

ROUNDTABLE

The International Who's Who of Corporate Immigration Lawyers has brought together four of the leading practitioners in the world to discuss key issues facing lawyers today.



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Who's Who Legal: *Our research revealed that a worldwide trend over the last few years has been an increase in government scrutiny leading to tougher immigration laws which are more strictly enforced. Is this noticeable in your country? What impact will this have in the future?*

Jane Pilkington: There has been a noticeable increase in government scrutiny in Ireland, which has led to tougher immigration laws. The government's stated intention for this change in policy is to ensure that every possible effort is made by employers to find suitably skilled employees from within the existing Irish labour market and the wider EEA. The main features of these measures include making more job categories ineligible for new employment permits; not creating any new employment permits for low-paid jobs (under €30,000 per annum); strengthening the Labour Market Needs Test; tougher conditions for the renewal of employment permits; the removal of a number of categories from the Green Card eligibility list in the salary range from €30,000 to €59,999; and the requirement for spouses and dependents of future employment permit holders to apply for employment permits in their own right subject to the standard eligibility criteria and fees. The net effect of these changes is that it has become more difficult to obtain employment permits in Ireland.

Gabriela Lessa: Although this is a trend in many countries, the situation has been quite different in Brazil. For example, in the past couple of years, Brazil has entered into agreements with other Mercosur states – Argentina, Paraguay and Uruguay – as well as associated countries – Bolivia, Chile, Colombia and Peru – to facilitate the entry of individuals seeking to live and work in Brazil; there is currently a Bill No. 5655 of 2009, which transacts in National Congress to revoke the Foreigners' Statute with the purpose to facilitate the rules for foreigners to enter and work in Brazil; and on 12 December 2012, the National Immigration Council (CNIg) introduced Normative Resolution No. 99 removing the requirement to have only legal entity sponsor a visa application thereby allowing individuals to hire foreigners directly. Looking to the future, Brazil is trying to adapt its immigration policy to promote the labour mobility and agility that are expected in a globalised world.

Bernard Caris: Compliance has indeed become increasingly important in Belgium. A new code on Labour and Social Security Criminal Law took effect on 1 July 2011. The unauthorised or illegal employment for more than three months of a foreigner not entitled to reside in Belgium, is treated as a "serious" infringement. In the event of criminal prosecution, the potential penalties include anything from six months to three years' imprisonment, a criminal fine of between €3,600 and €36,000 per employee (up to a maximum of €3,600,000), or both.

The implementation of European Directive 2009/52/EC on sanctions and measures against employers of illegally staying third-country nationals has created additional obligations and penalties for employers, as well as a potential several liability for parties who (in)directly work with such employers in a (sub)contracting relation. The Belgian authorities have also announced that in 2013 they will enhance their coordination of inspections, especially with regard to the employment of foreign nationals.

Gunther Mävers: The answer to this question, from a German perspective, is twofold. While this is a trend in some areas of immigration law, in others it is not. Since there is

an obligation in Germany – as with any other EU country – to implement EU law, the sanctions directive (which Bernard referred to) and the EU Visa Codex, to name but two examples, of course have had to be implemented in Germany, and indeed apply automatically. Hence, this can certainly be seen as an increase in the level of government scrutiny, leading to tougher and more strictly enforced immigration laws. On the other hand, Germany – like any other industrialised country in the world – is trying to compete in the seemingly never-ending race for talented professionals. As a consequence, we have seen the conditions and thresholds for certain visa categories lowered since August 2012. Moreover, the amendments came with other added means for students and family members to come over under a sponsored work permit.

Who's Who Legal: *A major concern among many immigration lawyers is the slow bureaucratic process which accompanies visa applications. Are there moves in your country to address this problem? Is there a solution?*

Jane Pilkington: Applications for employment permits in Ireland take approximately three to four weeks to process, so the procedure is not particularly slow. In addition to this, the relevant government department has now committed to reducing this processing time by an additional 10 days. However, certain nationalities then need to obtain an Irish pre-entry visa before they can travel to Ireland to take up their job position. The government department recommends that applications are submitted eight weeks in advance of the proposed date of travel but in practice, visa applications are generally processed much more quickly than this. It would be much simpler and quicker if both applications could be submitted and processed at the same time but there are no moves to implement such a change at the moment.

Gabriela Lessa: This excessive bureaucracy has long been a problem in Brazil. At the beginning of the century, the amount of documentation required to support a visa application was enormous. In some cases, companies were simply unable to fulfill the requirements of the process. In the last half-decade however, Brazilian entities sponsoring visa applications have benefited from a tremendous reduction in bureaucracy, although further progress is still necessary. As the government moves to resolve particular inefficiencies, the authorities have welcomed input both from consortiums of multinational companies and the general public as to how it might further improve and expedite the visa process. As an example, one project being developed by the immigration authorities, which is due to be implemented soon, is a facility for the online submission of visa applications. Moreover, this April, CNIg publicised that they will simplify issuance of short-term work visas valid up to 90 days for the rendering of services in Brazil.

Bernard Caris: The Belgian work permit system is a very business-friendly model. The regular work permit, with a resident labour test, is now very rarely used in the corporate immigration context. Instead, fast-track work permits, which do not entail a resident labour test, can in certain instances be obtained within three to four weeks from the date of filing the application. This expedited process can for instance be used for highly skilled workers who earn a gross salary in excess of an annually adjusted threshold and who hold at least a bachelor's degree.

