COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO. 035748-09**
Cynthia L. Merlini	Employee
Consulate General of Canada	Employer
Workers' Compensation Trust Fund	Insurer

REVIEWING BOARD DECISION
(Judges Levine, Fabricant and Koziol)

The case was heard by Administrative Judge Preston.

APPEARANCES
Alan S. Pierce, Esq., for the employee
Pedro Benitez-Perales, Esq., for the Workers' Compensation Trust Fund

LEVINE, J. The Workers' Compensation Trust Fund (Trust Fund) appeals from a decision awarding § 34 total incapacity benefits to the employee, a United States citizen and Massachusetts resident employed by the Canadian Consulate in Boston. The Trust Fund argues that the judge's decision is contrary to G. L. c. 152, § 65.[1] Because the judge 1) failed to adequately address the requirements of this statute; 2) erred by denying the Trust Fund the opportunity to present rebuttal testimony regarding the employee's rights under Canadian law; and 3) failed to take judicial notice of such law, the record below was not sufficiently developed for appellate review. See Praetz v. Factory Mut'l Eng'g & Research, 7 Mass. Workers'

[1] General Laws c. 152, § 65, provides, in relevant part:

> (2) There is hereby established a trust fund in the state treasury, known as the Workers' Compensation Trust Fund, the proceeds of which shall be used to pay or reimburse the following compensation: . . . (e) payment of benefits resulting from approved claims against employers subject to the personal jurisdiction of the commonwealth who are uninsured in violation of this chapter; provided, however, that (i) the claimant is not entitled to workers' compensation benefits in any other jurisdiction . . . .

Comp. Rep. 45, 46-47 (1993); Richardson v. Chapin Center Genesis Health, 23 Mass. Workers' Comp. Rep. 233, 235-236 (2009). In addition, the judge erred in not joining the Canadian Consulate as a party. We vacate the decision and recommit the case to the administrative judge for further proceedings and findings consistent with this decision. [2]

This is a case of first impression involving the interplay between Massachusetts and Canadian workers' compensation laws, specifically as they apply to American citizens hired by the Canadian government to work in the United States, so called "locally engaged employees outside Canada."

The employee worked as an administrative assistant for the Consulate General of Canada in Boston. (Dec. 5.) She was considered a "locally engaged employee" or "locally engaged staff," which meant she was a United States citizen, hired in the United States by the federal government of Canada "to provide support services in Canadian offices overseas, such as embassies and consulates." (Ex. 4, "Locally Engaged Employees Outside Canada"; see also Tr. I, 15.[3]) On January 22, 2009, the employee fell at work, injuring her neck and back. She received some workers' compensation benefits from the Federal Workers' Compensation Service

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[2] The parties have not raised, and the judge did not address, the issue of whether the board has subject matter jurisdiction over the employee's claim. The judge did state he found no merit in the Trust Fund's "defense that the Employee claim has no standing." (Dec. 6.) While standing is an element of subject matter jurisdiction, DaSilva v. Palladino Landscaping, 24 Mass. Workers' Comp. Rep. 211, 214 (2010), rev'd on other grounds, 10-P-1842 (June 20, 2011)(memorandum and order pursuant to Rule 1:28). We do not understand the Trust Fund to have argued that the board has no subject matter jurisdiction to hear the employee's claim. Of course, the question of subject matter jurisdiction cannot be waived by the parties and may be considered sua sponte, even after adjudication and on appeal. Id. We have not found any law or treaty between the United States and Canada indicating this board would not have subject matter jurisdiction over the employee's claim. However, the proceedings upon recommittal may shed light on this dispositive issue.

[3] The April 15, 2011 transcript of the hearing will be referred to as "Tr. I." The June 9, 2011 transcript of the status conference will be referred to as "Tr. II." On April 3, 2012, there was oral argument before this panel. The transcript of that proceeding is also referred to in this decision.

(FWCS) in Canada. (Dec. 5; Tr. I, 17, 21.) On October 29, 2009, the FWCS closed her workers' compensation case and ordered her back to work. She worked only until November 12, 2009. (Tr. I, 23-24.) After her Canadian benefits were terminated, the employee filed a claim against the Trust Fund, alleging that the Consulate was an uninsured employer under Massachusetts law. Following a § 10A conference, an administrative judge ordered the Trust Fund to pay the employee § 34 benefits from January 23, 2009 forward.[4] The Trust Fund appealed to a hearing. (Dec. 3.)

