NEW YORK STATE BAR ASSOCIATION

NYSBA CLE

CLE Course Materials

International Bridging the Gap

NYSBA Co-Sponsors:

International Section

Committee on Continuing Legal Education

Fordham University School of Law

NYSBA

International Bridging the Gap

Day 1
Thursday, June 14, 2018
9:00 a.m. – 6:30 p.m.

Day 2
Friday, June 15, 2018
9:00 a.m. – 5:05 p.m.

Fordham University School of Law

16.0 MCLE Credits: 6.0 Skills, 3.0 Ethics, 7.0 Areas of Professional Practice

Sponsored by the Committee on Continuing Legal Education and the International Section of the New York State Bar Association and Fordham University School of Law.

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New York State Bar Association

Program Description

The New York State Bar Association is pleased to present *International Bridging the Gap.* Have you started an international legal career or are you interested in expanding your skill set to include international law? It can be challenging to develop the knowledge and experience necessary to represent clients in international legal affairs, such as cross-border mergers and acquisitions, international litigation and arbitration, and international corporate law. In the increasingly globalized and interconnected world, legal work often requires a multidisciplinary, cross-border approach. Issues may be complex and varied, and it often takes years to learn about the many aspects of international practice.

Organized by the New York State Bar Association, International Section ("NYSBA International"), this course covers critical aspects of international law for those entering or practicing in this diverse and complex area. Join a distinguished and experienced NYSBA International faculty and learn about the fundamental underlying areas of cross-border practice and other critical aspects of international law, and receive sixteen (16) MCLE credits, including three (3) ethics credits.

Accessing the Online Course Materials

Below is the link to the online course materials. These program materials are up-to-date and include supplemental materials that were not included in your course book.

http://www.nysba.org/IBTG18CourseMaterials/

All program materials are being distributed online, allowing you more flexibility in storing this information and allowing you to copy and paste relevant portions of the materials for specific use in your practice. WiFi access is available at this location however, we cannot guarantee connection speeds. This CLE Coursebook contains materials submitted prior to the program. Supplemental materials will be added to the online course materials link.

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New York Rules of Professional Conduct

These Rules of Professional Conduct were promulgated as Joint Rules of the Appellate Divisions of the Supreme Court, effective April 1, 2009, and amended on several occasions thereafter. They supersede the former part 1200 (Disciplinary Rules of the Code of Professional Responsibility).

The New York State Bar Association has issued a Preamble, Scope and Comments to accompany these Rules. They are not enacted with this Part, and where a conflict exists between a Rule and the Preamble, Scope or a Comment, the Rule controls.

This unofficial compilation of the Rules provided for informational purposes only. The official version of Part 1200 is published by the New York State Department of State. An unofficial on-line version is available at www.dos.ny.gov/info/nycrr.html (Title 22 [Judiciary]; Subtitle B Courts; Chapter IV Supreme Court; Subchapter E All Departments; Part 1200 Rules of Professional Conduct; § 1200.0 Rules of Professional Conduct).

http://nycourts.gov/rules/jointappellate/NY-Rules-Prof-Conduct-1200.pdf

Lawyer Assistance Program 800.255.0569

Q. What is LAP?

A. The Lawyer Assistance Program is a program of the New York State Bar Association established to help attorneys, judges, and law students in New York State (NYSBA members and non-members) who are affected by alcoholism, drug abuse, gambling, depression, other mental health issues, or debilitating stress.

Q. What services does LAP provide?

A. Services are **free** and include:

- Early identification of impairment
- Intervention and motivation to seek help
- Assessment, evaluation and development of an appropriate treatment plan
- Referral to community resources, self-help groups, inpatient treatment, outpatient counseling, and rehabilitation services
- Referral to a trained peer assistant – attorneys who have faced their own difficulties and volunteer to assist a struggling colleague by providing support, understanding, guidance, and good listening
- Information and consultation for those (family, firm, and judges) concerned about an attorney
- Training programs on recognizing, preventing, and dealing with addiction, stress, depression, and other mental health issues

Q. Are LAP services confidential?

A. Absolutely, this wouldn't work any other way. In fact your confidentiality is guaranteed and protected under Section 499 of the Judiciary Law. Confidentiality is the hallmark of the program and the reason it has remained viable for almost 20 years.

Judiciary Law Section 499 Lawyer Assistance Committees Chapter 327 of the Laws of 1993

Confidential information privileged. The confidential relations and communications between a member or authorized agent of a lawyer assistance committee sponsored by a state or local bar association and any person, firm or corporation communicating with such a committee, its members or authorized agents shall be deemed to be privileged on the same basis as those provided by law between attorney and client. Such privileges may be waived only by the person, firm or corporation who has furnished information to the committee.

Q. How do I access LAP services?

A. LAP services are accessed voluntarily by calling **800.255.0569** or connecting to our website **www.nysba.org/lap**

Q. What can I expect when I contact LAP?

A. You can expect to speak to a Lawyer Assistance professional who has extensive experience with the issues and with the lawyer population. You can expect the undivided attention you deserve to share what's on your mind and to explore options for addressing your concerns. You will receive referrals, suggestions, and support. The LAP professional will ask your permission to check in with you in the weeks following your initial call to the LAP office.

Q. Can I expect resolution of my problem?

A. The LAP instills hope through the peer assistant volunteers, many of whom have triumphed over their own significant personal problems. Also there is evidence that appropriate treatment and support is effective in most cases of mental health problems. For example, a combination of medication and therapy effectively treats depression in 85% of the cases.

Personal Inventory

Personal problems such as alcoholism, substance abuse, depression and stress affect one's ability to practice law. Take time to review the following questions and consider whether you or a colleague would benefit from the available Lawyer Assistance Program services. If you answer "yes" to any of these questions, you may need help.

1. **Are my associates, clients or family saying that my behavior has changed or that I don't seem myself?**
2. **Is it difficult for me to maintain a routine and stay on top of responsibilities?**
3. **Have I experienced memory problems or an inability to concentrate?**
4. **Am I having difficulty managing emotions such as anger and sadness?**
5. **Have I missed appointments or appearances or failed to return phone calls? Am I keeping up with correspondence?**
6. **Have my sleeping and eating habits changed?**
7. **Am I experiencing a pattern of relationship problems with significant people in my life (spouse/parent, children, partners/associates)?**
8. **Does my family have a history of alcoholism, substance abuse or depression?**
9. **Do I drink or take drugs to deal with my problems?**
10. **In the last few months, have I had more drinks or drugs than I intended, or felt that I should cut back or quit, but could not?**
11. **Is gambling making me careless of my financial responsibilities?**
12. **Do I feel so stressed, burned out and depressed that I have thoughts of suicide?**

There Is Hope

CONTACT LAP TODAY FOR FREE CONFIDENTIAL ASSISTANCE AND SUPPORT

The sooner the better!

Lawyer Assistance Program

1.800.255.0569

Bringing you the best and most relevant continuing education to help you be a better lawyer. Last year over 2,000 lawyers and judges volunteered for a NYSBA CLE. For decades, CLE volunteers have been developing and presenting seminars, preparing rich collections of written materials and raising the bar for legal practice in New York.

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www.nysba.org/CLE

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International Bridging the Gap
Day 1

I. Framework of International Practice Parts One and Two

THE FRAMEWORK OF INTERNATIONAL LEGAL PRACTICE

Michael W. Galligan, Esq.
Phillips Nizer LLP, New York, New York*

I. Relationship Between Private International Law and Public International Law

A. Initially, public international law began by governing relationships between sovereign entities ("States"), rather than between or among individuals.

1. One major area of public international law is the law of war, which governs the conduct of military forces during an armed conflict. Henry H. Perritt, Jr., *Symposium on the Internet and Legal Theory: The Internet is Changing International Law*, 73 Chi.-Kent L. Rev. 997, 1001-1002 (1998). Another area of traditional international law is the law of diplomatic relations.

2. Areas of more recent public international law include trade, the environment, regional institutions and human rights.

3. In deciding disputes between States, the International Court of Justice applies the following sources of international law:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations;

d. subject to the provisions of Article 59 [of the Statute of the International Court of Justice], decisions and teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. Statute of the International Court of Justice, Art. 38.

B. Private international law, generally, can refer to the law applicable to relationships between individuals or private entities from different national jurisdictions.

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* Partner in the Trusts, Estates, Tax and Immigration Department of Phillips Nizer, LLP; former chair of the International Section of the New York State Bar Association and Academician of the International Academy of Estate and Trust Law. Mr. Galligan wishes to acknowledge the assistance of Chryssa Valletta, formerly associated with Phillips Nizer LLP and now with Seyfarth Shaw LLP, and Sean Vallancourt, associated with Phillips Nizer LLP, with the preparation and revision of this Outline.

1. Private international law now should be viewed more comprehensively and dynamically, including "(1) seeing the various countries of the world as they develop their own law related to the increasing internationalization of all aspects of life as laboratories of legal invention and experimentation from which all of our respective countries can learn and benefit, (2) building a network of agreements between countries that seek to rationalize and harmonize the legal traditions of the state parties in areas of commercial and personal law so as to encourage and not inhibit transnational private activity, and (3) where desirable and convenient, to establish transnational structures that coordinate and regulate specific areas of international commerce – for example, in the areas of trade, environment and even immigration." Michael W. Galligan, *Address of Michael W. Galligan, First Meeting of NYSBA International India Chapter, New Delhi, June 5, 2009*, New York International Chapter News (Winter 2009).

C. In more strict terms, in civil law, private international law refers to the principles governing the determination of which country's or jurisdiction's law will become the law governing a particular question, entity, transaction, occasion, event or personal relationship. In the common law world, private international law in this more narrow sense is referred to as conflict of laws.

1. Traditional areas of private international law include obligations of citizenship, commercial transactions, employment law, property law, family law and fiduciary relationships.

D. Traditionally, citizens of a State would not be able to assert claims against other States, but would have to hope that their own State would assert the claim on their behalf. However, this has changed over the past fifty to one hundred years, and there are now many areas of public international law that accord rights to individuals and not just States.

1. Human rights law is a major area of public international law. Its scope expanded greatly during the twentieth century, as international human rights law expanded to protect citizens from their own governments. Prior to the twentieth century, international human rights law protected citizens of a State only if another State violated their rights – in such circumstances, the violating State would have violated its obligations to the citizens' State under international law. Henry H. Perritt, Jr., *Symposium on the Internet and Legal Theory: The Internet is Changing International Law*, 73 Chi.-Kent L. Rev. 997, 1001-1002 (1998). In addition, human rights law has expanded to ban human rights violations by individuals, as well as States. *Id.* Thus, over the years, human rights law has become more like private international law in that it also considers individuals as being to assert claims against the State, rather than making disputes only between two States. For example, there are remedies available to individuals in the European Court of Human Rights, the Inter-American Court of Human Rights, and the Human Rights Committee under the United Nations Convention on Civil and Political Rights Optional Protocol, and

individuals can sue States in those courts. In addition, under some States' internal laws an individual can sue in that State's court to assert claims based upon violation of his or her civil rights as expressed in international law.

2. International law is now becoming more likely to require States to also pass laws obliging their own citizens in other areas as well. For example, the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Dec. 17, 1997), requires that "Each Party shall take such measures as may be necessary to establish that it is a criminal offense under its law for any person. . . to offer. . . any undue pecuniary or other advantage. . . to a foreign public official. . . in order to obtain. . . improper advantage in the conduct of international business." Henry H. Perritt, Jr., *Symposium on the Internet and Legal Theory: The Internet is Changing International Law*, 73 Chi.-Kent L. Rev. 997, 1001 (1998). Thus, although treaties are traditionally "public international law," it is now possible to require states to impose private laws on their own citizens in a treaty.

3. In additional to human rights law, there are a number of treaties now on family law issues, such as Convention on the Civil Aspects of International Child Abduction (October 25, 1980) (Hague Child Abduction Convention) (signed and ratified by the United States) and the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (May 29, 1993) (Hague Adoption Convention) (signed and ratified by the United States), which incorporate concerns that are traditionally matters of private international law into the public international law arena.

E. In light of these changes in traditional public international law, several areas of overlap between public and private international law have developed:

1. Human rights, as mentioned above, imposes obligations on individuals as well as States and protects individuals as well as States. Henry H. Perritt, Jr., *Symposium on the Internet and Legal Theory: The Internet is Changing International Law*, 73 Chi.-Kent L. Rev. 997, 1003 (1998). In addition, there are now State-sponsored international tribunals that afford remedies for individuals to sue States, such as the European Court of Human Rights and the Inter-American Court of Human Rights.

2. Admiralty restricts the power of States against other States' vessels but also concerns individuals' rights against other individuals' vessels. *Id.* at 1005.

3. Foreign Sovereign Immunities Act

   a. Under United States law, foreign states (including their political subdivisions and agencies and instrumentalities) are

entitled to immunity from the jurisdiction of the courts of the United States and of its states. 28 U.S.C. § 1604, 1603.

b. Certain exceptions from this jurisdictional immunity exist

i. Waiver by the foreign state

ii. When the action is based upon a commercial activity carried on in the United States by the foreign state

iii. When the action is based upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere

iv. When the action is based upon an act performed outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States

v. When rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state, or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States

vi. When rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue

vii. Subject to certain exceptions, when money damages are sought against a foreign state for personal injury or death, or damage to or loss of property occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his employment

viii. Under certain circumstances, if the action is brought to enforce an agreement by a foreign state with or for the benefit of a private party to submit to arbitration

ix. Provided that certain procedural notice requirements are met, in any case in which a suit in admiralty is brought to enforce a maritime lien which is based upon a commercial activity of the foreign state against a vessel or cargo of the foreign state

x. In an action to foreclose a preferred mortgage

xi. In a case not otherwise covered by the exceptions above in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee or agent of such foreign state while acting within the scope of his or her office, employment or agency. 28 U.S.C. §§ 1605, 1605A

4. Transnational commercial law in the context of treaty based organizations is an important area of overlap because it regulates non-State actors across State boundaries. Henry H. Perritt, Jr., *Symposium on the Internet and Legal Theory: The Internet is Changing International Law*, 73 Chi.-Kent L. Rev. 997, 1005 (1998). Some examples of such organizations include:

a. World Trade Organization

b. World Intellectual Property Organization

5. In addition, the United Nations Convention on Contracts for the International Sale of Goods regulates cross-border sales transactions.

6. It's important to be aware of transnational commercial law issues when advising your client in a trans-border transaction.

a. Transnational commercial law is hardly new, though – the law of lex mercatoria was established centuries ago to govern transactions between merchants based in different countries.

b. Lex Mercatoria

i. Came about as Europe emerged from the Dark Ages and was a body of law that was run not by a formal legal order, but merchants themselves. Wayne R.

Barnes, *Contemplating a Civil Law Paradigm for a Future International Commercial Code*, 65 La. L. Rev. 677, 735 (2005).

ii. Main characteristics of lex mercatoria

a. Transnational

b. Mercantile customs was its principal source

c. Merchants themselves, rather than judges, were administrators.

d. Procedures were quick and informal

e. Equity was its main principle. *Id.* at 736.

iii. Lex mercatoria had lost most of its strength by the time of the Napoleonic Code (1804). *Id.*

7. Courts are becoming more likely to consider international norms when deciding cases.

F. Although public international law has become more concerned with individuals and their rights, there are still many issues that can only be decided between States. As set forth above, there are issues of war, trade and other concerns that must be addressed on the State level. In addition, the courts of the United States have incorporated deference for other States into U.S. law under the act of state doctrine and comity, as well as the political question doctrine and the law of extraterritoriality.

1. The act of state doctrine was created by judges, and generally precludes judicial inquiry by a U.S. court into the official acts of a State within that State's own borders. Ronald J. Silverman & Mark W. Deveno, *Distressed Sovereign Debt: A Creditor's Perspective*, 11 Am. Bankr. Inst. L. Rev. 179, 188 (2003). The seminal Supreme Court case on the act of state doctrine is *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964) in which the Court found that the act of state doctrine prevented a challenge to the validity of a Cuban expropriation decree whereby a Cuban instrumentality acquired sugar that had belonged to a Cuban corporation whose stock was principally owned by United States residents, in part because the state of international law on the protection of investments in property connected to or located in a country by investors from outside the country was, in the view of the Court, not clear.

a. However, both the Supreme Court and Congress have limited the act of state doctrine's scope and applicability. In *First National City Bank*, the Court, recognizing the act of state doctrine is "grounded on judicial concern that application of customary

principles of law to judge the acts of a foreign sovereign might frustrate the conduct of foreign relations by the political branches of the government," held that where the Executive Branch – the branch which has the foremost role in conducting foreign affairs – expressly informs a court the application of the act of state doctrine would not advance the interests of American foreign policy in a particular case, the act of state doctrine should not be applied. *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 767-68 (1972). Four years later, the Court narrowed the act of state doctrine further, holding the act of state doctrine does not apply to the acts of foreign sovereigns committed solely in the course of their "purely commercial operations." *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 706 (1976). Even *Sabbatino* was blunted, as Congress – only a year after *Sabbatino* was decided – enacted the Hickenlooper Amendment to the Foreign Assistance Act of 1964, which provides, in relevant part:

> no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right to property is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law.

