, both the *Shari'a* and *fiqh* give tacit approval to the institution of slavery in that they provide rules governing the conditions under which prisoners of war may be enslaved, the treatment of slaves and circumstances under which slaves may be emancipated.[23]

Conservative *Shari'a* law may also be in direct conflict with the guarantee of religious freedom provided by the Afghan Constitution in that it traditionally prescribes the death penalty for the crime of apostasy. In 2006, this conflict moved beyond the realm of the abstract when Abdul Rahman, an Afghan citizen, was arrested and threatened with the death penalty for converting to Christianity. Although Rahman was eventually released on procedural grounds and given asylum by the Italian government, the troubling implication of his case lingers.

On the one hand, the Afghan Constitution, on its face, does not obligate the state to seek the death penalty for apostates. Specifically, paragraph 2 of Article 130 provides that the Afghan courts are to apply *Hanafi* jurisprudence only where there are no

[11] *Id.* at art. 131.
[12] *Id.* at art. 29.
[13] *Id.* at art. 58.
[14] *Id.* at art. 3.
[15] *See* Abdullahi Ahmed An-Na'im, *Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law*, 99, 179 (Syracuse University Press 1996).
[16] *Id.* at 54–55.
[17] *Id.* at 55.
[18] See *Id.* at 87, nt. 61.
[19] *Id.* at 90.
[20] *Id.*
[21] *Id.*
[22] *Id.* at 91.
[23] *Id.* at 173.

provisions under the Constitution or other laws regarding the ruling of a pending case.[24] For a criminal case, the term "other laws" in the provision would normally be considered statutory law, and neither the Constitution nor statutory law prescribes death as punishment for apostasy.[25] On the other hand, the courts could just as easily interpret Article 3 of the Constitution as a provision that requires them to apply *Shari'a* law or *fiqh* before considering other constitutional provisions or statutory law. Such an interpretation would certainly have spelled doom for Abdul Rahman and other Afghan apostates like him. According to *Hanafi* jurisprudence, the prescribed sanction for the apostasy of a Muslim-born adult of sound mind is death.[26]

Brandon Chan is a recent graduate of the Seattle University School of Law in the areas of international and criminal law. He is the outgoing student liaison correspondent of the WSBA International Practice Section. He served in the United States Navy between 1998 and 2002.

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eDiscovery (Disclosure) in International Arbitration: Common Law vs. Civil Law Perspectives, Part IV of IV

~ Peter R. Day ~

[The following is the final installment of a four-part series of *The Global Gavel*.]

In the fall of 2008, in preparation for the International Bar Association annual meeting in Buenos Aires, the chair of the IBA Rules of Evidence Subcommittee sent an e-mail soliciting members to complete a survey on the existing IBA Rules on the Taking of Evidence in International Commercial Arbitration (the "IBA Rules"). He also invited recipients to attend a forum on the rules at the Buenos Aires meeting and asked for comments.

What followed was an interesting exchange of at least 89 e-mails on the subject, focusing primarily on what we Americans call e-discovery (or as one UK barrister referred to it, the "D-word"), its role, if any, in international arbitration, whether the IBA rules needed amendment in view of e-discovery, and the continuing debate between the civil law and common law communities on production of evidence.

The following presents excerpts of some of those e-mails, edited to a greater or lesser degree, which I believe provide a very good summary of many of the current issues surrounding discovery (a word best avoided beyond our shores) in the context of international arbitration.

With permission, I have included the names of the authors of the major contributions, all of whom are highly experienced and well known in the field, and given the city for those from whose e-mails I have included shorter comments.

To my knowledge, no revisions to the IBA rules have yet been publicized, but as mentioned below, both the Chartered Institute of Arbitrators in London ("CIArb") and the international branch of the American Arbitration Association, the ICDR, have published guidelines for "e-disclosure" in international arbitration.

Dear Michael

Thank you for a strong word in time. It is just another example for the ongoing "Americanization" of the legal world which is even stronger in the field of commercial and banking law. For those who are interested I refer to two Articles on that issue I published in the 90-ies which can be found on my homepage (shown below, Publications n° 11 and 14).

[Bern, Switzerland]

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[24] Afg. Const. art. 130, para. 2.

[25] *See* Mandana Knust Rassekh Afshar, *The Case of an Afghan Apostate – The Right to a Fair Trial Between Islamic Law and Human Rights in the Afghan Constitution*, 10 Max Plank Y.B. U.N. L. 599 (2006), *available at* http://www.mpil.de/shared/data/pdf/pdfmpunyb/13_knust.pdf.

[26] *Id.* at 598.

Dear all,
The vivid discussion shows that there is a growing concern that e-discovery, an instrument that can create a digital war of attrition, drives a lot of people out of the US litigation system who ought to be there and has a likelihood of being disproportional to the case now makes it way into international arbitration. The deluge of electronic information that overwhelms the American civil justice should remain an American problem.

In Germany, a civil law country with an inquisitorial legal tradition, it seems to be common understanding also in the arbitration community that the threats from e-discovery American style need to be minimized.