Because the procedural history is relevant to our disposition of this case, we describe it in detail. Prior to the hearing, the Trust Fund filed a motion to join the employer. On March 21, 2011, the administrative judge heard the motion, at which the Trust Fund argued that joinder was important to assist the parties and the administrative judge in understanding the Canadian laws and procedures relevant to the employee's claim. Counsel for the Canadian Consulate was present and assented to joinder on the record, as did employee's counsel. (March 21, 2011 Tr., Motion to Join, 6-7.) Three weeks later, at the start of the hearing on April 15, 2011, the judge, without explanation, denied the motion. (Dec. 5; Tr. I, 7-10.)[5]

At hearing, the parties stipulated that the employer did not carry workers' compensation insurance in Massachusetts,[6] and that the employee was paid workers' compensation benefits "in Canada." (Dec. 4; Tr. 5-6.) In addition to contesting liability, disability, and causal relationship, the Trust Fund raised as issues and/or

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[4] We take judicial notice of documents in the board file. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161, n. 3 (2002).

[5] At oral argument before the reviewing board, counsel for the Trust Fund stated he thought he eventually withdrew his motion to join because the judge offered Canadian counsel standing to participate in the hearing, but not as a party, and he did not want any testimony presented through Canadian counsel deemed inadmissible for that reason. (April 3, 2012 Tr. 4.) However, the record contains no indication the motion was withdrawn, but rather shows it was denied. (Dec. 5; Tr. I, 7-10.)

[6] The Trust Fund maintained, however, that the Consulate was not required to carry such insurance under G.L. c. 152. (Tr. I, 5.)

defenses § 65(2)(e) and 452 Code Mass. Regs. § 3.04(8).[7] (Dec. 3.) The employee was the only witness. She submitted into evidence selected pages from the Canadian website on workers' compensation to which she had been referred by the FWCS, (Ex. 4), and testified regarding her understanding of her rights under Canadian law. She stated several times she had no right to appeal the closing of her Canadian compensation case.[8] (See Dec. 5.)

When the employee's testimony concluded on April 15, 2011, the judge closed the hearing, (Tr. I, 57), but left the record open until May 15, 2011, for additional medical evidence and closing arguments. (Dec. 6.) On May 11, 2011, prior to the closing of the record, the Trust Fund submitted a "Motion to Reopen Hearing for Rebuttal Evidence with Offer of Proof."[9] (Ex. C, for identification.) The employee submitted her written opposition to the motion on May 12, 2011. (Ex. D, for identification.) At a June 9, 2011 status conference on the motion, the Trust Fund

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[7] 452 Code Mass. Regs. § 3.04(8), states: "For the purposes of M.G.L. c. 152, § 65(2)(e), no public employer shall be considered to be uninsured."

[8] The employee testified she was referred to the FWCS website, which contained information on how "federal government employees" could appeal a denial of their claims, but contained no information on how "locally engaged staff" could appeal. (Tr.I, 26-31, 46.) Nonetheless, after being informed her case was closed, she submitted additional medical information for evaluation, (Tr. I, 24-25), and seventeen weeks later received a formal denial. (Tr. I, 33, 46.) On cross-examination, she testified that she had never pursued an appeal because "when that decision not to reopen my case about 17 weeks later there really was no appeal process available to me." (Tr. I, 45-46.) She never contacted anyone in Boston regarding whether she had a right to appeal because "this was a matter that was handled by Ottawa." (Tr. I, 46.)