22 U.S.C. § 2370(e)(2).

2. Under the doctrine of comity, U.S. courts may refrain from acting in deference to another State's legal system. Comity is broader than the act of state doctrine because it may apply to actions taken outside a State's own borders. However, in the U.S., courts will only defer to another State's legal system if that deference will not result in consequences that are inconsistent with U.S. law and policy. Ronald J. Silverman & Mark W. Deveno, *Distressed Sovereign Debt: A Creditor's Perspective*, 11 Am. Bankr. Inst. L. Rev. 179, 188 (2003). In practice, comity implicates a federal court's exercise of jurisdiction and can best be seen as an abstention doctrine. *O.N.E. Shipping Ltd. v. Flota Mercante Grancolombiana, S.A.*, 830 F.2d 449, 452 (2d Cir. 1987).

3. "The political question doctrine is invoked by courts when they feel absolute deference to the other branches of government is appropriate. The judiciary has found such deference may be necessary in cases that involve the foreign policy decisions of the executive and legislative branches of the United States." Nick Robinson, *Citizens Not Subjects: U.S. Foreign Relations Law and the Decentralization of Foreign Policy,* 40 Akron L. Rev. 647, 666 (2007). A case may be dismissed on the basis of the political question doctrine if there exists:

"[1] a textually demonstrable constitutional commitment of the issue [at hand] to a coordinate political department; [2] a lack of judicially discoverable and manageable standards for resolving it; [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Baker v. Carr,* 369 U.S. 186, 217 (1962)

a. Interestingly, the United States executive branch has not taken the position that the political question applies even in certain politically sensitive human rights cases, such as the suit against Radovan Karadzic, the leader of Srpksa, a Bosnia breakaway republic in the Second Circuit. *See* Jon O. Newman, *Symposium: Law, War and Human Rights: International Courts and the Legacy of Nuremberg: Toward an International Civil War Claims Tribunal*, 12 Conn. J. Int'l L. 245, 249 (1997). Karadzic was sued under the Alien Tort Claims Act, 28 U.S.C. § 1350, which confers federal subject matter jurisdiction over a suit by an alien for a tort committed in violation of the law of nations (*i.e.*, international law), in the case *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995). The Second Circuit has held that corporations could not be held liable under the Alien Tort Claims Act because the scope of liability is determined by customary international law itself and customary international law does not hold corporations liable for violations of it. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 11, 145 (2d Cir. 2011). Recently, the Supreme Court confirmed that a foreign corporation may not be a defendant in a suit brought under the Alien Tort Statute, but on different grounds. Rather than base its decision on customary international law, the Court based its decision on separation of powers concerns, holding that any decision to expand the scope of liability under the Alien Tort Statute to include foreign corporations must be made by Congress, and not the Judiciary. *Jesner v. Arab Bank, PLC*, 200 L. Ed. 2d 612, 631, 634, 636 (2018).

4. U.S. courts also apply a canon of statutory construction known as the presumption against extraterritoriality. Under this presumption, "[absent clearly expressed congressional intent to the contrary, federal laws will be construed to have only domestic application." *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010). Courts apply a two-step framework in analyzing extraterritoriality issues. First, a court asks whether the presumption has been rebutted – "whether the statute

gives a clear, affirmative indication that it applies extraterritorially." *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2093-94 (2016). If the statute is not found extraterritorial at this step, a court, at step two, examines the statute's focus to determine whether the case at issue involves a domestic application of the statute. *Id.* at 2094. If the conduct relevant to the statute's focus occurred domestically, the case involves a permissible domestic application even if other conduct occurred on foreign soil. *Id.* If, however, the conduct occurred in a foreign country, the case involves an impermissible extraterritorial application. *Id.*

In affirming the Second Circuit's ruling in *Kiobel*, the Supreme Court applied this two-step framework, holding that the presumption against extraterritoriality applies to claims raised under the Alien Tort Statute and that because all of the relevant conduct in the case took place outside the United States, the petitioner's suit under the Alien Tort Statute was barred. *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. ___ (2013).

II. Navigating the Differences Between the Common Law, Civil Law, and Other Legal Systems. For a detailed comparison of different jurisdictions, see International Practice Comparative Charts, Exhibit 2 hereto, and Choosing New York Law as Governing Law for International Commercial Transactions, Exhibit 3 hereto.

A. Civil Law and Common Law Defined

1. Civil Law originated in Roman Law and has two branches: codified Roman Law (*e.g.*, French Civil Code), and uncodified Roman Law (*e.g.*, Scotland). William Tetley, Q.C., *Mixed Jurisdictions: Common Law vs. Civil Law (Codified and Uncodified)*, available online on the CISG database at http://www.cisg.law.pace.edu/cisg/biblio/tetley.html

a. It is used in "pure" or "mixed" (*i.e.*, mixed with another form of law, such as Muslim law (sharia)) form by 115 nations. Wayne R. Barnes, *Contemplating a Civil Law Paradigm for a Future International Commercial Code*, 65 La. L. Rev. 677, 684 (2005).

2. Common Law originated in England and now exists in England, most U.S. states (except Louisiana), most former English colonies (including India) and other countries such as Guyana and the Panama Canal Zone Tetley, *Mixed Jurisdictions: Common Law vs. Civil Law (Codified and Uncodified)*

a. It is used in "pure" or "mixed" form by 51 nations. Barnes, *Contemplating a Civil Law Paradigm for a Future International Commercial Code*, 65 La. L. Rev. at 684.

B. Civil Law vs. Common Law: Overview of Philosophical Differences

1. General differences in approach.

a. Civil law systems use a "syllogistic reasoning process." Their focus is deductive, fitting fact patterns of a particular case into a particular code section. James P. George, *International Parallel Litigation – A Survey of Current Conventions and Model Laws*, 37 Tex. Int'l L.J. 499, 510 (2002)

i. Strengths of this system include certainty and predictability. *Id.*

ii. Weaknesses of this system include failure to address special circumstances and the inability to expand rules without amending code systems. *Id.*

b. Common law systems use an "inductive" reasoning process. They focus on particularities, creating "nuanced rules." *Id.* at 506.

i. Strengths of common law systems include an ability to address unique circumstances. *Id.*

ii. Weaknesses include the possibility that rules will be created to fit extremely unusual fact patterns and that do not necessarily fit most cases. *Id.*

2. Stare decisis

a. Defined as "The doctrine of precedent, under which it is necessary for a court to follow earlier judicial decisions when the same points arise again in litigation." Black's Law Dictionary (8th Ed. 2004).

b. Distinctive feature of common law system – allows judges to apply rules derived from analogous precedents (*i.e.*, earlier decided cases) to new factual situations.

c. Led to the description of the common law as "judge-made." Barnes, *Contemplating a Civil Law Paradigm for a Future International Commercial Code*, 65 La. L. Rev. at 694.

d. Not used in civil law system – under the civil law system cases are not law. *Id.* at 723.

3. Role of statutes in common law v. code in civil law

a. Statutes in the common law are designed to be understood against background of common law. Barnes, *Contemplating a Civil Law Paradigm for a Future International Commercial Code*, 65 La. L. Rev. at 695.

b. Cases in the common law add a judicial gloss to the statute by interpreting it.

c. The code is understood as the cornerstone of the civil law. *Id.* at 717.

d. The code is so important to civil law because of the belief that it provides certainty in the law. *Id.* at 718.

e. The Code in civil law is generally quite broad – close in terms of type to Uniform Commercial Code, rather than the typical, much more narrowly drawn statutes in common law countries.

4. Role of judges

a. Judges in the common law system are highly esteemed, due in part to their role as makers of law, and usually do not attain the bench until relatively late in their careers, after achieving success as practicing attorneys. Barnes, *Contemplating a Civil Law Paradigm for a Future International Commercial Code*, 65 La. L. Rev. at 698-699.

b. Judges in the civil law system typically become judges at the outset of their careers and generally are seen as having a fairly "mechanical" function. *Id.* at 730.

c. The concept of the equitable powers of the court in the common law system gives the judge even more power because it allows him or her to achieve justice in a particular dispute by alleviating the application of a rule that might be unnecessarily harsh under the circumstances. Barnes, *Contemplating a Civil Law Paradigm for a Future International Commercial Code*, 65 La. L. Rev. at 697.

d. Judges in the civil law system must adjudicate disputes by working within the framework of the code. *Id.* at 722.

e. Under the civil law system, judges cannot rely on previous case law. *Id.* at 724.

f. Civil law opinions are usually shorter than common law opinions, although not always. Colin B. Picker, *International Law's Mixed Heritage*: A Common/Civil Law Jurisdiction, 41 Vand. J. Transnat'l L. 1083, 1115 (2008)

g. Civil law opinions also differ in style from common law opinions. Civil law opinions typically begin with identification of the relevant legal principles and then verify if the facts support the application of such principles (only contain the necessary facts). Common law opinions typically contain relatively extensive factual discussions and then proceed to the legal rule that relates to the facts. Tetley, *Mixed Jurisdictions: Common Law vs. Civil Law (Codified and Uncodified)*

C. Civil Law vs. Common Law: Conflict of laws and differences in application

1. Conflict of Laws (as mentioned above, consists of choice of law, choice of jurisdiction and recognition of foreign judgments)

a. Civil law places more emphasis on choice of law rules while common law places more emphasis on jurisdictional rules. Tetley, *Mixed Jurisdictions: Common Law vs. Civil Law (Codified and Uncodified)*

b. In fact, common law conflict of law rules are relatively new because the emphasis on the jurisdictional rule of service used to be so strict as to limit the court's jurisdiction to domestic conflicts. *Id.*

c. Traditional method of conflict of laws consists of characterization of the dispute as belonging to a certain category and then identifying the applicable law in relation to the category concerned. Similar issues are sometimes placed in different categories in civil law versus common law systems. For example, a delay to sue issue would be substantive under civil law but procedural under common law. Maritime liens are procedural in England but substantive in civil law systems. *Id.*

2. Contract law.

a. Common law objective contract theory requires that contractual promises be interpreted according to the reasonable expectation of the promisee (an objective standard). On the other hand, civil law contract theory imposes a subjective standard of actual consent of the promisor. *Id.*

b. In common law systems consideration (meaning that a contract must be supported by something of value) is required before a contract will be binding, while in civil law systems a lawful cause (a reason why the party binds himself) must exist for a contract to be binding. Cause differs from consideration

because a party may have a gratuitous cause that does not benefit the party itself. Caslav Pejovic, Civil Law and Common Law: Two Different Paths Leading to the Same Goal, *Victoria University of Wellington Law Review*, available online at http://www.austlii.edu.au/nz/journals/VUWLRev/2001/42.html

c. In civil law systems, fault on the part of the breaching party is generally required for damages to be awarded in a breach of contract action (the breaching party must have at least been negligent), while damages may be awarded in common law countries without fault (although there are doctrines of impossibility and changed circumstances that prevent the application of this principle from being unduly harsh). *Id.*

d. Generally, a writing is essential under civil law systems, while a writing is not necessary for all contracts under the common law system.

3. Trust law. Trusts are generally available in common law systems, but are not found in civil law jurisdictions, except by statute. This is the case because civil law systems never developed the bifurcation between legal ownership and beneficial ownership that is essential for a trust. Under the civil law system, there can be only one "owner" of property. M. Read Moore, *Practical Estate Planning For Noncitizens who Reside in the United States*, ALI-ABA Course of Study Material, Estate Planning in Depth, vol. 2 (June 2005). Michael W. Galligan, *International Estate Planning for U.S. Citizens: An Integrated Approach*, Estate Planning (October 2009)

4. Criminal law. In civil law systems, the criminal proceeding consists of three phases

a. Investigative phase during which a government official (usually the public prosecutor) gathers the evidence and decides whether to bring formal charges. James G. Apple and Robert P. Deyling, *A Primer on the Civil-Law System* (prepared and published by the Federal Judicial Center at the request of the International Judicial Relations Committee of the Judicial Conference of the United States and available online at http://www.fjc.gov/public/pdf.nsf/lookup/CivilLaw.pdf/$file/CivilLaw.pdf) at 28.

b. Examining phase (primarily conducted in writing) during which the examining judge collects and reviews the record (including gathering evidence and questioning witnesses) and decides whether the case should proceed to trial. There is no cross-examination as there is in a common law system. Also, the attorneys do not gather evidence as they do in the common

law system although the defendant does have a right to be represented by counsel. *Id.*

c. Trial phase which is far shorter than a common law trial because the evidentiary record has already been collected – the purpose of a trial in the civil law system is to present the case to the trial judge and occasionally the jury (unlike in the common law system, juries in the civil law system typically only decide cases involving serious crimes) and to allow the attorneys to present oral argument, rather than evidence. *Id.*

5. There are no punitive damages in civil law systems. David Epstein, Jeffrey L. Snyder, Charles S. Baldwin, IV, International Litigation, A Guide to Jurisdiction, Practice and Strategy, (Martinus Nijhoff, Publishers, Third Ed. 2005), § 1.02, p. 1-10

6. Inheritance law (for a more thorough discussion, please see Michael Galligan, *International Estate Planning for U.S. Citizens: An Integrated Approach*, Estate Planning (October 2009))

a. Common Law

i. General testamentary freedom

ii. Institution of "estate" for administration of decedent's property immediately after death.

iii. Heirs are liable for decedent's debt only to the amount of their inheritance.

b. Civil Law

i. Mandatory testamentary shares for children

ii. No "estate" instituted

iii. Heirs generally have unlimited personal liability for decedent's debts.

7. Court structures are very different in the two systems. The typical common law system is a series of gradually higher courts. On the other hand, the civil law system consists of a system of "ordinary" courts that adjudicate nearly all criminal and civil cases, and a system of "administrative" courts that exercise independent jurisdiction and review government conduct. James G. Apple and Robert P. Deyling, *A Primer on the Civil-Law System* (prepared and published by the Federal Judicial Center at the request of the International Judicial Relations Committee of the Judicial Conference of the United States and available online at

http://www.fjc.gov/public/pdf.nsf/lookup/CivilLaw.pdf/$file/CivilLaw.pdf) at 25-26.

8. Civil procedure differs greatly in the two systems

   a. There is no formal civil law counterpart to common law discovery. *Id.* at 26.

   b. The civil law process is largely conducted in writing – for example a lawyer who wants to question a witness must first present a document describing the scope of the questions to opposing counsel and the judge. The judge then typically asks the questions of the witness at a later-scheduled hearing. Cross-examination is unusual. *Id.* at 27.

   c. Common law process is conducted by the parties' attorneys, rather than the judge as in the civil law proceedings. David Epstein, Jeffrey L. Snyder, Charles S. Baldwin, IV, International Litigation, A Guide to Jurisdiction, Practice and Strategy, (Martinus Nijhoff, Publishers, Third Ed. 2005), § 3.02, p. 3-6.

   d. There is no jury in non-criminal cases in civil law systems, which leads to differences in how evidence is admitted (generally more opinion and hearsay evidence is allowed). James G. Apple and Robert P. Deyling, *A Primer on the Civil-Law System* at 27.

D. Islamic law (sharia)

1. Overview

   a. "Sharia" initially referred to the path by which camels were taken to water and now refers to "the way" or "the path" by which a Muslim must conduct his or her life. Michael J.T. McMillan, *International Legal Developments in Review: 2007: Regional and Comparative Law, Islamic Law Forum*, 42 Int'l Law. 1017, (2008)

   b. Generally seen as broader than simply "legal" rules, also refers to religion, ethics, morality and other behavioral rules. *Id.*

2. Finance

   a. Trading and partnership or joint ventures require that rewards and risks are proportionate. *Id.*

   b. "Riba" is forbidden because it is a reward without commensurate risk and preferential reward *Id.*

1. Riba is commonly construed as interest but it's any excess paid or received on principal, or an increase in price or return. Some examples include unequal spot trades in specified commodities, credit transactions in specified commodities, and discounting on payment. *Id.*

c. Guarantees or assurances of return are not allowed. *Id.*

d. Every financial transaction must concern a tangible asset (except for certain limited exceptions, such as for intellectual property). *Id.*

e. Mortgage loans, and debts that have been divorced from their underlying assets, such as receivables and derivatives, are forbidden *Id.*

f. To abide by these strictures, sharia has evolved to create a system of contracts that are sharia-compliant, and which are relatively narrowly construed. *Id.*

3. Inheritance Law

a. Under sharia, inheritance law is governed by a complex system of shares. Zainab Chaudhry, *The Myth of Misogyny: A Reanalysis of Women's Inheritance in Islamic Law*, 61 Alb. L. Rev. 511, 527 (1997).

b. Traditionally, before anything is distributed to heirs, funeral expenses, debts owned by the decedent and bequests are paid out of the estate. *Id.* at 528.

c. Bequests may be made but are limited to one-third of the entire estate and may not be made to those heirs who will take under succession. *Id.*

d. The remainder of the estate (at least two-thirds) is distributed by the rules of intestate succession among various classes of heirs. *Id.* at 529.

i. Not all heirs always inherit, some classes may exclude other classes and some heirs within a class may exclude others within the same class. *Id.*

ii. Only the decedent's spouse, parents and children may not be excluded from inheritance, although their shares may be

decreased if there are many heirs. *Id.* at 529-530.