In a conference early this year hosted by the Hamburg Arbitration Circle, the American Chamber of Commerce in Germany and the Hamburg Chamber of Commerce and Industry dealing with e-discovery in arbitration the audience was more or less shocked about the amount of relevant - and in particular irrelevant - information that uncontrolled e-discovery American style can produce if introduced in arbitration procedures without strict limitations. For those of you who can read German I enclose an article on e-discovery in arbitration procedures which is based on that conference.

Dr. Mark C. Hilgard
Mayer Brown
Frankfurt

Dear Michael

I read your thoughtful email on the subject of E Discovery, and I believe we both attended the same Juris seminar held in New York in January 2008 to explore some of the issues raised by e-discovery in international arbitration.

Whilst I share many of the misgivings that you have been raised by yourself and others I believe that there are dangers in use of eye catching titles suggesting that we can or should “Forget E-Discovery.”

As we all appreciate the IBA Rules have increasing application in international arbitration. Under the IBA Rules “Document” has been defined as “a writing of any kind, whether recorded on paper, electronic means, … or electronic means of storing or recording information.”

Therefore in arbitration which is either governed by or which has reference to the IBA Rules, Requests to Produce can and frequently do make reference to categories of document embracing (i) categories of documents recorded by electronic means and (ii) electronic means storing or recording information.

These are legitimate categories of request under Article 3 of the IBA Rules. The real question I believe is for counsel in international arbitration to rise to the challenge in framing requests for “E discovery” in a sufficiently targeted and defined fashion so as to comply with both the letter and spirit of the IBA Rules rather than attempt to shut out or side line these sorts of requests as legitimate categories of documents.

David Joseph QC
London

Dear all:

I have been following the emails concerning Rob's and my article with great interest. I do think [Montreal attorney’s] email below is in keeping with what we had in mind. I recall in the article our comparing the process of US discovery to a game of Marco Polo played in the pool (absent, of course, the fun) -- blind, belabored, inefficient lunging about; an analogy that was not intended to be an endorsement.

If you accept the proposition that flexibility/adaptability is important to consumers of private dispute resolution services, and further accept the proposition that "document production" is a valid tool for delivering "fair and just" outcomes to those consumers -- as the existing IBA Rules on taking evidence already do -- then it seems to me there ought to be flexible

protocols available in international arbitration to enable parties and arbitrators to address electronic "document production", including at one end of the available spectrum the option (as our article expressly observes) of not having any electronic document production at all -- if that is what informed deliberation on the circumstances of a particular case suggest.

If I can offer a simplified analogy to punctuate my point (and elicit at least a smile, if not convince you), it's a bit like offering roadside tire repair services with hammer and chisel. People don't drive around on wheels made of stone anymore. They drive around in cars run by computers on wheels made of alloy, titanium, rubber etc. The evidence that is "relevant and material" to resolve today's business disputes, especially big complex ones, largely doesn't come from paper document files. The evidence consists of electronically stored information because business is conducted electronically. To acknowledge and offer document production as something parties to international arbitration often want and should be able to have, but without the ability to intelligently address electronic documents, is to offer a service not optimally-suited to its market. At the same time, to adopt "discovery" of electronic documents in international arbitration of the kind found in US courts is to offer the market a service that consumers can already find elsewhere if they want. That would fail to differentiate what private international arbitration has to offer business leaders who have business disputes to resolve to keep their businesses "on the road", and want alternatives to choose from.

Tyler Robinson
Simpson Thacher & Bartlett LLP
London

Peter R. Day is the principal of the Mercer Island Arbitration Chambers International, LLC and a member of the Executive Committee of the WSBA International Practice Section.

Upcoming Events:

To post an upcoming event with the *Gavel*, please contact the editor-in-chief at: eic@globalgavelnews.org.

SEPTEMBER

4th Biennial IBA Conference on Construction Projects from Conception to Completion
Brussels, Belgium
September 17-18, 2010
For more information, go to:
http://www.ibanet.org/Conferences/conferences_home.aspx.

14th Annual Competition Conference
Florence, Italy
September 17-18, 2010
For more information, go to:
http://www.ibanet.org/Conferences/conferences_home.aspx.

8th Annual Anti-Corruption Conference
Prague, Czech Republic
September 20-22, 2010
For more information, go to:
http://www.ibanet.org/Conferences/conferences_home.aspx.

OCTOBER

IBA Annual Conference 2010
Vancouver, Canada
October 3-8, 2010
For more information, go to:
http://www.ibanet.org/Conferences/conferences_home.aspx.

2nd Russia & CIS 'M&A' Conference
Brussels, Belgium
October 28-29, 2010
For more information, go to:
http://www.ibanet.org/Conferences/conferences_home.aspx.

***GLOBAL GAVEL* CONTACTS:**

Editor-in-Chief
Jacqueline F. Pruner
eic@globalgavelnews.org

Student Liaison Correspondent
Brandon Chan
slc@globalgavelnews.org

Notices and Employment Opportunities:

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Student Liaison Correspondent/Coordinator

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UW LawConnect

The Center for Career Planning and Public Service at UW School of Law seeks to connect law students interested in associate positions and contract law work with firms that may have openings. If you or someone you know would like to interview UW law students for open positions, please contact Naomi Sanchez, assistant dean, at 206-616-1366 or naomiks@u.washington.edu.

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