[9] The Trust Fund's offer of proof stated that Kathleen McGrath, of Justice Legal Services Division, Department of Foreign Affairs and International Trade, Ontario Canada, would testify regarding the amount of the payments the employee had received in accordance with the Government Employees Compensation Act (GECA) and for what period; that the FWCS had determined she was fit to return to work on October 28, 2009, and had closed her case; and that the employee was informed at that time she had a right to appeal the FWCS decision through the Federal Court of Canada under the Federal Courts Act (R.S., 1985, c.F-7, § 1; 2002, c.8, § 14). Attached to the motion were e-mails advising her of this right of appeal and how to access the website of the Federal Court; pointing out the timeframe for appeal; and advising her she might wish to seek legal counsel. (Ex. C, for identification.)

argued that rebuttal testimony was appropriate to refute the employee's unexpected testimony that she had no appeal rights under Canadian law. (Tr. II, 17-19.) The judge denied the motion, over the Trust Fund's objection. (Tr. II, 20.) In his decision, the judge found that "[n]othing prevented the [Trust Fund] from presenting evidence on April 15, 2011. . . ." (Dec. 5.) However, the judge extended the date for closing the record until June 16, 2011, to allow the Trust Fund to submit additional medical evidence and its closing argument. (Dec. 6.)

In his decision, the judge found the employer "did not have the requisite workers' compensation insurance policy pursuant to M.G.L. chapter 152," and was "an uninsured employer within . . . Massachusetts." (Dec. 5.) Relying on the "credible testimony of the Employee and documentary evidence," (Dec. 8), the judge further found that, "[i]n the event it is deemed material . . . when the Employer declined her claim, she had *no right of appeal* to address the denial because she was a 'locally engaged employee' "; she was "not a federal employee of the Canadian government." (Dec. 5; emphasis added.) He concluded the Trust Fund was liable to pay workers' compensation benefits "because the Employer did not have the required insurance for this 'locally engaged employee.' " (Dec. 8.) Finding the employee temporarily totally disabled, the judge ordered the Trust Fund to pay § 34 benefits from January 22, 2009, forward, except for the two weeks she returned to work in October and November 2009. (Dec. 8, 9.)

On appeal, the Trust Fund argues that the judge's decision is contrary to § 65(2)(e), which sets out three criteria, all of which must be satisfied before the Trust Fund can be held liable: 1) the employer must be "uninsured in violation of" chapter 152; 2) the employer must be subject to the personal jurisdiction of the Commonwealth; and 3) the employee must not be entitled to benefits in any other jurisdiction. The Trust Fund maintains that none of these criteria has been met. It argues that the employer is not an "uninsured employer" within the meaning of chapter 152, because the government of Canada affords workers' compensation benefits to locally engaged employees under Canada's Government Employees

Compensation Act.[10] In addition, the Canadian Consulate, an entity of the Canadian government, is not uninsured because "[f]or the purposes of M. G. L. c. 152, § 65(2)(e), no public employer shall be considered to be uninsured." 452 Code Mass. Regs. § 3.04(8). Second, the Consulate General of Canada is not subject to the "personal jurisdiction" of the Commonwealth. And, third, the employee *was* "entitled to benefits" through the Canadian workers' compensation system because she actually received such benefits, and could potentially have continued to receive them, as she had the right to appeal the decision of the FWCS to close her case. (Trust Fund br. 4, n. 4.)

With respect to the third criterion, that the employee is not entitled to benefits in another jurisdiction, the Trust Fund maintains that Chico v. Merrimack Employment Servs., 24 Mass. Workers' Comp. Rep. 267 (2010), aff'd, Chico's Case,

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[10] The Government Employees Compensation Act (R.S.C., 1985, c.G-5), provides, in relevant part:

> 7. (1) Where an employee *locally engaged outside Canada* is usually employed *in a place where under the law respecting compensation* to workmen and the dependants of deceased workmen *payments are made to a fund out of which compensation is paid* to workmen and the dependants of deceased workmen, *there may, with the approval of the Treasury Board, be paid to that fund, out of the Consolidated Revenue Fund, such payments in respect of that employee as may be deemed necessary by the Minister [of Labour].*
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> (2) The Minister *may*, with the approval of the Treasury Board, award compensation in such amount and in such manner *as he deems fit* to
>
> (a) an employee locally engaged outside Canada who
>
> (1) is caused personal injury by an accident arising out of and in the course of his employment, . . .
>
> . . . .
>
> and who [is] not otherwise entitled to compensation under any law respecting compensation to workmen and the dependants of deceased workmen.

(Emphasis added.)