E. Conflict of laws.

1. For example, consider a dispute between a citizen of New York and a citizen of Argentina over a contract. The Court, whether United States or Argentine, must decide whether to apply New York law, United States federal law, or Argentine law to the dispute. This is a "choice of law" issue. Henry H. Perritt, Jr., *Symposium on the Internet and Legal Theory: The Internet is Changing International Law*, 73 Chi.-Kent L. Rev. 997, 1003 (1998).

a. Choice of law issues in the United States.

i. Generally, a choice of law provision in a contract will be enforced by United States courts, especially in a business or commercial context, unless one party can show such provision is unreasonable. David Epstein, Jeffrey L. Snyder, Charles S. Baldwin, IV, International Litigation, A Guide to Jurisdiction, Practice and Strategy, (Martinus Nijhoff, Publishers, Third Ed. 2005), § 9.05, p. 9-10. New York General Obligations Law § 5-1401 provides that the parties to a contract arising out a transaction of at least $250,000 may agree in their contract that New York law applies regardless of whether their contract has a "reasonable relation" to New York. Section 5-1401 does not apply to contracts for personal services, family or household services or to the extent provided to the contrary by the New York Uniform Commercial Code. Thus, in New York, the state courts will generally enforce choice of law provisions selecting New York law if the contract is for $250,000 or more.

ii. A conflict-of-laws analysis need not be undertaken when there is an express choice of New York law in a contract pursuant to Section 5-1401. In *IRB-Brasil*, the Court of Appeals held when parties include an "ordinary New York choice-of-law provision," they demonstrate their intent that courts not conduct a conflict-of-laws analysis and New York's substantive law therefore applies to the exclusion of New York's conflict-of-laws principles. *IRB-Brasil Resseguros, S.A. v. Invepar Invs., S.A.*, 20 N.Y.3d 310, 312, 315-16 (2012). It is not necessary to expressly exclude

New York's conflict-of-law rules in drafting a New York choice-of-law provision. *Id.* at 316.

Three years later, the Court of Appeals extended its holding in *IRB-Brasil* to contracts that do not fall under Section 5-1401. *Ministers & Missionaries Benefit Bd. v. Snow*, 26 N.Y.3d 466 (2015). In addition, it held that when parties include a New York choice-of-law provision and the New York substantive law includes a statutory choice-of-law provision that may require the application of the law of another state, New York law still applies. *Id.* at 470, 475.

ii. Choice of law rules in the Restatement (Second) of Conflict of Laws apply equally to international conflicts as well as inter-state conflicts within the United States, although "there may, however, be factors in a particular international case which call for a result different from that which would be reached in an interstate case." Restatement (Second) Conflict of Laws § 10 (1971).

iii. Absent a choice of law provision in a contract, the court will consider a number of factors to determine which state (or foreign country) has the most substantial relationship, and thus which jurisdiction's law will apply. Typically, these factors include the place of contracting; the negotiation, performance, and location of the subject matter of the contract, as well as the domicile, residence, nationality, place of incorporation and place of business of the contracting parties. Restatement (Second) Conflict of Laws § 188 (1971).

iv. The choice of law in tort cases generally depends upon the local law of the state or foreign country with the most significant relationship to the dispute. The court should consider the place where the injury occurred; the place where the conduct causing the injury occurred; the domicile, residence, nationality, place of incorporation and place of business of the parties; and the place where the relationship, if any, between the parties is centered. Restatement (Second) Conflict of Laws § 145 (1971).

v. Practitioners should be aware of the distinctions between substantive and procedural law in different jurisdictions. For example, the general rule is that statutes of limitation are procedural in nature, so the

statue of limitations of the forum will generally apply in a diversity case brought in federal court, even if choice of law rules require the application of foreign substantive law. However, there is an exception if the limitations period for the cause of action under foreign law is contained in the same statute that creates the right of action. In that case, the federal court will follow the foreign limitations period because it is deemed substantive rather than procedural. David Epstein, Jeffrey L. Snyder, Charles S. Baldwin, IV, International Litigation, A Guide to Jurisdiction, Practice and Strategy, (Martinus Nijhoff, Publishers, Third Ed. 2005), § 9.06, pp. 9-15-9-16.

b. Choice of Law Issues Outside the United States

i. Different countries apply different rules regarding choice of law. For example, some courts rely on domicile of the parties, some courts rely on the situs of the property and some rely upon the nationality of the parties.

ii. Once you determine the rules regarding choice of law, you next have to determine whether the foreign court will apply the "whole law" that is indicated by its choice of law rules (*i.e.*, the substantive and procedural law). If the whole law applies, it is possible for the foreign law to require application of the law of the initial forum or a third forum (renvoi). That creates an issue of whether the court will accept such a referral back to its own law (remission) or a third forum (transmission).

iii. Such issues require the assistance of foreign local counsel to resolve.

2. To go back to our example, a judgment may have already been rendered in an Argentine court. Then, the New York party may decide to bring an action in New York, whether in New York State Supreme Court or federal court. The New York court must decide whether to recognize the judgment and, if it recognizes the judgment, must decide the effect that the judgment has on the dispute. Henry H. Perritt, Jr., *Symposium on the Internet and Legal Theory: The Internet is Changing International Law*, 73 Chi.-Kent L. Rev. 997, 1003 (1998). This is a "judgment recognition and preclusion" issue. *Id.*

a. Generally in diversity cases the law of the forum state will apply. David Epstein, Jeffrey L. Snyder, Charles S. Baldwin, IV, International Litigation, A Guide to Jurisdiction, Practice

and Strategy, (Martinus Nijhoff, Publishers, Third Ed. 2005), § 11.08, p. 11-17.

b. The Uniform Foreign Money-Judgments Recognition Act has been adopted by many states within the United States, including New York. *Id.* at §11.09, p. 11-19. "'New York has traditionally been a generous forum in which to enforce judgments for money damages rendered by foreign courts,' and, in accordance with that tradition, the State adopted the Uniform Foreign Country Money-Judgments Recognition Act as CPLR article 53." *John Galliano, S.A. v. Stallion, Inc.*, 15 N.Y.3d 75, 79-80 (2010) (quoting *CIBC Mellon Trust Co. v. Mora Hotel Corp.*, 100 N.Y.2d 213, 221 (2003)). Article 53 applies to any foreign country judgment which is final, conclusive and enforceable where rendered even though an appeal therefrom is pending or it is subject to appeal," N.Y. C.P.L.R. 5302, and a foreign country judgment is considered "conclusive between the parties to the extent that it grants or denies recovery of a sum of money." N.Y. C.P.L.R. 5303. In John Galliano, held Article 53 compelled the recognition and enforcement of a judgment of the Tribunal de Commerce of Paris, France. *Id.* at 84.

3. Finally, the New Yorker may argue that the Argentine judgment should not be recognized because the Argentine court never had personal jurisdiction over him. This is a "personal jurisdiction" issue. Henry H. Perritt, Jr., *Symposium on the Internet and Legal Theory: The Internet is Changing International Law*, 73 Chi.-Kent L. Rev. 997, 1003 (1998).

a. New York General Obligations Law § 5-1402 provides that a party may maintain an action in New York state courts if it arises out of a contract relating to a transaction of not less than $1,000,000 and there is a provision in the contract in which the other party agreed to submit to the jurisdiction of New York state courts. Thus, in New York, state courts will enforce choice of forum clauses in contracts for at least $1,000,000.

b. The issue of reasonableness to assert jurisdiction in the international context is governed by Sections 421 and 402 of the Restatement (Third) of Foreign Relations Law. Section 421 governs a State's jurisdiction to adjudicate a dispute and Section 402 governs a State's jurisdiction to prescribe conduct.

c. A State has jurisdiction to prescribe law with respect to conduct that wholly or in substantial part takes place within its territory; the status of persons or interests in property within its territory; conduct outside its territory that has or is intended to have substantial effect within its territory; the activities,

interests, status or relations of its nations both outside and inside its territory; and certain conduct outside its territory by persons who are not nationals of the State that is directed against the security of the State or certain other State interests. Restatement (Third) of Foreign Relations Law § 402 (1987).

d. Section 421 of the Restatement (Third) of Foreign Relations Law provides that a State may exercise its jurisdiction to adjudicate over a person or thing if the exercise of such jurisdiction is "reasonable." A State's exercise of jurisdiction is "reasonable" if at the time jurisdiction is asserted:

i. the person or thing is present in the State's territory (other than transitorily). Restatement (Third) of Foreign Relations Law § 421(2)(a) (1987).

ii. in the case of a natural person, he or she is domiciled, resident, or a national of the State. *Id* at § 421(2)(a)-(d).

iii. in the case of a corporation or comparable juridical person, it is organized pursuant to the law of the State. *Id* at § 421(2)(e).

iv. in the case of a ship, aircraft or other vehicle, it is registered under the State's laws. *Id* at § 421(2)(f).

v. in the case of a person (whether natural or juridical) it has consented to the exercise of jurisdiction, regularly carries on business in the State, had carried out activity in the State and the action relates to such activity, or had carried out outside the State an activity having a substantial, direct and foreseeable effect within the State, and the action relates to such activity. *Id* at § 421(2)(g)-(j).

vi. in the case of a thing that it is the subject of adjudication, such thing is owned, possessed or used in the State and the action relates to that thing. *Id* at § 421(2)(k).

e. A defense of lack of jurisdiction is generally waived by the appearance of a person in the action, if such appearance is for a purpose other than a challenge to the court's exercise of jurisdiction. *Id* at § 421(3).

III. The Role of Treaties in International Practice

A. Types of treaties

1. Bilateral – made by two countries

   a. Diplomatic Relations Treaties

   b. Investment Treaties

   c. Immigration Treaties

   d. Tax Treaties

   e. Economic and Technical Cooperation Treaties

   f. Mutual Legal Assistance in Criminal Matters Treaties.

2. Multilateral-Regional

   a. North American Free Trade Association ("NAFTA")

   b. Inter-American Convention on Letters Rogatory

   c. There are many regional treaties among countries in North America, Latin America and Europe, respectively.

3. Multilateral-Global

   a. Sometimes establish international institutions such as the World Trade Organization.

   b. United Nations Commission on International Trade Law ("UN-CITRAL") established a number of treaties relevant to commercial law issues.

4. Attached hereto as Exhibit 1 is a list of major treaties.

B. Treaties Under International Law

1. Vienna Convention on Law of Treaties, May 23, 1969 (included herewith as Exhibit 4)

   a. The Vienna Convention on Law of Treaties defines a "Treaty" as "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation." *Article 2*

   b. A State's consent to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed. *Article 11*

c. Reservations

i. A State's power to formulate a reservation to a treaty (that is, a "unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State") is restricted only by the following:

a. if the reservation is prohibited by the treaty

b. if the treaty provides that only specified reservations may be made and the reservation at issue is not one of the specified reservations

c. if the reservation is incompatible with the treaty's object and purpose. *Article 19*

ii. Other States' ability to accept or object to a State's reservation depends on the following:

a. if the reservation is expressly authorized by the treaty, it does not require acceptance by the other States (unless the treaty so provides)

b. if it appears from the limited number of negotiating States and the object and purpose of the treaty that the application of the treaty in its entirety among all parties is an essential condition of the consent of each one to be bound, then a reservation requires acceptance by all parties.

c. When a treaty is a constituent instrument of an international organization, a reservation requires acceptance of the competent organ of that organization, unless the treaty otherwise provides.

d. In all other cases (unless the treaty otherwise provides)

(i) Acceptance by another State of a State's reservation constitutes the reserving State as a party to the treaty in relation to the other State

if or when the treaty is in force for those States

(ii) Objection by another State to a State's reservation does not preclude the entry into force of the treaty as between the objecting and reserving states unless a contrary intention is definitely expressed by the objecting State

(iii) An act expressing a State's consent to be bound by the treaty and containing a reservation is effective as soon as at least one other State has accepted the reservation.

e. Unless the treaty otherwise provides, a reservation is considered accepted by a State if it raises no objection to the reservation by the later of the end of a period of twelve months after it was notified of the reservation or by the date upon which it expressed its consent to be bound. *Article 20*

iii. A reservation, once properly established with regard to another party to a treaty

a. for the reserving State as against another party, modifies the provision of the treaty to which the reservation applies to the extent of the reservation.

b. modifies those provisions to the same extent for the other party in its relations to the reserving State.

iv. The reservation does not modify the provisions of the treaty for the other parties to the treaty inter se. *Article 21*

d. Observance, Application and Interpretation of Treaties

i. Observance of Treaties

a. Treaties must be performed in good faith. *Article 26*

b. A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. However, a party may assert that its consent to enter into the treaty is invalidated if such consent was expressed in manifest violation of an internal law of fundamental importance. *Article 27*

ii. Application of Treaties

a. Treaties are non-retroactive. *Article 28*

iii. Interpretation of Treaties

a. The general rule is that a treaty will be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of the treaty's objective and purpose. *Article 31*

b. In addition to the treaty's context, subsequent agreements regarding the treaty or its application, subsequent practice in the application of the treaty and relevant rules of international practice may be considered. *Article 31*

c. Recourse to preparatory work on treaty allowed to resolve ambiguities. *Article 32*

e. Amendment, Termination and Suspension of Treaties

i. A treaty may be amended by agreement among the parties. *Article 39*

ii. Validity of a treaty or of a State's consent to be bound by a treaty can only be impeached through the application of the Vienna Convention. *Article 42*

iii. Invalidity, termination or suspension of a treaty does not impair the duty of a State to fulfill any obligation embodied in the treaty to which it would be subject under international law independent of the treaty *Article 43*.

iv. Potential grounds for invalidating a State's consent to be bound to a treaty include error, fraud, corruption,

coercion and treaties that conflict with a peremptory norm of general international law ("jus cogens") *Articles 48-52*

v. If a new rule of jus cogens emerges, any existing treaty in conflict with that norm becomes void and terminates. *Article 53*

vi. A treaty may be terminated or suspended either in conformity with its terms or by consent of all the parties. *Article 54*

C. Treaties Under United States Law

1. "Treaty" is an international agreement that has received the "advice and consent" of the Senate and that has been ratified by the President. U.S. Const., Art. II, Sect. 2.

2. Force of Treaties Under United States Law

a. All Treaties are the law of the land (that is, federal law). *Missouri v. Holland*, 252 U.S. 416 (1920)

b. Congressional law will always override a prior treaty under United States law. Frederic L. Kirgis, Treaties as Binding International Obligation, *ASIL Insights* (May 1997) (available on the American Society of International Law website at http://www.asil.org/insight9.cfm)

c. However, Congressional law does not override a prior treaty under international law. Thus, if decision makers in the United States obey a Congressional law that is inconsistent with a treaty obligation, the United States would be in violation of its obligations to its treaty partners under international law, unless there is a valid reason under international law for the violation. Some examples of valid reasons under international law include unforeseen, fundamentally changed circumstances or material breach by the other party to the treaty at issue. *Id.*

3. The Scope of the Constitutional Treaty Power

a. An unresolved and controversial issue is whether treaties can authorize Congress to legislate beyond the scope of its other enumerated powers. This issue was brought to the Supreme Court in Bond, a case concerning the Chemical Weapons Convention Implementation Act of 1998, the statute which implemented the Chemical Weapons Convention, a treaty aimed at eradicating the use of toxic chemicals as weapons of

war. *Bond v. United States*, 134 S. Ct. 2077, 2083 (2014). In *Bond*, the Implementation Act was used to prosecute a woman who used chemicals to inflict a minor injury upon her husband's lover. *Id.* at 2085. Her crime was a purely local one – that is, one committed entirely within one state – and therefore could not be made a federal crime unless it could have been construed as one relating to an enumerated power of the federal government. *Id.* at 2086 (citing United States v. Fox, 95 U.S. 670, 672). The government defended its prosecution by arguing the Implementation Act, as applied to the woman's offense, was a necessary and proper means of executing the Treaty Power contained in Article II of the U.S. Constitution. *Id.* at 2087. The woman countered by asserting to allow the application of the Implementation Act to her act would effectively give the government a federal police power it could use when enforcing treaties. *Id.*

The Court, however, declined to entertain this issue, invoking the doctrine of constitutional avoidance. It instead held the woman's act was not covered by the Implementation Statute because there was no clear indication in the text of the statute that Congress intended the statute to apply to purely local crimes. *Id.* at 2090.