On the other hand the registration and the obtaining of residence permits in Belgium can take quite some time, not only because of the legal requirements (a police check of the foreigner's address can take several weeks in some cities) but also because most municipalities tend to have their own administrative practices and rules regarding the process of registration.

Gunther Mävers: Unfortunately not. From a practitioner's point of view it would be preferable if, instead of facilitating corporate immigration to Germany, the authorities involved (such as the foreigners' office and the labour office) were to apply existing laws and regulations more uniformly and with more focus on results, rather than simply applying the strict wording of laws and regulations to cases or, worse, merely replacing that wording with instructions from the relevant ministries on how to apply the law. Even though such instructions have no binding legal authority, the agencies involved refuse to consider arguments, which although they comply with the law, differ from the instructions. For example, although the law itself contains no such limitations, the labour office will only grant a residence permit to take up employment for academic persons and IT and other specialists, if the employer is domiciled in Germany and concludes a local employment contract with the employee in Germany. From these instructions, it is not clear whether consent may only be given if a local employment contract is to be agreed, and if so, what impact such a practice would have on temporary assignments to Germany.

It does not look as if the government is likely to change this situation or even clarify its instructions. Therefore, it is strongly recommended that practitioners contact the competent authorities to check their interpretation of the law and regulations on the visa category in question. Moreover, the processing time for visa applications is an issue. Whereas the normal processing time is somewhere between eight and 12 weeks once an application has been fully filed, this period can be much longer and lengthened further still by unresponsive authorities. Only recently we filed a visa application for an Indian national at the German consulate in Chennai and despite many queries both to the consulate and the relevant local authorities (many of which went unanswered), we are still awaiting a decision from the consulate.

Who's Who Legal: *What are the main challenges facing clients who are trying to move employees into your country?*

Jane Pilkington: Where an applicant is highly skilled or qualified, it is relatively straightforward for a client to obtain an Irish employment permit. However, where an applicant has lower level skills or qualifications, it is much more difficult to obtain an Irish employment permit. In these instances a Labour Market Needs Test is generally required which means that employers must advertise the job position with an official employment network for at least two weeks and in a national newspaper and a local newspaper/job's website for at least three days. This lengthens the application process and increases costs but is in line with the tougher Irish immigration policy regime previously referred to.

Gabriela Lessa: In Brazil, prior to any move it is important to understand what labour, tax, corporate and in some specific cases intellectual property aspects are involved before embarking on any particular process. In view of the differing legislation between countries, what can be considered a simple procedure with no liability in one country can be the complete opposite and costly in another. One of the main challenges is to preventively assist clients to avoid future liabilities once an immigration process is concluded. Other challenges to be considered are the difficulties of legalising foreign documents outside of Brazil for specific visas, such as diplomas and marriage certificates, as well as the difficulty of obtaining a visa for dependents under stable union relationships.

Bernard Caris: Obtaining a fast-track work permit is quite straightforward whereas regular work permits, with their resident labour test, are difficult to obtain.

The fact that the registration and the obtaining of residence permits in Belgium can take quite some time must be taken into account: as a matter of fact, without such a residence permit, a foreigner may have difficulties re-entering the country, even after a trip within the Schengen area. It is advisable to apply for a long-term Type D visa prior to coming to Belgium. Family members of a foreign employee should always apply for a Type D visa: if they fail to do so, they will initially receive a residence permit that restricts travel for six months.

Service providers who assign employees to Belgium in order to work on a project should be aware that the rules on body leasing/third-party placement have been tightened with effect from 10 January 2013. One of the main innovations is that a written agreement, containing the instructions to the service provider from the Belgian client, must be drafted and submitted, if requested, to the works council, or representatives of the trade unions of the Belgian client.

Gunther Mävers: In short, there are probably three main challenges: firstly, to identify the most suitable visa category; secondly, collecting the requested information and documentation and sending the various necessary reminders; and thirdly, explaining why the authorities take more time than the business might have expected and why in the meantime, the employee is not permitted to engage in any kind of employment.

Who's Who Legal: *As a result of globalisation, many clients are looking for law firms who can deliver an international service. How has your firm adapted to this? Has this change had an impact on the legal market?*

Jane Pilkington: Mason Hayes & Curran regularly co-partner with firms in other jurisdictions to ensure where required, an international service can be provided to clients.

Gabriela Lessa: Veirano benefits from this change as, since Veirano's incorporation, our firm's focus has been on providing assistance in many areas to all clients by delivering an international service, based on our partnerships and alliances with law firms throughout the world. Veirano recruits qualified individuals and, in some cases, internationally and all of our partners, associates and interns are at the very least fluent in English and some in other languages. Additionally, a number have had the opportunity to attend LLM programmes in foreign universities, as well as training programmes with Veirano's partners outside of Brazil.

Bernard Caris: Our firm works with trusted partners in other jurisdictions in order to ensure a top-level international service. On the legal level, our service is also global in that we do not approach business immigration as a purely immigration law matter, but also from the perspective of employment, social security and corporate law, and citizenship.

Gunther Mävers: Unlike global firms, we rely on a network of most trusted firms and individual lawyers we have chosen on a country-by-country and case-by-case basis. Moreover, our firm is a member of two global alliances: Visalaw International and the Alliance of Global Business Immigration Lawyers, from whom we receive a lot of referrals. As an aside, being a partner of a full-service firm and a practitioner in labour law, may I also note that we benefit greatly from the fact that big firms focus on transactional work and are not really interested in the labour law-related work that we are happy to take on, bringing our reasonable pricing and, of course, our competitive level of knowledge and advice.