80 Mass. App. Ct. 1110 (2011) (Memorandum and Order pursuant to Rule 1:28) is controlling.[11] In Chico, we held that the plain and unambiguous language of "§ 65(2)(e) obligates the Trust Fund to pay compensation to the employees of uninsured employers *only if* 'the claimant is not entitled to workers' compensation benefits in any other jurisdiction.' " Id. at 270. (Emphasis in original.) We rejected the employee's interpretation, which would "require the Trust Fund to pay benefits when an employee, due to an out of state termination of benefits or settlement, is *no longer* entitled to *additional* benefits there." Id. (Emphasis in original.) We relied on the legislative history of the 1991 amendments to § 65, the purpose of which was to " 'narrow[] the Trust Fund's obligations to pay benefits to employees of uninsured employers . . . .' " Id., quoting CNA Ins. Cos. v. Sliski, 433 Mass. 491, 498 n.8 (2001). The Appeals Court affirmed for substantially the same reasons given by the reviewing board. Chico's Case, supra.

The employee does not argue that the requirements of § 65(2)(e) have been satisfied. Rather, she frames the issue as: "Whether the employee is entitled to compensation benefits from the . . . Trust Fund . . . *despite* the provisions of G.L. c. 152, § 65(2)(e)." (Employee br. 1; emphasis added.) She maintains that § 65(2)(e) should be narrowly construed where the other jurisdiction is a foreign government, and, for that reason, Chico is distinguishable. Furthermore, she contends the Canadian Consulate was required under G.L. c. 152, § 25A, to comply with Massachusetts workers' compensation laws by purchasing insurance or obtaining a self-insurance license. Since it did neither, it was "uninsured" under chapter 152. (Employee br. 3.) And, finally, the employee argues the Canadian government is not

[11] Mr. Chico was a Massachusetts resident hired in Massachusetts and injured in New Hampshire who collected workers' compensation benefits from his employer's New Hampshire insurer, and then settled his case there. Chico, supra.

immune from suit by the Trust Fund. (Id. at 5.)[12]

Resolution of this case requires analysis of § 65(2)(e), and the accompanying regulations, as well as other sections of chapter 152. It also requires understanding of applicable Canadian law and the extent to which the employee has rights under that system. Unfortunately, the judge failed to adequately address whether the requirements of § 65(2)(e) were met. In addition, he did not take notice of, or allow the admission of, relevant provisions of Canadian law. For these reasons, we are unable to determine whether the judge applied the law correctly, or even -- with respect to Canadian law -- what the applicable law was. As a result, recommittal is appropriate. Praetz, supra, at 47.

We agree with the Trust Fund that all three requirements in § 65(2)(e) must be present for the Trust Fund to be held liable to pay compensation. We disagree with the employee that the Trust Fund should be held liable without regard to the satisfaction of these criteria. However, other than listing § 65(2)(e) as an issue, the judge never referenced it. He does address one criterion, finding the employer to be an "uninsured employer," which did not have the "requisite" workers' compensation policy in Massachusetts. However, this finding is conclusory in light of the Trust Fund's unaddressed arguments that the provision of compensation by the Canadian government for locally engaged staff made it an "insured employer," and that a foreign governmental entity, like other public employers, is not considered "uninsured" under 452 Code Mass. Regs. § 3.04(8). Moreover, the judge did not reference the provisions of the Canadian law which authorized the employee to

[12] The employee argues the Trust Fund's cause of action against the Canadian government would be based on commercial, rather than diplomatic, activity. See Holden v. Canadian Consulate, 92 F.3rd 918 (1996). Presumably, this argument goes to the existence of subject matter jurisdiction over the Canadian Consulate, a prerequisite to personal jurisdiction, see 48 C.J.S. International Law, § 40 (2004), which the Commonwealth must have over the employer under § 65(2)(e) for the Trust Fund to be liable. The employee also relies on the Foreign Sovereign Immunity Act, 28 U.S.C. § 1602 et seq.; the Vienna Convention on Consulate Relations, Schedule II, Article 55; and the Vienna Convention on Diplomatic Relations Schedule I, Article 41, to support her position that the Canadian government is not immune from suit by the Trust Fund.

receive compensation benefits or make findings on the amount or extent of those benefits. For these reasons, we cannot tell whether the judge's decision regarding the "uninsured employer" status of the Consulate is on firm legal ground.