4. Self-Executing vs. Non-Self Executing Treaties

   a. Self-executing treaties are those which are intended to become effective as judicially-enforceable domestic law without implementing legislation. Typically more specific provisions are more likely to be thought of as self-executing. A provision in a treaty may be self-executing under United States' law even if it would not be under the laws of the other States party to the treaty. Also, not all provisions in a treaty need be self-executing. Some provisions may be self-executing while others are not. Frederic L. Kirgis, International Agreements and U.S. Law, *ASIL Insights* (May 1997) (available on the American Society of International Law website at http://www.asil.org/insigh10.cfm)

5. Interaction of Treaties with Inconsistent State Laws

   a. Courts will not allow states within the United States to have laws that conflict with a treaty. *Missouri v. Holland*, 252 U.S. 416 (1920).

   b. In the case of a self-executing treaty, such treaty has the same effect as United States federal law and thus supersedes

inconsistent state law. Frederic L. Kirgis, International Agreements and U.S. Law, *ASIL Insights* (May 1997) (available on the American Society of International Law website at http://www.asil.org/insigh10.cfm)

c. In the case of a non-self-executing treaty, the United States would not permit a state within the Union to breach the United States' obligation to its treaty partners under international law and the inconsistent state law would be struck down as conflicting with the federal government's power over foreign affairs. *Id.*

D. Other Types of International Agreements

1. Congressional-Executive Agreements entered into with the concurrence of a simple majority of both houses

a. Prevailing view is that a Congressional-Executive Agreement is equivalent to a treaty under United States Law. Restatement Third of Foreign Relations Law of United States § 303.

2. Presidential Agreements entered into by the President without the participation of Congress

a Controversial – typically limited to President's authority as Commander in Chief and consist of armistice agreements and agreements incidental to the operation of foreign embassies in the U.S. Frederic L. Kirgis, International Agreements and U.S. Law, *ASIL Insights* (May 1997) (available on the American Society of International Law website at http://www.asil.org/insigh10.cfm)

E. How to Locate Relevant Treaties

1. When the United States is a Party

a. For text of treaties, electronic databases are the quickest method.

1. Lexis (INTLAW; USTRY)

2. Westlaw (USTREATIES)

b. For an exhaustive, searchable list of all treaties in force to which the United States is a party, consult the United States Department of State website at http://www.state.gov/s/l/treaty/tif/index.htm. This list includes not only treaties as defined in the United States constitution but also international agreements concluded by the Executive. Please note that this list is periodically updated

and is current as of January 1, 2014 (there is a 2013 edition and a 2014 supplement).

2. When the United States May Not Be a Party

a. European Union treaties are available on Westlaw (EU-TREATIES) and Lexis (INTLAW; ECTY).

b. United Nations publishes the United Nations Treaty Series which contains treaties registered, filed or recorded with the United Nations.

ATTACHMENTS

1. List of Important Treaties

2. International Practice Comparative Charts with Annotations (prepared by Michael W. Galligan, Florian Von Eyb, Johanna Schrimpf et al.)

3. Choosing New York Law as Governing Law for International Commercial Transactions (Michael W. Galligan)

4. Vienna Convention on the Law of Treaties

LIST OF IMPORTANT TREATIES

Multilateral Treaties

International Documents Treaties

Convention Abolishing the Requirement of Legalization of Foreign Public Documents (October 5, 1961) (Hague Apostille Convention) (signed and ratified by the United States)

International Commerce

United Nations Convention on Contracts for the International Sale of Goods (April 11, 1980) (signed and ratified by the United States)

United Nations Convention on the Assignment of Receivables in International Trade (December 12, 2001)(Security Interest) (signed but not ratified by the United States)

United Nations Convention on International Bills of Exchange and International Promissory Notes (December 9, 1988) (signed but not ratified by the United States)

United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (December 11, 1995) (signed but not ratified by the United States)

International Trade

World Trade Organization – created by the Uruguay Round of Negotiations under the General Agreement on Tariffs and Trade ("GATT"). See General Agreement on Tariffs and Trade: Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, April 15, 1994. See also Agreement on Trade-Related Aspects of Intellectual Property (United States is a member)

North American Free Trade Association (United States is a member)

Mercado Comun del Sur, common market among certain Latin American countries (established by Treaty Establishing a Common Market, Mar. 26, 1991) (United States is not a member)

International Transportation

United Nations Convention on the Carriage of Goods by Sea (March 31, 1978) (the "Hamburg Rules") (signed but not ratified by the United States)

United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (April 19, 1991) (signed but not ratified by the United States)

United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (December 11, 2008) (the "Rotterdam Rules") (neither signed nor ratified by the United States)

International Litigation and Arbitration

Convention on the Recognition and Enforcement of Foreign Arbitral Awards (United Nations Conference on International Commercial Arbitration) ("New York Convention") (United Nations 1958) (signed and ratified by the United States)

Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (March 18, 1970) (Hague Evidence Convention) (signed and ratified by the United States)

Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters (Nov. 15, 1965) (signed and ratified by the United States)

Inter-American Convention on Letters Rogatory (signed and ratified by the United States)

Convention on Choice of Court Agreements (June 30, 2005)(Hague Convention on Choice of Courts) (signed but not ratified by the United States)

International Wills and Trusts

Convention on the Law Applicable to Succession to the Estates of Deceased Persons (August 1, 1989) (not signed or ratified by the United States)

Convention on the Law Applicable to Trusts and on Their Recognition (July 1, 1985) (signed but not ratified by the United States)

Convention Providing a Uniform Law on the Form of an International Will (October 26, 1973) (signed and ratified by the United States) ("Washington Convention")

International Family Law

Convention on the Civil Aspects of International Child Abduction (October 25, 1980) (Hague Child Abduction Convention) (signed and ratified by the United States)

Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (May 29, 1993) (Hague Adoption Convention) (signed and ratified by the United States)

Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (October 19, 1996) (Hague Convention on Child Protection) (neither signed nor ratified by the United States)

Convention on the International Protection of Adults (January 13, 2000) (Hague Convention on International Protection of Adults) (neither signed nor ratified by the United States)

International Intellectual Property Treaties

World Intellectual Property Organization (created by the Convention Establishing the World Intellectual Property Organization, July 14, 1967) ("WIPO") (United States is a member)

The WIPO administers various intellectual property treaties, including the

Berne Convention for the Protection of Literary and Artistic Works (September 9, 1886) ("Berne Convention") (signed and ratified by United States)

Paris Convention for the Protection of Industrial Property (March 20, 1883) ("Paris Convention") (signed and ratified by the United States)

Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (October 26, 1961) ("Rome Convention") (neither signed nor ratified by the United States)

Trademark Law Treaty (October 27, 1994) (Geneva) (signed and ratified by the United States)

Madrid Agreement Concerning the International Registration of Marks (1891) ("Madrid Convention") (neither signed nor ratified by the United States)

Singapore Treaty on the Law of Trademarks (March 27, 2006) (signed and ratified by the United States)

Enforcement of Judgments

European

Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (September 27, 1968) ("Brussels Convention") (European Union treaty – has been called "Europe's full faith and credit clause") (neither signed nor ratified by the United States)

Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (September 16, 1988) ("Lugano Convention") (neither signed nor ratified by the United States)

Latin American

Inter-American Convention On Extraterritorial Validity Of Judgments And Arbitral Awards (Montevideo, 1979) (neither signed nor ratified by the United States)

Inter-American Convention On Jurisdiction In The International Sphere For The Extraterritorial Validity Of Foreign Judgments (La Paz, 1984) (neither signed nor ratified by the United States)

Public International Treaties

Law of War Conventions

Convention – Respecting the Laws and Customs of War on Land (October 18, 1907) ("Hague Convention") (signed and ratified by the United States)

"Geneva Conventions" on Law of War

Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949(signed and ratified by the United States)

Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, August 12, 1949 (signed and ratified by the United States)

Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949(signed and ratified by the United States)

Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949(signed and ratified by the United States)

Human Rights

International Covenant on Civil and Political Rights (Dec. 16, 1966) (signed and ratified by the United States)

International Covenant on Economic, Social and Cultural Rights (Dec. 16, 1966) (signed and ratified by the United States)

Convention on the Elimination of all Forms of Discrimination against Women (December 18, 1979) (signed but not ratified by the United States)

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (December 10, 1984) (signed and ratified by the United States)

Convention on the Prevention and Punishment of the Crime of Genocide (December 9, 1948) (signed and ratified by the United States)

American Convention on Human Rights ("Inter-American Convention on Human Rights") (1978) (signed but not ratified by the United States)

International Environmental Treaties

Kyoto Protocol To The United Nations Framework Convention On Climate Change (neither signed nor ratified by the United States)

International Organizations Treaties

Universal Postal Union (Treaty Relative to the Formation of a General Postal Union, Oct. 9, 1874) (United States is a member).

International Civil Aviation Organization (created by the Convention on International Civil Aviation (December 7, 1944)) governs civil aviation over the high seas (United States is a member)

North Atlantic Treaty Organization ("NATO") to fulfill the North Atlantic Treaty (April 4, 1949) (United States is a member)

Convention on the Organization for Economic Cooperation and Development, December 14, 1960 which created the Organization for Economic Cooperation and Development (originally only consultative and advisory body but has emerged as a rulemaking forum in the last twenty years, developing dispute resolution mechanisms as well) (United States is a member)

International Centre for Settlement of Investment Disputes (created by Convention on the Settlement of Investment Disputes between States and Nationals of other States (March 18, 1965) (ICSID)) (United States is a member).

Maritime Treaties

United Nations Convention on the Law of the Sea (December 10, 1982) (neither signed nor ratified by the United States)

Bilateral Treaties

Investment Treaties Between the United States and Other Nations

Albania
Argentina
Armenia
Azerbaijan
Bahrain
Bangladesh
Belarus
Bolivia
Bulgaria
Cameroon
Croatia
Czech Republic
Democratic Republic of the Congo
Ecuador
Egypt
El Salvador
Estonia
Georgia

Grenada
Haiti
Honduras
Jamaica
Jordan
Kazakhstan
Kyrgyzstan
Latvia
Lithuania
Moldova
Mongolia
Morocco
Mozambique
Nicaragua
Panama
Poland
Romania
Russian Federation
Rwanda
Senegal
Slovakia
Sri Lanka
Trinidad and Tobago
Tunisia
Turkey
Ukraine
Uruguay
Uzbekistan

Friendship, Navigation and Commerce Treaties Between The United States and Other Nations

Austria
Belgium
Brunei
Columbia
Costa Rica
Denmark
Ethiopia
Finland
France
Germany
Greece
Ireland
Israel
Italy
Japan
Korea
Liberia
Luxembourg

Malta
Nepal
Netherlands
Norway
Oman
Pakistan
Paraguay
Spain
Suriname
Switzerland
Taiwan
Thailand
Togo
Yemen

Tax Treaties Between the United States and Other Nations

1. Income Tax Treaties (copies of the treaties are available online at http://www.irs.gov/businesses/international/article/0,,id=96739,00.html).

Armenia
Australia
Austria
Azerbaijan
Bangladesh
Barbados
Belarus
Belgium
Bulgaria
Canada
China
Cyprus
Czech Republic
Denmark
Egypt
Estonia
Finland
France
Georgia
Germany
Greece
Hungary
Iceland
India
Indonesia
Ireland
Israel
Italy
Jamaica
Japan

Kazakhstan
Korea
Kyrgyzstan
Latvia
Lithuania
Luxembourg
Malta
Mexico
Moldova
Morocco
Netherlands
New Zealand
Norway
Pakistan
Philippines
Poland
Portugal
Romania
Russia
Slovak Republic
Slovenia
South Africa
Spain
Sri Lanka
Sweden
Switzerland
Tajikistan
Thailand
Trinidad
Tunisia
Turkey
Turkmenistan
Ukraine
Union of Soviet Socialist Republics (USSR)
United Kingdom
Uzbekistan
Venezuela

2. Estate and Gift Tax Treaties

Australia
Austria
Denmark
Finland
France
Germany
Greece
Ireland
Italy
Japan

Netherlands
South Africa
Switzerland
United Kingdom

Totalization Treaties Between the United States and Other Nations

Australia
Austria
Belgium
Canada
Chile
Czech Republic
Denmark
Finland
France
Germany
Greece
Hungary
Ireland
Italy
Japan
Korea (South)
Luxembourg
Netherlands
Norway
Poland
Portugal
Spain
Sweden
Switzerland
United Kingdom

PHILLIPS NIZER LLP

INTERNATIONAL PRACTICE COMPARATIVE CHARTS

with Annotations

May 20, 2018

Prepared by

Michael W. Galligan, Partner

and

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INTERNATIONAL PRACTICE COMPARATIVE CHARTS*

CONTRACT LAW

		NY LAW	ENGLISH	FRENCH	GERMAN	CISG	UNIDROIT	PECL
1.	Consideration	Yes	Yes	No	No	No	No	No
2.	Promissory Estoppel (Reliance) as Independent Cause of Action in Contract	Yes	No	No	Yes	Yes	Yes	Yes
3.	Gift Contracts Enforceable	No	No	Yes	Yes	N/A	N/A	Yes
4.	Writing Frequently Required for Enforceable Contract (as a Matter of Substantive Contract Law) Other Than Sale of Real Property and Certain Consumer Contracts	Yes	No	No	No	No	No	No
5.	Extrinsic Evidence To Establish Missing or Additional Terms of Written Contract	No	No	Yes	Yes	Yes	Yes	Yes
6.	Supply Missing Term of Contract on Basis of Commercial Practice	Yes	Yes	Yes	Yes	Yes	Yes	Yes
7.	Extrinsic Evidence of Collateral Agreements to Construe Written Contract Lacking Merger Clause	Yes	Yes	Yes	Yes	Yes	Yes	Yes
8.	Parties Permitted to Exclude Extrinsic Evidence of Collateral Agreements in Construction of Written Contract	Yes	Yes	No	Yes	No	Yes	Yes
9.	"Formation of Contract:" for Sale of Goods:	No	Yes	Yes	Yes	Yes	Yes	Yes

* Assembled by Michael W. Galligan, Partner, Phillips Nizer LLP

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		NY LAW	ENGLISH	FRENCH	GERMAN	CISG	UNIDROIT	PECL
	Agreement on all Material Terms Required"							
10.	"Formation of Contract:" Agreement on All Non-Material Terms Required	No	Yes	Yes	No	No	No	No
11.	Good Faith as an Implied Term of Contracts, Generally	Yes	No	Yes	Yes	No	Yes	Yes
12.	Good Faith in Negotiation of Contracts	No	No	Yes	Yes	No	Yes	Yes
13.	Excuse of Impossibility	Yes	Yes	Yes	Yes	Yes	Yes	Yes
14.	Excuse of Hardship between private parties	No	No	Yes	Yes	Yes	Yes	Yes
15.	Excuse of Hardship between public and private parties	No	No	Yes	Yes	Yes	Yes	Yes
16.	"Highest" Good Faith for Business Partnerships	Yes	Yes	Yes	Yes	N/A	N/A	N/A
17.	Third Party Beneficiaries Pre-1999	Yes	No	Yes	Yes	No	Yes	N/A
18.	Third Party Beneficiaries Post-1999	Yes	Yes	Yes	Yes	No	Yes	Yes
19.	Perfect Tender Rule (Between Merchants)	Yes	Yes	Yes	No	No	N/A	N/A
20.	Unilateral Grant of Extra Time to Complete Performance, Subject to Contract Avoidance	No	No	No	Yes	Yes	Yes	Yes
21.	Passage of Title and Passage of Risk Coincide	Yes	No	No	Yes	N/A	N/A	N/A
22.	Contract Damages (excluding Product Liability) – Strict Liability	Yes	Yes	No	No	Yes	Yes	Yes

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		NY LAW	ENGLISH	FRENCH	GERMAN	CISG	UNIDROIT	PECL
23.	Contract Damages (including Product Liability) – Fault	No	No	No	Yes	No	Yes	No
24.	Damages for Loss Foreseeable at Time of Contract Was Signed	Yes	Yes	Yes	No	Yes	Yes	Yes
25.	Damages under Contract Law of Breaching Party Offset by Non-Breaching Party's Contribution to Breach ("Comparative Negligence")	No	No	Yes	Yes	No	Yes	Yes
26.	Requirement of Mitigation or "Cover" by Non-Breaching Party	Yes	Yes	No	Yes	Yes	Yes	Yes
27.	Specific Performance Limited to Real Estate or Unique Goods	Yes	Yes	No	No	No	No	No
28.	Liquidated Damages As Penalty	No	No	Yes	Yes	No	No	Yes
29.	Liquidating Damages as Approximation of Damages ("Reasonable")	Yes	Yes	Yes	Yes	Yes	Yes	Yes
30.	Anticipatory Breach	Yes	Yes	No	Yes	Yes	Yes	Yes
31.	Other Grants for Termination of Contract	Yes	Yes	Yes	Yes	Yes	Yes	Yes

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COMMERCIAL LAW

		NEW YORK	ENGLISH	FRENCH	GERMAN
1.	Negotiable Instruments: Protection Against Fraudulent Endorser	Yes	Yes	No	No
2.	Letters of Credit: Protection Against Fraudulent Demands	Yes	Limited	Yes	Yes
3.	Bills of Lading: Remedy for Carrier if Master Does Not Receive the Goods	Yes	No	Yes	Yes
4.	Security Interests: Central Registration	Yes	Yes but limited	No	No
5.	Floating Lien: Creditor Can Appoint Receiver	No	Yes	No	No

CIVIL PROCEDURE

		NEW YORK	ENGLISH	FRENCH	GERMAN
1.	Pre-Trial Deposition To Preserve Evidence	Yes	Yes	No	No
2.	Pre-Trial Deposition To Discover or Clarify Evidence	Yes	No	No	No
3.	General Document Demands	Yes	Yes	No	No
4.	Parties Appoint Experts	Yes	Yes	No	No
5.	Court Appoints Experts	No	Yes	Yes	Yes
6.	Formal "Direct" Presentation of Claimant's Case Generally Required	Yes	Yes	No	No
7.	Cross-Examination by Parties Permitted	Yes	Yes	No	Yes

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NEW YORK CONTRACT LAW

		NY LAW	ANNOTATIONS
1.	Consideration	Yes	"[W]ithout consideration, there is no contract." See Express Industries v. Elsevier Sciences, Ltd., 927 F.Supp.2d. 2d 688, 703 (S.D.N.Y. 1996).
2.	Promissory Estoppel (Reliance) as Independent Cause of Action in Contract	Yes	See Section 90 of the First Restatement of Contracts. Although Section 90 nowhere mentions the term 'promissory estoppel,' courts invoking the doctrine often refer to that section to determine the elements of a valid claim. These are the core requirements: a promise, reasonably foreseeable reliance, actual inducement of reliance by the promise, and achievement of justice only through enforcement of the promise. See Advanced Refractory Technologies, Inc. v. Power Auth. of New York, 568 N.Y.S.2d 986 (App. Div. 1991). It should be noted that the N.Y. Court of Appeals has itself never formally applied relief on this basis in a purely commercial context. Glen Banks, New York Contract Law, New York (2017), Section 4:31.
3.	Gift Contracts Enforceable	No	A contract that does not require performance by each party is unenforceable for lack of consideration. See Baker's Aid, a Div. of M. Rasubvogel Co., Inc. v. Hussmann Foodservice Co., 730 F. Supp. 1209, 1219, 1990-1 Trade Cas. (CCH) P 68947 (E.D.N.Y. 1990).
4.	Writing Frequently Required for Enforceable Contract (as a Matter of Substantive Law) other than for Sale of Real Property and Certain Consumer Contracts	Yes	New York requires some written evidence as an additional requirement for the enforcement of many contracts. These include contracts that, of their nature, take more than a year to perform, contracts for the sale of real property, agreements regarding the debt of another and promises to pay a debt discharged in bankruptcy, finder's fees and fees for services payable other than to attorneys, and real estate brokerage fee arrangements. In addition, **NY UCC Section 2-201(1)** requires a writing in the case of contracts for the sale of goods in excess of $500.
5.	Extrinsic Evidence To Establish Missing or Additional Terms of Written Contract	No	New York law prohibits, in the case of a dispute about the terms of a written agreement, recourse to oral evidence of prior negotiations, representations and inconsistent understandings. New York is said to have a hard parol evidence rule as expressed in the "four corners" principle, under which a court must decide whether the terms of a contract are ambiguous on the basis of its analysis of the document itself and may only consider extrinsic evidence (written or oral) if it determines, as a matter of law and not of fact, that one or more of the contract terms are ambiguous. See Glen Banks, New York Contract Law, New York (2017), Sections 9:17, 9:28.

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6.	Supply Missing Term of Contract on Basis of Commercial Practice	Yes	Courts can supply the missing term based on custom in the relevant industry or reasonable commercial practice in that area of business or the past practice of the parties themselves. See Cobble Hill Nursing Home, Inc v Henry and Warren Corp., 74 N.Y. 2d 475, 438, 548 N.Y.S. 2d 920, 923, 548 N.E. 2d 203 (1989).
7.	Extrinsic Evidence of Collateral Agreements to Construe Written Contract Lacking Merger Clause	Yes	At least in the absence of a merger or 'entire agreement' clause, when an essential term is missing, there is a general trend in New York law, perhaps encouraged by the policies embedded in the NY UCC, towards supplying the missing term from evidence of the party's conduct and general commercial practice in the relevant field of trade or business. See Point Developers Inc. v. F.D.I.C., 921 F. Supp. 1014 (E.D. N.Y. 1996); Glen Banks, New York Contract Law, New York (2017), Section 8:35.
8.	Parties Permitted to Exclude Extrinsic Evidence of Collateral Agreements in Construction of Written Contract	Yes	New York courts give high protection against extrinsic evidence (including collateral agreements) regarding the terms of a contract if the parties have agreed to merge or integrate their agreement. Such provisions are given almost exclusive deference by New York courts. See, e.g., Caiolo v. Citibank, N.A., New York, 295 F.3d 312, 317–18 (2d Cir. 2002).
9.	"Battle of Forms" for Contracts for Sale of Goods: "Mirror Image" as to material terms	No	The NY UCC provides in **Section 2-207(1)** that *"[a] definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms."* Under this approach, acceptance of an offer to buy by delivery of the goods, even if the delivery is accompanied by different terms and conditions, represents an acceptance of the offer so that a contract has been established. The statute does not distinguish between material and non material terms.
10.	"Battle of Forms" for Contract for Sale of Goods – "Mirror Image" as to non-material terms	No	See above.
11.	Good Faith as Implied Term of Contracts Generally	Yes	New York courts were the first in the United States to introduce the implied covenant of good faith into contract law jurisprudence. See New York Central Iron Works Co., v. United States Radiator Co., 174 N.Y. 331 (1903). **NY UCC Section 1-203** provides that *"[e]very contract or duty within this Act imposes an obligation of good faith in its performance or enforcement."* **NY UCC Section 2-103** defines good faith for purposes of the sale of good as *"honesty in fact and the observance of reasonable commercial standards*

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			of fair dealing in the trade".
12.	Good Faith in Negotiation of Contracts	No	While New York law may be more open to enforcing express agreements to negotiate in good faith where a contract already exists or where sufficient terms have already been agreed to, New York law does not seem inclined to extend the duty of good faith and fair dealing in any significant way outside the contours of concluded contracts, see American Broadcasting Companies, Inc. v. Wolf, 52 N.Y. 2d 394 (1981); Baird v. Gamble Brothers, 64 F.2d 344 (2d Cir. 1933). Certain "binding commitment letters" may give rise to a duty to negotiate in good faith to conclude the "open" terms of the contract. See Teachers Ins. and Annuity Ass'n of America v. Tribune Co., 670 F. Supp. 491 (S.D.N.Y. 1997).
13.	Excuse of Impossibility	Yes	The Court of Appeals for the Second Circuit stated that *"Impossibility may be equated with an inability to perform as promised due to intervening events such as an act of state or destruction of the subject matter of the contract.* U.S. v. General Douglas MacArthur Senior Village, Inc., 508 F.2d 377, 381 (2d Cir. 1974). Such acts or events must in general be unforeseeable. Glen Banks, New York Contract Law, New York (2017) Section 20:4.
14.	Excuse of Hardship between private parties	No	The doctrines of impossibility and frustration of purpose generally offer very little relief to a party for whom performance may have become extremely burdensome or ruinous because of the limited circumstances to which they apply, see no 13.
15.	Excuse of Hardship between public and private parties	No	New York Law does not make a distinction on this basis.
16.	"Highest" Good Faith for Business Partnerships	Yes	There is a very high standard of conduct New York law imposes on business partners in regard to each other. This standard amounts to the duty of a fiduciary and was memorably articulated by Justice Benjamin Cardozo, then sitting as a Judge of the New York Court of Appeals, when he wrote: *"Joint venturers, like co-partners, owe to one another, while the enterprise continues, the duty of the finest loyalty."* Meinhard v. Salmon, 249 NY 458, 463-464 (1928).
17.	Third Party Beneficiaries Pre-1999	Yes	In 1985, the Court of Appeals adopted the principles put forth in **Section 302**

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			of the Restatement (Second) of Contracts regarding third party beneficiaries. Under this test, a third-party beneficiary has the burden of demonstrating that *(1) a valid and binding contract exists, (2) that it was an intended beneficiary of the contract, and (3) that the benefit to it is sufficiently immediate to indicate that the contracting parties intended to compensate the third party if it lost its benefit.* See Fourth Ocean Putnam Corp. v. Interstate Wrecking Co., Inc., 66 N.Y.2d 38 (1985) and State of California Public Employees' Retirement System v. Sherman & Sterling, 95 N.Y.2d 427 (2000).
18.	Third Party Beneficiaries Post-1999	Yes	See above.
19.	Perfect Tender Rule (Between Merchants)	Yes	See NY UCC **Section 2-601(a);** *"if the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may (a) reject the whole; or (b) accept the whole; or (c) accept any commercial unit or units and reject the rest."*
20.	Unilateral Grant of Extra Time to Complete Performance, Subject to Contract Avoidance	No	This is a remedy not available under NY law.
21.	Passage of Title and Passage of Risk Coincide	Yes	**NY UCC 2-401(2)** provides a presumptive rule that title passes *"at the time and place at which the seller completes his performance with reference to the physical delivery of the goods."*
22.	Contract Damages (excluding Product Liability)– Strict Liability	Yes	"Contract liability is strict liability." This core regime is based on two key prongs: (1) the promisor is liable to the promisee for breach, and that liability is unaffected by the promisor's exercise of due care or failure to take efficient precautions; and (2) the promisor's liability is unaffected by the fact that the promisee, prior to the breach, has failed to take cost-effective precautions to reduce the consequences of nonperformance. See Restatement (Second) of Contracts, Chapter 11, Introductory Note at 309–12 (1981). E.g., breaking a promise creates liability even in the absence of fault, and the remedies available to the victim are not dependent on the breaching party's culpability.
23.	Contract Damages (including Product Liability)– Fault	No	See above. Fault is not a relevant issue under New York Law; *"[w]hen a contract is breached, the non-breaching party may assert a claim to recover*

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			damages for the loss it suffered as a result of the breach." Banks, NYCL 22:1.
24.	Damages for Loss Foreseeable at Time of Contract was Signed	Yes	New York law permits recovery of damages for a breach of contract in the form of lost profits if: 1. the damages were caused by the breach; 2. the claimed loss can be proved with reasonable certainty or at least the establishment of a stable foundation for a reasonable estimate of the amount of damages; and 3. the particular damages were within the contemplation of the parties to the contract at the time it was executed– the foreseeability rule. Glen Banks, New York Contract Law, New York (2017), Section 23:5. Under the foreseeability rule, the breaching party is legally responsible for the risks it foresaw or reasonably should have foreseen when the contract was executed. The plaintiff need not show that the breaching party foresaw either the specific breach that occurred or the specific manner in which the loss came about, see e.g., Honeywell International Inc. and Gem Microelectronic Materials, L.L.C., v. Air Products & Chemicals, Inc., 872 A.2d 944 (Supreme Court of Delaware 2005, New York Law).
25.	Damages under Contract Law of Breaching Party Offset by Non-Breaching Party's Contribution to Breach ("Comparative Negligence")	No	This concept is only relevant in tort law.
26.	Requirement of Mitigation or "Cover" by Non-Breaching Party	Yes	Mitigation requires a showing that plaintiff took reasonable steps to cut its losses, not that plaintiff did what the defaulting defendants would have had it do, or what in hindsight seems most effective to reduce the defaulting defendants' damages. See e.g., Carrols Equities Corp. v. Villnave, 57 A.D.2d 1044, 1045; 395 N.Y.S.2d 800, 803 (4th Dep't 1977).
27.	Specific Performance Limited to Real Estate or Unique Goods	Yes	New York law disfavors the remedy of specific performance except in the case of real property sales; however, private parties may stipulate to the availability of the remedy of specific performance provided the criteria for determining when and how such a remedy should be administered are carefully delineated in the parties' contract Sokoloff v. Harriman Estates Development Corp., 96 N.Y. 2d 409, 415, 729 N.Y.S. 2d 425, 429, 754

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		NY LAW	ANNOTATIONS
			N.E.2d 184 (2001).
28.	Liquidated Damages As Penalty	No	Under New York law, LDs are enforceable as a remedy for breach of contract if: (1) the parties intended to liquidate damages and not to provide for a penalty; (2) the LD clause fixes an amount that bears a reasonable relationship to the anticipated loss suffered by the non-breaching party; and (3) actual loss is difficult to ascertain or incapable of estimation. See Vernitron Corp. v CF 48 Associates, 478 N.Y.S.2d 933, 934 (N.Y. App. Div. 1984).
29.	Liquidating Damages as Approximation of Damages ("Reasonable")	Yes	New York courts generally recognize and give effect to liquidated damage clauses when the damages represent reasonable estimates of the cost of breach determined as of the date of the contract, especially under circumstance where establishing the cost of breach may not be easy. McKinley Associates, LLC v. McKesson HBOC, Inc., 110 F. Supp. 2d 169, 178 (W.D. N.Y. 2000). Glen Banks, New York Contract Law, New York (2017), Section 22:63.
30.	Anticipatory Breach	Yes	Under the doctrine of anticipatory breach, where one party clearly and unequivocally repudiates his contractual obligations under a contract prior to the time performance is required, the non-repudiating party may deem the contract breached and immediately sue for damages; see American List Corp. v. U.S. News & World Report, 75 NY2d 38, 550 NYS2d 590, 549 NE2d 1161 [1989].
31.	Other Grounds for Termination of Contract	Yes	In the case of material breach by a party to a contract, the non-breaching party must elect either to let the contract continue or to terminate the contract and sue for damages. Marathon Enterprises, Inc. v. Schroter GMBH & Co, 2003 WL 355238 (S.D.N.Y. 2003); see also Glen Banks, New York Contract Law, New York (2017), Section 17:19. See UCC Section 2-106. *(3) "Termination" occurs when either party pursuant to a power created by agreement or law puts an end to the contract otherwise than for its breach. On "termination" all obligations which are still executory on both sides are discharged but any right based on prior breach or performance survives.*

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COMMERCIAL LAW

		NY LAW	ANNOTATIONS
1.	Negotiable Instruments: Protection Against Fraudulent Endorser	Yes	Under the NY UCC, at least in regard to instruments made out to a payee, a thief can never be a holder because an individual qualifies as a holder only by showing that the person is in possession of the instrument and that the order or promise on the bill "runs" to that person. Since, by definition, the instrument cannot be made to the order of a person who is not the payee, the thief cannot be a holder within the meaning of NY UCC **Section 1-102(20)** and therefore the thief cannot endorse the instrument to someone else within the meaning of **NY UCC Section 3-302.** Chan-Hung Chung, "A Holder in Due Course of Commercial Paper Under the UCC and a Good Faith Purchaser of Bills and Checks Under the Geneva Uniform Law," 18 Korean Journal of Comparative Law (1990), p. 1.
2.	Letters of Credit: Protection Against Fraudulent Demands	Yes	Following the lead of the Supreme Court of New York County in Sztejn v. J. Henry Schroder Banking Corp et al., 31 NYS 2, 631-34 (Sup. Ct. N.Y. Cty., 1941) New York courts have made an exception to the "abstraction" of the letter of credit from other circumstances affecting the applicant or beneficiary where a bank has received notice of actual fraud on the applicant. There, the Court distinguished between a breach of warranty and an intentional failure to deliver the goods and denied a defendant's motion to dismiss the claim of the buyer to stop the payment where there was credible evidence that the bill of lading had been falsified.
3.	Bills of Lading: Remedy for Carrier if Master Does Not Receive the Goods	Yes	In New York, bills of lading are governed by NY UCC **Article 7**. The Comments to UCC Section 7-507 provides that the carrier who issues a bill of lading is liable for the bill when the carrier's agent has received no goods. See also Daniel Murray, "History and Development of the Bill of Lading," University of Miami Law Review, Vol. 37:689, p. 689.
4.	Security Interests: Central Registration	Yes	NY UCC **Article 9** provides a uniform filing system for perfecting security interests by providing that a secured party may register its security interest at a designated depositary and need not give individual notice to all actual or suspected creditors of the debtor. See McGuire Woods, "Security Interests in Accounts Receivable and Inventory in

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			Common Law and Civil Law Jurisdictions.
5.	Floating Lien: Creditor Can Appoint Receiver	No	NY UCC **Article 9** provides for various forms of self-help in the event a security interest holder needs to execute against the collateral, but not in the form of a right to appoint an receiver. See McGuire Woods, "Security Interests in Accounts Receivable and Inventory in Common Law and Civil Law Jurisdictions."