With respect to the other § 65(2)(e) requirements -- that the Commonwealth has personal jurisdiction over the employer and that the employee is not entitled to compensation in any other jurisdiction -- the decision is silent. The Trust Fund does not advance an argument regarding personal jurisdiction, but focuses most of its argument on its contention the employee is entitled to benefits under Canadian law, and is therefore not entitled to benefits from the Trust Fund. The judge does not explain how the employee's situation is distinguishable from that of the employee in Chico, who was denied compensation from the Trust Fund because he had received benefits in New Hampshire.

The judge's finding that the employee had no appeal rights under Canadian law raises an issue not addressed in Chico; namely, whether the employee is "not entitled" to benefits in Canada if she has no due process rights to contest the closing of her case.[13] However, the judge's finding that the employee had no appeal rights under

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[13] Chico held only that the phrase, "not entitled to workers' compensation benefits in any other jurisdiction," did not apply when an employee, due to an out of state settlement, was no longer entitled to benefits in the other jurisdiction. It did not address the question whether, in order to be "entitled to" compensation in another jurisdiction, the employee must be provided with the fundamental due process right to be heard at a meaningful time and in a meaningful manner. Doyle v. Department of Indus. Accidents, 50 Mass. App. Ct. 42, 46-47 (2000). In Doyle, the court also stated:

> Generally, an individual has a property interest in a benefit when the relevant law establishes certain eligibility criteria which, if met, entitle an individual to the benefit. . . . However, if the relevant law provides the awarding agency or other entity discretion to decide whether to grant benefits to a potential recipient, such discretion negates any entitlement claim which the potential recipient may have had.

Id. at 45-46 (citations omitted). See also Castle Rock v. Gonzales, 545 U.S. 748, 756 (2005), citing Kentucky Dep't of Corrections v. Thompson, 490 U.S. 454, 462-463 (1989)("a benefit is not a protected entitlement if government officials may grant or deny it in their discretion"). There seems to be no question that New Hampshire law provides employees with fundamental due process rights. But cf. GECA, § 7.1(2) ("The minister may, with the

Canadian law was not based on an adequate record. The judge must address all the issues based on an adequate record and in a manner enabling this board to determine whether he has applied correct rules of law. See Praetz, supra.

Thus, on recommittal, the judge must revisit his finding that the employee had no appeal rights in view of the fact that it was based solely on the employee's testimony regarding her understanding of Canadian law and on selected pages from a Canadian government website, neither of which is an appropriate basis for the determination of foreign law. To establish the law of another jurisdiction, a party may direct a judge's attention to the law of that jurisdiction by oral testimony of a qualified witness, such as an attorney, as well as by the citation of statutes and decisions. Eastern Offices, Inc. v. P.F. O'Keefe Advertising Agency, Inc., 289 Mass. 23, 26 (1935); see also Liacos, Brodin and Avery, Massachusetts Evidence, § 2.8.1 (7th ed. 1999). Where a judge is asked to take judicial notice of the law of another jurisdiction, it may be error for him to refuse to do so. See G. L. c. 233, § 70.[14] See also Goodale v. Morrison, 343 Mass. 607, 611-612 (1962)(error for trial judge to fail to charge jury on applicable New Hampshire law after proper request and citation). Cf. Tsacoyeanes v. Canadian Pacific Ry., 339 Mass. 726, 728 (1959)(court need not take judicial notice of law of a foreign jurisdiction where it is not brought to its attention by the record or briefs). Here, the Trust Fund asked the judge to take judicial notice of the Federal Courts Act and the GECA in its closing brief and in its motion to reopen the hearing. (See Ex. G for identification, [Trust Fund] Closing Memorandum, 5, n.5, referencing Ex. C for identification, [Trust Fund] Motion to Reopen Hearing.) Neither the transcripts nor the decision reflects that he did so. This was error.

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approval of the Treasury Board, award compensation in such amount and in such manner as he deems fit to (a) an employee locally engaged outside Canada . . . ").

[14] G. L. c. 233, § 70, provides: "The courts *shall* take judicial notice of the law of . . . a foreign country whenever the same shall be material." (Emphasis added.)