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CIVIL PROCEDURE

		NY LAW	ANNOTATIONS
1.	Pre-Trial Deposition To Preserve Evidence	Yes	New York procedure rules require that the parties should have access to all relevant, non-privileged documents, including those of their adversary. See the rules of deposition, which are set out in *the uniform rules for the conduct of depositions.*
2.	Pre-Trial Deposition To Discover or Clarify Evidence	Yes	See Hon. Harold Baer, Jr.; Robert C. Meade, Jr., Esq., "Depositions: Practice and Procedure in Federal and New York State Courts," Second Edition.
3.	General Document Demands	Yes	Under the rules of procedure of New York, a party can obtain access to a range of documents without which it is unlikely the fraud could be discovered or proven. See Caslav Pejovic, " Civil Law and Common Law," Section IV(C).
4.	Parties Appoint Experts	Yes	Under New York law, the court does not generally choose a single expert but the parties choose their own experts, with the court having the opportunity to hear the testimony and advise of each side's expert. See Federal Rules of Evidence, Rule 706.
5.	Court Appoints Experts	No	See above.
6.	Formal "Direct" Presentation of Claimant's Case Generally Required	Yes	Under New York Law, oral testimony by witnesses is usually a key component in the proof because affidavits do not present the opportunity for cross-examination nor for the exploration of questions that the litigating parties or the judges themselves may think important to resolve the matter. See Caslav Pejovic, " Civil Law and Common Law: Two Different Paths Leading To the Same Goal," Section IV(E).
7.	Cross-Examination by Parties	Yes	Cross-examination is available in New York courts to test written evidence. See Hon. Harold Baer, Jr.; Robert C. Meade, Jr., Esq., "Depositions: Practice and Procedure in Federal and New York State Courts," Second Edition.

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ENGLISH LAW CONTRACT LAW

		ENGLISH	ANNOTATIONS
1.	Consideration	Yes	English law requires that an agreement, to be valid and enforceable, must reflect some exchange of value which can consist of promises or performances- that constitutes consideration. See Thomas v Thomas (1842) 2 QB 851, 859 and Currie v Misa [1875] LR 10 Ex 153, Lush LJ.
2.	Promissory Estoppel (Reliance) as Independent Cause of Action in Contract	No	Under English Law, promissory estoppel has been thought to be incapable of raising an independent cause of action, so that one may only plead another party is estopped from enforcing their strict legal rights as a 'shield', but cannot bring a cause of action out of estoppel as a 'sword', see eg Combe v Combe [1952] EWCA Civ 7. There is an exception for real property contracts ("proprietary estoppel").
3.	Gift Contracts Enforceable	No	A gratuitous promise is not binding for lack of consideration. See no 2. There is an exception under English law for contracts "by Deed."
4.	Writing Frequently Required for Enforceable Contract (as a Matter of Substantive Law) other than for Sale of Real Property and Certain Consumer Contracts	Generally no	English law has eliminated the requirement of a writing for all contracts except real estate contracts. See Section 2 of the Law of Property Act 1989: *"A contract for the sale or other disposition of an interest in land can only be made in writing (..)."*
5.	Extrinsic Evidence To Establish Missing or Additional Terms of Written Contract	No	Under English Law, the focus of the interpretation is the document itself. When a contract is written down, there is a basic presumption that the written document will contain all the terms of an agreement, see City and Westminster Properties (1934) Ltd v Mudd [1959] Ch 129.
6.	Supply Missing Term of Contract on Basis of Commercial Practice	Yes	In Mannai Investment Co Ltd v. Eagle Star Life Assurance Co Ltd [1997] AC 749 (HL) Lord Steyn emphasized that *"the rules of interpretation of written contracts in a commercial context, must reflect commercial expectations."*
7.	Extrinsic Evidence of Collateral Agreements to Construe Written Contract Lacking Merger Clause	Yes	In the absence of a merger or 'entire agreement' clause, when an essential term is missing, courts tend to supply the missing term from evidence of the party's conduct and general commercial practice in the relevant field of trade or business. See Investors Compensation Scheme Ltd v. West Bromwich

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		ENGLISH	ANNOTATIONS
			Building Society, [1985] AC 191, 201, discussed in Cartwright, Contract Law, pp. 186-188.
8.	Parties Permitted to Exclude Extrinsic Evidence of Collateral Agreements in Construction of Written Contract	Yes	If the parties have included in their written contract an 'entire agreement' clause, such as one that provides that 'this agreement constitutes the entire agreement between the parties', there cannot be any claim based on collateral contract. See Exxonmobil Sales and Supply Corporation v Texaco Ltd [2003] EWHC (1964).
9.	"Battle of Forms" for Contracts for Sale of Goods: "Mirror Image" as to material terms	Yes	In the case of a 'battle of the forms' it is still necessary somehow to find a contract by finding an offer which was accepted, based on the strict 'offer and acceptance' analysis, to determine whether a contract was concluded. See Gibson v Manchester City Council [1979] 1 WLR 294 (HL) 297.
10.	"Battle of Forms" for Contract for Sale of Goods – "Mirror Image" as to non-material terms	Yes	See no 9; Gibson v Manchester City Council [1979] 1 WLR 294 (HL) 297. The majority of the courts still apply the traditional approach mentioned above, under which an acceptance of an purported offer does not constitute an effective acceptance if the acceptance is subject to the change of *any terms* proposed in the offer, but rather is viewed as a new offer proposed to the original offeror.
11.	Good Faith as Implied Term of Contracts Generally	No	English law to date steadfastly declines to adopt the principle of good faith into its contract law. English courts, it is said, have a reluctance to *"generalize abstract principles"* and a preference *"to work with particular instances of duty which can be identified in particular cases."* John Cartwright, Contract Law: An Introduction to the English Law of Contract for the Civil Lawyer, p. 59. Secondly, English judges have expressed concerns *"about the lack of certainty in defining the duty of good faith in the context of the relationship between contracting parties"* – particularly as this may apply to negotiations between parties before agreement is reached. Cartwright, Contract Law, p. 60.
12.	Good Faith in Negotiation of Contracts	No	See no 11. Also, under English law, a party generally has the right to withdraw from negotiations at any time up to the point where a contract or agreement has been reached. See Walford v Miles, [1992] AC 128 (HL) 138.
13.	Excuse of Impossibility	Yes	English courts developed the doctrine of *frustration.*

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		ENGLISH	ANNOTATIONS
			"In contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance." Taylor v. Caldwell, [1863] 3 B & S 826; 122 ER 309.
14.	Excuse of Hardship between private parties	No	Under English Law, hardship is only possible in case of a *'material'* change of circumstance. This requires *"an adverse change of very considerable significance striking at the heart of the purpose of the transaction, analogous...to something that would justify frustration of a legal contract."* The rules governing changes of circumstances during the lifetime of a contract are therefore very limited. See Kirsten Birkett, "Untying the Knot: Material Adverse Change Clauses" and Suhrud Mehta (Milbank), "Material Adverse Change Clauses in Adverse Markets."
15.	Excuse of Hardship between public and private parties	No	English Law does not make a distinction on this basis.
16.	"Highest" Good Faith for Business Partnerships	Yes	The law of England knows the duty of business partners to each other as *'uberrimae fidei;'* meaning that in some cases the courts will require a party to act in "utmost good faith"- not because of the type of contract in question, but because of the type of relationship which already exists between the parties at the time when the contract is negotiated. Cartwright, Contract Law at 168.
17.	Third Party Beneficiaries Pre-1999	No	England overcame the traditional common law aversion to providing third parties the possibility of having rights under contracts by enacting "The Contracts (Rights of Third Parties) 1999." The Act provides that, subject to the provisions of the Act, *"...a person who is not a party to a contract (a "third party") may in his own right enforce a term of the contract if (a) the contract expressly provides that he may, or (b) subject to Section (2), the term purports to confer a benefit on him."*
18.	Third Party Beneficiaries Post-1999	Yes	See above.

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		ENGLISH	ANNOTATIONS
19.	Perfect Tender Rule (Between Merchants)	Yes	Where commercial parties of equal bargaining power wish to insist on circumstances in which a deposit will be forfeit and insist precisely on the letter of their deal, the courts will not interfere, see Union Eagle Ltd v Golden Achievement Ltd [1997] UKPC 5, [1997] AC 514.
20.	Unilateral Grant of Extra Time to Complete Performance, Subject to Contract Avoidance	No	No
21.	Passage of Title and Passage of Risk Coincide	No	Under English law, while title often passes on conclusion of the contract, passage of risk follows when the goods are transferred to the buyer. Sale of Goods Act (1979), Section 20(1).
22.	Contract Damages (excluding Product Liability)– Strict Liability	Yes	English Law distinguishes between intentional and non intentional torts in its rule for remoteness of damage; but not in contract. The remedies of damages for breach of contract is designed to reflect the economic risk allocation as it was settled by the parties when they entered into the contract. It does not reflect the 'wrongfulness' of the breach. See Cartwright, Contract Law, p. 271.
23.	Contract Damages (including Product Liability)– Fault	No	See above.
24.	Damages for Loss Foreseeable at Time of Contract Was Signed	Yes	See Hadley v. Baxendale, (1854) 9 Ex. 341. Under the rule of Hadley v. Baxendale, a breaching party's liability includes not only loss that would ordinarily flow 'in the normal course of things' from a breach at the time the contract was entered but also loss that follows in the ordinary course from breach due to special circumstances known to the parties at the time the contract was formed.
25.	Damages under Contract Law of Breaching Party Offset by Non-Breaching Party's Contribution to Breach ("Comparative Negligence")	No	Comparative negligence is not generally available as a defense to a claim for breach of contract. It can only be raised in cases of concurrent liability in contract and tort, "*where the defense of contributory negligence is available to the defendant if sued in contract where he could equally have raised it had he been sued in tort*". see Forsikringsaktieselskapet Vesta v. Butcher, [1989] AC 852, 858-68,875,879 (CA).

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		ENGLISH	ANNOTATIONS
26.	Requirement of Mitigation or "Cover" by Non-Breaching Party	Yes	See principle of *mitigation of loss;* the defendant will not be required to pay any part of the claimant's loss which the claimant would not have suffered if he had taken such steps upon occurrence as he ought reasonably to have taken to avoid or reduce his loss. British Westinghouse Electric and Manufacturing Co v. Underground Electric Railways Co of London [1912] AC 673 (HL).
27.	Specific Performance Limited to Real Estate or Unique Goods	Yes	English law has resisted a tendency to give the remedy of specific performance a broader application, Co-operative Insurance Society Ltd. v Argyll Stores (Holdings) Ltd., [1998] AC 1 (HL).
28.	Liquidated Damages As Penalty	No	Agreements may state that, as opposed to a sum fixed by the courts, a particular sum of 'liquidated damages' will be paid upon non-performance. However the courts place an outer-limit on liquidated damages clauses if they became so high, or 'extravagant' and unconscionable as to look like a penalty. Dunlop Pneumatic Tyre Co v. New Garage and Motor Co Ltd [1915] AC 79 (HL).
29.	Liquidating Damages as Approximation of Damages ("Reasonable")	Yes	English courts generally recognize and give effect to liquidated damage clauses when the damages represent reasonable estimates of the cost of breach, especially under circumstance where establishing the cost of breach may not be easy. However, courts are very reluctant to interfere with liquidated damage clauses as between sophisticated commercial parties, see Hadley v. Baxendale, (1854) 9 Ex. 341.
30.	Anticipatory Breach	Yes	The courts have again recently confirmed that, in certain circumstances, and provided the ingredients of a repudiatory breach are present, the innocent party may treat the contract as repudiated as a result of an anticipatory breach of contract, see SK Shipping (S) Pte Ltd v Petroexport Ltd [2009].
31.	Other Grounds for Termination of the Contract	Yes	The primary way in which contracts are brought to an untimely end is through one party not performing the major primary obligations on her side of the bargain. If a breach of the contract is "fundamental" or goes "to the root of the contract", then the innocent party gets the right to elect to terminate his own performance for the future, see Boone v Eyre (1777) 1 H Bl 273.

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COMMERCIAL LAW

		ENGLISH	ANNOTATIONS
1.	Negotiable Instruments: Protection Against Fraudulent Endorser	Yes	See the English Bills of Exchange Act. Under this provision, at least in regard to instruments made out to a payee, a thief can never be a holder because an individual qualifies as a holder only by showing that the person is in possession of the instrument and that the order or promise on the bill 'runs' to that person. Since, by definition, the instrument cannot be made to the order of a person who is not the payee, the thief cannot be a holder and therefore the thief cannot endorse the instrument to someone else within the meaning of the provision.
2.	Letters of Credit: Protection Against Fraudulent Demands	Limited	The courts of England have been very firm in upholding the "abstraction" of the letter of credit from other circumstances affecting the applicant or beneficiary. Although recognizing an exception to the independent status of a letter of credit in principle, English courts have been very reluctant to give relief or to issue temporary injunctions in cases where credible allegations of fraud have been raised. Roberto Luis Frias Garcia, "The Autonomy Principle of Letters of Credit," Mexican Law Review, Vol. III, No. 1, p. 68, , 74-75.
3.	Bills of Lading: Remedy for Carrier if Master Does Not Receive the Goods	No	Under the leading English case of Grant v. Norway, 10 C.B. 665, 138 Eng. Rep. 263 (C.B. 1851), a shipping company could not be held responsible for the master's misrepresentation about goods the master never received. The English Carriage of Goods By Sea Act 1992 effectively repeals the rule of Grant v. Norway as to transferable bills of lading but not "straight bills of lading" and waybills made to specific consignees. See Indira Carr, International Trade Law, Fourth Edition, pp. 175-176.
4.	Security Interests: Central Registration	Yes but limited	While England has a central registration system, 'legal' charges over receivables only apply if account debtors have been given individual notice. Also, registering a security interest only satisfies the notice requirements for parties likely to search – so notice to specific creditors still remains preferable.
5.	Floating Lien: Creditor Can Appoint	Yes	English law does give the holder of a lien over substantially all of a

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	Receiver		Borrower's assets a form of self-help in the form of a right to appoint an "administrative receiver" who answers to the secured lender and who can take control of the assets as long as an "ordinary receiver" has not been appointed by a court. See McGuire Woods, "Security Interests in Accounts Receivable and Inventory in Common Law and Civil Law Jurisdictions."

CIVIL PROCEDURE

		ENGLISH	ANNOTATIONS
1.	Pre-Trial Deposition To Preserve Evidence	Yes	English procedure rules require that the parties should have access to all relevant, non-privileged documents, including those of their adversary. See the rules of standard *disclosure*, which are set out by the Civil Procedure Rules 1998 (the CPR) Rule 31.6.
2.	Pre-Trial Deposition To Discover or Clarify Evidence	No	The routine practice of obtaining the oral evidence of a witness before trial is foreign to England's legal system.
3.	General Document Demands	Yes	The right to inspect documents in English civil procedure is governed by CPR Part 31.15. Upon written notice, the party to whom a document has been disclosed has the right to inspect that document (if such inspection would be proportionate given the nature of the case) except where the party making disclosure has the right to withhold inspection.
4.	Parties Appoint Experts	Yes	See The Civil Procedure Rules Part 35 provisions. The court can appoint a single, joint expert who will act for both parties. If the parties do not agree on who is to act as single, joint expert, the court can resolve the impasse by appointing from a list provided by the parties, or the court can direct that the expert shall be selected in some other fashion.
5.	Court Appoints Experts	Yes	See above
6.	Formal "Direct" Presentation of Claimant's Case Generally Required	Yes	In English civil procedures, oral testimony by witnesses is an important component in the proof because affidavits- although recognized as a form of deposition- do not present the opportunity for the exploration of questions

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			that the litigating parties or the judges themselves may think important to resolve the matter. See Caslav Pejovic, " Civil Law and Common Law: Two Different Paths Leading To the Same Goal," Section IV(E).
7.	Cross-Examination by Parties	Yes	Cross-examination is available in English courts to test written evidence.

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FRENCH CONTRACT LAW

		FRENCH	ANNOTATIONS
1.	Consideration	No	Pursuant to section 1128 of the Civil Code, the only requirements of a contract are: 1- the consent of the parties 2- their capacity to contract 3- content which is lawful and certain
2.	Promissory Estoppel (Reliance) as Independent Cause of Action in Contract	No	There are no provisions regarding promissory estoppel, but actions for breach of negotiations will be made under tort law (Section 1382 of the Civil Code). In France, the "théorie de l'apparence" as well as the "enrichissement sans cause" are possible claims for the injured party, based on the theory of restitution rather than contracts law.
3.	Gift Contracts Enforceable	Yes	Pursuant to section 932 of the Civil Code, a gift contract (inter-vivos gift) becomes binding once it is accepted by the beneficiary.
4.	Writing Required for Enforceable Contract	No	Writings are generally not part of the prerequisites (Section 1172 of the Civil Code). Section 1173 of the Civil Code states that formal requirements imposed for the purposes of proof of a contract or setting up a contract against another person have no effect on the validity of the contract. However, certain assumptions are made if there is no writing, such as in employment contracts regarding the employee benefits. Also, contracts in France are formed once there is an offer that has been accepted by the other party. French law, while also requiring written evidence for contracts above a certain amount set by regulation, exempts commercial contracts from this requirement.
5.	Extrinsic Evidence To Establish Missing or Additional Terms of Written Contract	Yes	Unless falling under the threshold of section 1358 of the Civil Code (€800 or less), section 1359 of the Civil Code states that proof must be established in writing, whether privately signed or authenticated. Section 1359 of the Civil Code provides an exception in the case of physical or moral impossibility of the written evidence being obtained, if it is customary not to establish written evidence, or where the written evidence has been lost as a result of force majeure.
6.	Supply Missing Term of Contract on Basis of Commercial Practice	Yes	Pursuant to section 1188 of the Civil Code a contract is to be interpreted according to the common intention of the parties. Where this intention cannot be discerned, a contract is to be interpreted in the sense which a reasonable person placed in the same situation would give to it.

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7.	Extrinsic Evidence of Collateral Agreements to Construe Written Contract Lacking Merger Clause	Yes	See point 5.
8.	Parties Permitted to Exclude Extrinsic Evidence of Collateral Agreements in Construction of Written Contract	No	No.
9.	"Battle of Forms" for Contract for Sale of Goods: "Mirror Image" as to material terms	Yes	Section 1188 of the Civil Code provides that the agreement has to state what the parties intend rather than the literal meaning of the contract. Sections 1189 – 1192 of the Civil Code continue in the same goal of interpreting the contract.
10.	"Battle of Forms" for Contract for Sale of Goods – "Mirror Image" as to non-material terms	Yes	Similar to the previous point. A distinction is not made between material and non-material terms.
11.	Good Faith as Implied Term of Contracts Generally	Yes	Section 1104 of the Civil Code states that agreements have to be negotiated, formed and performed in good faith.
12.	Good Faith in Negotiation of Contracts	Yes	Yes, under Sections 1104 and 1112 of the Civil Code. In addition, 1112-1 of the Civil Code provides that during the negotiations, a party who knows information which is of decisive importance for the consent of the other, must inform him of it where the latter legitimately does not know the information or relies on the contracting party.
13.	Excuse of Impossibility	Yes	In the event of force majeure section 1218 of the Civil Code states that if the prevention of performance is permanent, the contract is terminated by operation of law and the parties are discharged from their obligations under the conditions provided by articles 1351 and 1351-1 (Impossibility of performance).
14.	Excuse of Hardship between private parties	Yes	Section 1195 provides the possibility to adjust the contract when unforeseen circumstances have made the bargain unduly costly. Paragraph 1 provides that, if a change of circumstances that was unforeseeable at the time the contract was made renders performance excessively onerous for a party and that party had not accepted the risk of such a change, he may ask the other party to renegotiate the contract. Paragraph 2 sets out the consequences of the proposed renegotiation being refused or failing. The parties may agree to terminate the contract or ask the court to revise it.
15.	Excuse of Hardship between public and private parties	Yes	Similar to the previous point.
16.	"Highest" Good Faith for Business Partnerships	Yes	No distinctive section, however section 1104 of the Civil Code is interpreted fully as applying to "agreements of co-operation".
17.	Third Party Beneficiaries Pre-1999	Yes	Sections 1205 and 1206 of the Civil Code allow for third-parties to be beneficiaries and will be protected once they have agreed to take advantage of this benefit.
18.	Third Party Beneficiaries Post-1999	Yes	Similar sections as in the previous point.

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19.	Perfect Tender Rule (Between Merchants)	Yes	Section 1217 of the Civil Code states that a party towards whom an undertaking has not been performed or has been performed imperfectly, may: - refuse to perform or suspend performance of his own obligations; - seek enforced performance in kind of the undertaking; - request a reduction in price; - provoke the termination22 of the contract; - claim reparation of the consequences of non-performance.
20.	Unilateral Grant of Extra Time to Complete Performance, Subject to Contract Avoidance	Yes	Pursuant to sections 1221, 1223 and 1226 of the Civil Code the creditor must give notice to perform prior to seek performance, reduce the price or terminate the contract.
21.	Passage of Title and Passage of Risk Coincide	Yes	Section 1196 of the Civil Code states in paragraph 3 that the transfer of property entails the transfer of risk in the thing.
22.	Contract Damages – Strict Liability (Excluding Products Liability)	No	Such liability only derives from Products Liability and is not possible on a contractual basis, but rather trough a tort action.
23.	Contract Damages – Fault	No	Section 1231-1 of the Civil Code provides that a debtor is liable for the damages either on the ground of non-performance or a delay in performance of an obligation, unless he justifies this on the ground that performance was prevented by force majeure.
24.	Damages for Loss Foreseeable at Time of Contract Was Signed	Yes	Pursuant to section 1231-3 of the Civil Code a debtor is bound only to damages which were either foreseen or which could have been foreseen at the time of conclusion of the contract, except where non-performance was due to a gross or dishonest fault.
25.	Damages of Breaching Party Offset by Non-Breaching Party's Contribution to Breach ("Comparative Negligence")	Yes	Section 1245-12 of the Civil Code states that a producer's liability for defective products may be reduced or excluded, having regard to all circumstances, where the harm is caused jointly by a defect in the product and by the fault of the victim or of a person for whom the victim is responsible.
26.	Requirement of Mitigation or "Cover" by Non-Breaching Party	No	No duty to mitigate losses is imposed on the injured party.
27.	Specific Performance Limited to Real Estate or Unique Goods	No	Sections 1217 and 1221 of the Civil Code provide that a creditor of an obligation may seek performance in kind unless performance is impossible or if there is a manifest disproportion between its cost to the debtor and its interest for the creditor.
28.	Liquidated Damages as Penalty	Yes	Section 1231-5 (paragraph 1) of the Civil Code allows for parties to agree to certain damages in case of breach.
29.	Liquidating Damages as Approximation of Damages ("Reasonable")	Yes	Section 1231-5 (paragraph 2) of the Civil Code allows for the judge to increase or decrease the damages awarded to a reasonable approximation of the actual loss incurred if the damages written are ridiculously low or excessively high.
30.	Anticipatory Breach	No	Section 1305-2 of the Civil Code states that when the performance of an obligation is due only after a delay, its performance cannot be demanded until

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			the time so fixed has passed. However, pursuant to section 1220 of the Civil Code a party may suspend the performance of his obligation as soon as it becomes evident that his contracting partner will not perform his obligation when it becomes due and that the consequences of this non-performance are sufficiently serious for him.
31.	Other Grounds for Termination of the Contract	Yes	Section 1217 of the Civil Code provides that non-performance or imperfect performance of a contract for no external reasons is grounds for termination. In addition, the unforeseeable change of circumstances may be grounds for termination (section 1195 of the Civil Code).

COMMERCIAL LAW

		FRENCH	ANNOTATIONS
1.	Negotiable Instruments: Protection Against Fraudulent Endorser	No	Such protection is only available through the Geneva Convention Uniform Law for Cheques.
2.	Letters of Credit: Protection Against Fraudulent Demands	Yes	There is such protection under French Law pursuant to *Regles Usages Uniformes (RUU 600)*.
3.	Bills of Lading: Remedy for Carrier if Master Does Not Receive the Goods	Yes	Section L132-8 of the Commercial Code states that "the carriers shall have a direct claim for payment of their services to the consignor and the recipient who shall act as guarantors for the payment of the transport cost."
4.	Security Interests: Central Registration	No	Executing on collateral requires an application to a court. An insolvency administrator is then appointed, but it is a quicker method to have an attachment.
5.	Floating Lien: Creditor Can Appoint Receiver	No	Floating liens are not recognized under French Law, but the *Loi Dailly* does allow for liens to be placed on future accounts receivable, but only if the debtor regularly provides information and updates about them.

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CIVIL PROCEDURE

		FRENCH	ANNOTATIONS
1.	Pre-Trial Deposition To Preserve Evidence	No	No
2.	Pre-Trial Deposition To Discover or Clarify Evidence	No	No
3.	General Document Demands – Court Intervention Not Needed	No	Such procedure is done through the court's intervention only.
4.	General Document Demands – Court Intervention Needed	Yes	A party may request a judge to order the other party or any third party to disclose any documents relating to a dispute when it has not been produced pursuant to Sections 9 and 11 of the New Code of Civil Procedure.
5.	Parties Appoint Experts	No	An expert (or judiciary expert) must be registered on a list of experts maintained by an Appeals court and can only be appointed by the Court.
6.	Court Appoints Experts	Yes	Pursuant to the Décret No 2004-1463 of December 23, 2004 regarding judiciary experts, they have to be on the experts list (as stated in the previous point) and are appointed by the Court.
7.	Direct Evidence at Trial Hearing (Formal Presentation of the claimant's case)	No	No
8.	Cross-Examination by Parties	No	Such examination methods are not allowed in French civil procedure. Interestingly, the Code of Civil Procedure of Quebec, which is strongly inspired from its French equivalent, does allow for the cross-examination by parties.

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GERMAN CONTRACT LAW

		GERMAN	ANNOTATIONS
1.	Consideration	No	See various "gratuitous contracts": gift contracts and unilateral contracts established in the German Civil Code, e.g. **Section 662** (Mandate): *"By accepting a mandate, the mandatary agrees to carry out a transaction entrusted to him by the mandatory for the mandatory gratuitously."* or **Section 765** (Suretyship): *"By a contract of suretyship the surety puts himself under a duty to the creditor of a third party to be responsible for discharging that third party's obligation."*
2.	Promissory Estoppel (Reliance) as Independent Cause of Action in Contract	Yes	In the context of pre-contractual negotiations Section 311(2) of the German Civil Code provides *"An obligation with duties under section 241 (2) also comes into existence by* *1. the commencement of contract negotiations* *2. the initiation of a contract where a party, with regard to a potential contractual relationship, gives the other party the possibility of affecting his rights, legal interests and other interests, or entrusts these to him, or* *3. similar business contacts."*
3.	Gift Contracts Enforceable	Yes	See **Section 518** of the German Civil Code: *"(1)For a contract by witch performance is promised as a donation to be valid, notarial recording of the promise is required.* *(2) A defect of form is cured by rendering the performance promised."* No contract required if gift is given before/without promise.
4.	Writing Frequently Required for Enforceable Contract (as a Matter of Substantive Law) other than for Sales of Real Property and Certain Consumer Contracts	Generally no	See Palandt-Weidenkaff, 71. Aufl. 2012, § 125 Rn. 1. German contract law is based on the principle of *"Formfreiheit"* (freedom of form). Pursuant to this principle, contracts generally may be concluded without complying with any formal requirement, unless the law provides for a specific formal requirement, or the parties to the contract have agreed on such.

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		GERMAN	ANNOTATIONS
			The Law provides for exceptions from the principle of freedom of contract inter alia in cases where a person is to be protected from rushing into a contractual obligation (e.g. personal securities); where the contractual document is the basis for entering information into a register (e.g. purchase of real state); or where a formal requirement is necessary for reasons of publicity and legal certainty (e.g. assignment).
5.	Extrinsic Evidence To Establish Missing or Additional Terms of Written Contract	Yes	Extrinsic evidence may be used to prove true intention in case an issue was not (conclusively) addressed in the contract. See **Section 133** of the German Civil Code: *"When a declaration of intent is interpreted, it is necessary to ascertain the true intention rather than adhering to the literal meaning of the declaration."*
6.	Supply Missing Term of Contract on Basis of Commercial Practice	Yes	See **Section 157** of the German Civil Code: *"Contracts are to be interpreted as required by good faith, taking customary practice into consideration."*
7.	Extrinsic Evidence of Collateral Agreements to Construe Written Contract Lacking Merger Clause	Yes	See above; **Section 133** of the German Civil Code.
8.	Parties Permitted to Exclude Extrinsic Evidence of Collateral Agreements in Construction of Written Contract	Yes	Due to the principle of personal autonomy in German Law, parties can generally agree to exclude extrinsic evidence in the written contract. However, the trial court has some discretion to admit extrinsic evidence to fill unintended gaps in a contract. See Palandt-Weidenkaff, 71. Aufl. 2012, § 157 Rn. 8
9.	"Battle of Forms" for Contracts for Sale of Goods: "Mirror Image" as to material terms	Yes	See **Section 150 (3), 154** of the German Civil Code The German Civil Code provides, in Section 150 (3), that *"[a]n acceptance with amplifications, limitations or other alterations is deemed to be a refusal coupled with a new offer."* Article 154 of the German Civil Code provides that *"So long as the parties have not agreed upon all points of a contract upon which agreement is essential, according to the declaration of even one party, the contract is, in*

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		GERMAN	ANNOTATIONS
			case of doubt, not concluded." All of these approaches focus on agreement as the key factor in determining if a contract exists– with the focus on searching for the "mirroring" of the subjective intentions of the parties, at least as to material or essential terms.
10.	"Battle of Forms" for Contract for Sale of Goods – "Mirror Image" as to non-material terms	No	See no 9; Section 154 of the German Civil Code. See also **Section 155** of the German Civil Code: *"If the parties to a contract which they consider to have been entered into have, in fact, not agreed on a point on which an agreement was required to be reached, whatever is agreed is applicable if it is to be assumed that the contract would have been entered into even without a provision concerning this point."*
11.	Good Faith as Implied Term of Contracts Generally	Yes	See **Section 242** of the German Civil Code, which provides that all contractual obligations must be performed according to the requirement of good faith. ("Treu und Glauben", literally "faith and trust")
12.	Good Faith in Negotiation of Contracts	Yes	See no 11. more detailed: Squire Sanders, "The Notion of Contractual Good Faith: Perspectives from Comparative Law," Section on German Law. In advance of concluding the contract, parties can be held liable e.g. for termination of contract negotiations, see **Section 311 (2)** of the German Civil Code: *"An obligation with duties under section 241 (2) also comes into existence by* *1. the commencement of contract negotiations* *2. the initiation of a contract where a party, with regard to a potential contractual relationship, gives the other party the possibility of affecting his rights, legal interests and other interests, or entrusts these to him, or* *3. similar business contacts."*
13.	Excuse of Impossibility	Yes	See **Section 275** of the German Civil Code:

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		GERMAN	ANNOTATIONS
			"A claim of performance is excluded to the extent that performance is impossible for the obligor or for any other person."
14.	Excuse of Hardship between private parties	Yes	See **Section 313** of the German Civil Code, which addresses the *"collapse of the foundation of a contract"* ("Wegfall der Geschaeftsgrundlage"): *"If circumstances at the basis of the contract formation have substantially changed and the parties would not have entered into the contract at all or with different contents if they could have anticipated this change, a claim for an adjustment of the contractor can be made, provided that, given all circumstances of the individual case, especially the contractual or statutory risk distribution, one cannot be expected to continue with the contract as it is."*
15.	Excuse of Hardship between public and private parties	Yes	See above
16.	"Highest" Good Faith for Business Partnerships	Yes	German law does not speak in this exact terminology but interprets the principle of good faith that way. See Palandt-Weidenkaff, 71. Aufl. 2012, § 242 Rn. 23.
17.	Third Party Beneficiaries Pre-1999	Yes	See **Section 328** of the German Civil Code, which provides that *"a contract may stipulate performance for the benefit of a third party, so that the third party acquires the right directly to demand performance."* A third party may also, under German law, seek damages for failure of a party to perform its duty under the contract. See also Karsten Keilhack, "Third Party Rights: A Comparison of English and German Law with Respect to the UNIDROIT Principles on International Commercial Contracts," Section B(II).
18.	Third Party Beneficiaries Post-1999	Yes	See above
19.	Perfect Tender Rule (Between Merchants)	No	See **Section 434 et seq.** of the German Civil Code *"The thing is free from material defects, if, upon the passing of the risk, the thing has the agreed quality. To the extent that the quality has not been*