The judge also erred by denying the Trust Fund's motion to reopen the hearing for rebuttal evidence on the issue of Canadian law through the testimony of an attorney with the Canadian government. (Ex. C, for identification.) Such testimony would have been relevant and material to establishing the employee's rights under the Canadian workers' compensation system. See Sullivan v. First Massachusetts Fin. Corp., 409 Mass. 783, 793 (1991)(law of another jurisdiction may be established by expert testimony); Eastern Offices, Inc., supra.

While the decision to allow testimony on the law of another jurisdiction is discretionary under Mass. R. Civ. P. 44.1, Berman v. Alexander, 57 Mass. App. Ct. 181, 189 (2003),[15] under the circumstances presented here, we think the Trust Fund had a right to introduce the rebuttal evidence described in its offer of proof. See Urban Investment and Dev. Co., v. Turner Constr. Co., 35 Mass. App. Ct. 100, 103 (1993)("a party may present rebuttal evidence as a matter of right . . . when seeking to refute evidence presented by an opposing party"); see also Haley's Case, 356 Mass. 678, 681 (1970)(due process entitles parties to hearing at which they have the opportunity to, inter alia, rebut evidence presented against them). The Trust Fund's offer of proof demonstrates that its proposed evidence was intended to rebut the employee's testimony she could not appeal the denial of her claim.[16] While it would have been preferable for the Trust Fund to have offered this evidence on the date the employee testified, its motion and offer of proof were made before the hearing record

[15] Rule 44.1 provides, in pertinent part: "[a] party who intends to raise an issue concerning the law . . . of a foreign country shall give notice in his pleadings or other reasonable written notice. The court, in determining such law, may consider any relevant material or source, including testimony." Although board proceedings are not governed by the Rules of Civil Procedure, they may "provide instruction by analogy." Rodriguez v. Carilorz Corp., 23 Mass. Workers' Comp. Rep. 89, 94 n.11 (2009).

[16] There was no indication in the record prior to hearing that the employee would testify she had no right to appeal the closing of her case. (See March 21, 2011 Tr., Motion to Join.)

closed.[17] Thus, because the Trust Fund had a right to present rebuttal evidence regarding the employee's rights under Canadian law, the judge's denial of the Trust Fund's motion to re-open the hearing for submission of that evidence was contrary to law and an abuse of discretion.

Accordingly, the interests of justice are best served by vacating the decision and recommitting the case to the judge. Upon recommittal, the judge should take judicial notice of relevant aspects of Canadian law called to his attention, and allow the Trust Fund to present rebuttal testimony on the issue of the employee's rights under Canadian law. In the circumstances, the denial of the Trust Fund's motion to join the Canadian Consulate as a party was an error as that party may assist in the understanding of Canadian law.[18] After the above steps are taken, including the joinder of the Canadian Consulate as a party, the judge should revisit his decision regarding whether the employee has appeal rights under Canadian law, and address the criteria of § 65(2)(e), as necessary, including that, for the Trust Fund to be liable, each of the three relevant criteria under § 65(2)(e) must be satisfied.

So ordered.

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[17] The motion here was not analogous to a motion for a new trial because the record had not closed nor had a decision been issued. Cf. McElhinney v. Massachusetts Bay Transp. Auth., 9 Mass. Workers' Comp. Rep. 349, 352 (1995)(motion to re-open hearing based on new evidence presented after hearing decision issued is essentially a motion for new trial, which will not be granted unless evidence was unavailable by exercise of reasonable diligence and material because relevant and admissible, and likely to affect the adjudicatory result), citing DeLuca v. Boston Elevated Ry., 312 Mass. 495, 497 (1942).

[18] As the court pointed out in Lenn v. Riche, 331 Mass. 104 (1954), where it undertook consideration of French law "with diffidence" because it had "not had the benefit of the considered opinion of any French lawyer upon . . . the particular facts of this case but [had] been obliged to come to our conclusion solely by taking judicial notice of the provisions of the French code, of statements of French legal writers, and of the decisions of the French courts *which have been submitted by the parties,*" id. at 109(emphasis added): "In dealing in this manner with foreign law with which we are unfamiliar there is always the possibility that something that might affect the result has not come to our attention or that we have failed properly to correlate the material supplied." Id. at 109. In this case, a meaningful decision is most likely to be reached with the benefit of expert testimony.

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Frederick E. Levine
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

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Catherine Watson Koziol
Administrative Law Judge

Filed: **August 7, 2012**