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		GERMAN	ANNOTATIONS
			agreed, the thing is free of material defects *1. if it is suitable for the use intended under the contract.* *2. if it is suitable for the customary use and its quality is usual in things of the same kind and the buyer may expect this quality in view of the type of the thing."* Also, the legal consequences differ; under German law the "defective" performance would lead to warranty claims (specific performance) rather than to the payment of damages.
20.	Unilateral Grant of Extra Time to Complete Performance, Subject to Contract Avoidance	Yes	See the German concept of "Nachfrist" ("Extension of time"), e.g.: **Section 281 (1)** of the German Civil Code *"To the extent that the obligor does not render performance as owed, the obligee may [...] demand damages in lieu of performance, if he has without result set a reasonable period for the obligor for performance or cure."* Palandt-Weidenkaff, 71. Aufl. 2012, § 281 Rn. 9
21.	Passage of Title and Passage of Risk Coincide	Yes	See **Section 446** of the German Civil Code: *"The risk of accidental destruction and accidental deterioration passes to the buyer upon delivery of the thing sold."* The Law provides for exceptions though, see e.g. Section 300 (2), 447 etc.
22.	Contract Damages (excluding Product Liability)– Strict Liability	No	See **Section 254** of the German Civil Code German law acknowledges the fundamental principle that damages should compensate for loss of profit or gain but the range of the loss, following the general tort-like analysis of the civil law even in the area of contracts, looks more to the damages that can be tied by reason of cause to the breach. Eric C. Schneider, "Consequential Damages in the International Sale of Goods: Analysis of Two Decisions," Section 4
23.	Contract Damages (including Product Liability)– Fault	Yes	See **Section 276** of the German Civil Code: *"The obligor is responsible for intention and negligence, if a higher or lower degree of liability is neither laid down nor to be inferred from the other*

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		GERMAN	ANNOTATIONS
			subject matter of the obligation, including but not limited to the giving of a guarantee or the assumption of a procurement risk."
24.	Damages for Loss Foreseeable at Time of Contract Was Signed	No	German law focuses more on the damages that could be foreseen at the time of breach rather than at the time the contract was formed. Eric C. Schneider, "Consequential Damages in the International Sale of Goods: Analysis of Two Decisions," Section 4
25.	Damages under Contract Law of Breaching Party Offset by Non-Breaching Party's Contribution to Breach ("Comparative Negligence")	Yes	See **Section 254**: *"Where fault on the part of the injured person contributes to the occurrence of the damage, liability in damages as well as the extent of compensation to be paid depend on the circumstances, in particular to what extent the damage is caused mainly by one or the other party."*
26.	Requirement of Mitigation or "Cover" by Non-Breaching Party	Yes	See **Section 254 (2)** of the German Civil Code: *"(1) Where fault on the part of the injured person contributes to the occurrence of the damage, liability in damages as well as the extent of compensation to be paid depend on the circumstances, in particular to what extent the damage is caused mainly by one or the other party.* *(2) This also applies if the fault of the injured person is limited to failing to draw the attention of the obligor to the danger of unusually extensive damage, where the obligor neither was nor ought to have been aware of the danger, or to failing to avert or reduce the damage."* Palandt-Weidenkaff, 71. Aufl. 2012, § 254 Rn. 32
27.	Specific Performance Limited to Real Estate or Unique Goods	No	Specific performance is available whenever *"the thing is defective"*, see **Section 437** of the German Civil Code. **Section 439** of the German Civil Code states, that *"the buyer may, at his choice, demand that the defect is remedied or a thing free of defects is supplied."* See more detailed: Henrik Lando and Caspar Rose, "On the Enforcement of Specific Performance in Civil Law Countries," International Review of Law and Economics (2004) 473-487.

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		GERMAN	ANNOTATIONS
28.	Liquidated Damages As Penalty	Yes	See **Section 339** et seq. of the German Civil Code *"Where the obligor promises the obligee, in the event that he fails to perform his obligation or fails to do so properly, payment of an amount of money as penalty, the penalty is payable if he is in default."*
29.	Liquidating Damages as Approximation of Damages ("Reasonable")	Yes	See **Section 249 et seq.** of the German Civil Code *"A person who is liable in damages must restore the position that would exist if the circumstance obliging him to pay damages had not occurred."*
30.	Anticipatory Breach	Yes	See **Section 323 (4)** of the German Civil Code: *"The obligee may revoke the contract before performance is due if it is obvious that the requirements for revocation will be met."* See also **Section 281 (2)** of the German Civil Code: *"Setting a period for performance may be dispensed with if the obligor seriously and definitively refuses performance or if there are special circumstances which, after the interests of both parties are weighed, justify the immediate assertion of a claim for damages."*
31.	Other Grounds for Termination of the Contract	Yes	See **Section 323 (1)** of the German Civil Code: *"If, in the case of a reciprocal contract, the obligor does not render an act of performance which is due, or does not render it in conformity with the contract, then the obligee may revoke the contract, if he has specified, without result, an additional period for performance or cure."*

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COMMERCIAL LAW

		GERMAN	
1.	Negotiable Instruments: Protection Against Fraudulent Endorser	No	For Germany, the two major sources of law are the Geneva Convention Uniform Law for Bills of Exchange and Promissory Notes and the Geneva Convention Uniform Law for Cheques. Under the Geneva system, a holder acquiring an instrument in good faith and without gross negligence by an uninterrupted series of endorsements can be a good faith purchaser even though the instrument was lost or stolen and one of the signatures was forged.
2.	Letters of Credit: Protection Against Fraudulent Demands	Yes	The courts have been very firm in upholding the *"abstraction"* of the letter of credit from other circumstances affecting the applicant or beneficiary. However, the Uniform Customs and Practice for Documentary Credits (UCP) provides an exception where a bank has received notice of actual fraud on the applicant.
3.	Bills of Lading: Remedy for Carrier if Master Does Not Receive the Goods	Yes	See **Section 409 (1)** of the German Commercial Code: *"A consignment note signed by both parties shall be prima facie evidence of the conclusion of the contract of carriage, the conditions of the contract and the receipt of the goods by the carrier."*
4.	Security Interests: Central Registration	No	There is no national system of registration in Germany. Under German law, executing on the collateral requires application to a court. See McGuire Woods, "Security Interests in Accounts Receivable and Inventory in Common Law and Civil Law Jurisdictions."
5.	Floating Lien: Creditor Can Appoint Receiver	No	Under German Law, the Creditor has no right to appoint a receiver, this requires court action.

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CIVIL PROCEDURE

		GERMAN	
1.	Pre-Trial Deposition To Preserve Evidence	No	In German law there is no such procedure.
2.	Pre-Trial Deposition To Discover or Clarify Evidence	No	Each party may only use the evidence it actually has access to. Under German Law, parties do not have the right to ask for documents they cannot specifically identify and therefore the ability to review a party's entire record with regard to a transaction is not generally available. See Caslav Pejovic, "Civil Law and Common Law," Section IV(C).
3.	General Document Demands	No	However parties do have a right to inspect specific documents, see **Section 810** of the German Civil Code: *"A person who has a legal interest in inspecting a document in the possession of another person may demand from its possessor permission to inspect it if the document was drawn up to his interests or if in the document a legal relationship existing between himself and another is documented or if the document contains negotiations on a legal transaction that were engaged in between him and another person or between one of the two of them and a joint intermediary."*
4.	Parties Appoint Experts	No	See **Section 404 (1)** of the German Code of Civil Procedure: *"The Appointment of the Experts/the determination of their number rests with the trial court."* Parties may consult experts, but the probative value of such a *private* expert is only that of a witness, see Section 402 of the German Code of Civil Procedure.
5.	Court Appoints Experts	Yes	See no 4.

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6.	Formal "Direct" Presentation of Claimant's Case Generally Required	No	There is generally a great dependence on written testimony in German Civil Procedure. Testimony is usually quite limited and is ordinarily based on questions posed by the Judge. Attorneys often do not question the witness directly but present questions for the Judge to ask. See Caslav Pejovic, " Civil Law and Common Law: Two Different Paths Leading To the Same Goal," Section IV(E).
7.	Cross-Examination by Parties	Generally yes	Cross-Examination by parties is generally possible under German Law, pursuant **Section 397** of the German Code of Civil Procedure. However, it is hardly carried out in practice. It is more common for both parties/their attorneys to examine the witnesses in succession.

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CONTRACT LAW UNDER THE CONVENTION FOR THE INTERNATIONAL SALE OF GOODS

		CISG	ANNOTATIONS
1.	Consideration	No	**Article 29(1)** of the CISG states that *'[a] contract may be modified or terminated by the mere agreement of the parties'* thereby clearly indicating that there is no place for consideration in the CISG.
2.	Promissory Estoppel (Reliance) as Independent Cause of Action in Contract other than for Contracts of Sales of Real Property or Arising during Contract Negotiations	Yes	See CISG **Article 16:** *(1) Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance.* *(2) However, an offer cannot be revoked: (a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or (b) if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted* ***in reliance on the offer****.*
3.	Gift Contracts Enforceable	N/A	
4.	Writing Frequently Required for Enforceable Contract (as a Matter of Substantive Law) other than Sales of Real Property and Certain Consumer Contracts	No	See CISG **Article 11:** *A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.*
5.	Extrinsic Evidence To Establish Missing or Additional Terms of Written Contract	Yes	Under CISG **Article 8**, if the intent of the parties was not evident from their statements and conduct, a 'reasonable person' standard would be applied, 'due consideration' being given *"to all relevant circumstances of the case, including the negotiations, any practices which the parties have established for themselves, usages and any subsequent conduct of the parties."*

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		CISG	ANNOTATIONS
6.	Supply Missing Term of Contract on Basis of Commercial Practice	Yes	See CISG **Article 8:** *(1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.* *(2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.* *(3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.*
7.	Extrinsic Evidence of Collateral Agreements to Construe Written Contract Lacking Merger Clause	Yes	See no 6. There is no parole evidence rule in the CISG.
8.	Parties Permitted to Exclude Extrinsic Evidence of Collateral Agreements in Construction of Written Contract	No	Such a 'merger'- or 'entire agreement' clause would derogate from **Article 11**, which provides that a sales contract may be proved by any means, including witnesses. The objective to prevent recourse to extrinsic evidence for the purpose of contract interpretation would also appear to derogate from the Convention's canons of interpretation incorporated in CISG **Article 8.**

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		CISG	ANNOTATIONS
9.	"Battle of Forms" for Contracts for Sale of Goods: "Mirror Image" as to material terms	Yes	See CISG **Article 19:** *(1) A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.* *(2) However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do* ***not materially*** *alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.* *(3) Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially.*
10.	"Battle of Forms" for Contract for Sale of Goods – "Mirror Image" as to non-material terms	No	See above **Article 19 (2).**
11.	Good Faith as Implied Term of Contracts Generally	No	The CISG does not have an express provision imposing a duty of good faith in the performance of contracts but does provide that regard must be had for *"promoting the observance of good faith in international trade"* in interpretation of the Convention, see **Article 7.**
12.	Good Faith in Negotiation of Contracts	No	Since the CISG does not even have an express provision imposing a duty of good faith in the performance of the contract, Good Faith in Negotiation of Contracts can not be implied in Article. 7, see no 11.
13.	Excuse of Impossibility	Yes	CISG **Article 79** provides a limited form of 'exemption' in the case of a party's failure to perform because of *"an impediment beyond its control"* for the period of time during which the impediment applies, where the party claiming the exemption could not reasonably be expected to have taken the impediment into account at the time their contract was entered into or to have overcome it.

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		CISG	ANNOTATIONS
14.	Excuse of Hardship between private parties	Yes	See no 13.
15.	Excuse of Hardship between public and private parties	Yes	See no 13.
16.	"Highest" Good Faith for Business Partnerships	N/A	
17.	Third Party Beneficiaries Pre-1999	No	The CISG is silent on the admissibility of direct contractual claims by parties not in privity.
18.	Third Party Beneficiaries Post-1999	No	See above.
19.	Perfect Tender Rule (Between Merchants)	No	CISG **Article 49(1)(a)** allows the buyer upon delivery to avoid the contract once goods have been delivered only *"if the failure by the seller to perform any of its obligations under the contract or this Convention amounts to a fundamental bread of contract."* The adoption of the substantial performance standard under the CISG derives from the view that the distances and expenses of transporting of goods in international commerce makes a perfect tender rule less sensible and therefore the substantial performance rule better reflects the likely expectations of parties in international trade.
20.	Unilateral Grant of Extra Time to Complete Performance, Subject to Contract Avoidance	Yes	Under CISG **Article 48,** a seller may *"remedy at his expense any failure to perform his obligations if he can do so without unreasonable delay and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer."* CISG **Article 49** gives the buyer a measure of self-help in the case of delay in the seller's performance. CISG **Article 47** allows the buyer *"to fix an additional period of time of reasonable length before performance by the seller of its obligations."*
21.	Passage of Title and Passage of Risk Coincide	N/A	The CISG leaves the question of passage of title to be determined by local law.

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		CISG	ANNOTATIONS
22.	Contract Damages (excluding Product Liability)– Strict Liability	Yes	CISG is an essentially 'strict' liability system, since the CISG obligee's right to claim damages is conditioned only on the obligor's non-performance, not his or her fault. See CISG **Article 45(1)(b):** *(1) If the seller fails to perform any of his obligations under the contract or this Convention, the buyer may:* *(b) claim damages as provided in articles 74 to 77,* and CISG **Article 61(1)(b):** *(1) If the buyer fails to perform any of his obligations under the contract or this Convention, the seller may:* *(b) claim damages as provided in articles 74 to 77.*
23.	Contract Damages (including Product Liability)– Fault	No	The CISG focuses primarily on loss, see no 22 and 24.
24.	Damages for Loss Foreseeable at Time of Contract Was Signed	Yes	See **Article 74:** *"Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract."*
25.	Damages under Contract Law of Breaching Party Offset by Non-Breaching Party's Contribution to Breach ("Comparative Negligence")	No	The CISG is silent on the possibility of remedies if the reason for the non-performance was the result of the act(s) or omission(s) of the party seeking relief.
26.	Requirement of Mitigation or "Cover" by Non-Breaching Party	Yes	See CISG **Article 77:** *"A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated."*

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		CISG	ANNOTATIONS
27.	Specific Performance Limited to Real Estate or Unique Goods	No	See CISG **Article 28:** *"If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention."*
28.	Liquidated Damages As Penalty	No	The Convention impliedly excludes damages not related to loss. See **Article 74**, described in no 29 below.
29.	Liquidating Damages as Approximation of Damages ("Reasonable")	Yes	See CISG **Article 74:** *"Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract."*
30.	Anticipatory Breach	Yes	See CISG **Article 72 (1):** *If prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach of contract, the other party may declare the contract avoided.*
31.	Grounds for Termination of the Contract	Yes	The CISG uses the term "fundamental breach" to constitute the usual precondition for the contract to be avoided. (CISG Art. 49(1)(a); Art. 51; Art. 64(1)(a); Art. 72(1); Art. 73). See CISG **Article 25:** *A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.*

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CONTRACT LAW UNDER THE UNIDROIT PRINCIPLES

		UNIDROIT	ANNOTATIONS
1.	Consideration	No	See **Article 3.2:** *"A contract is concluded, modified or terminated by the mere agreement of the parties, without any further requirement."*
2.	Promissory Estoppel (Reliance) as Independent Cause of Action in Contract	Yes	See **Article 2.4:** *(1) Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before it has dispatched an acceptance.* *(2) However, an offer cannot be revoked (a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or (b) if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance of the offer.*
3.	Gift Contracts Enforceable	N/A	
4.	Writing Frequently Required for Enforceable Contract (as a Matter of Substantive Law) other than Sales of Real Property and Certain Consumer Contracts	No	See **Article 1.2:** *"Nothing in these Principles requires a contract to be concluded in or evidenced by writing. It may be proved by any means, including witnessess."* **Article 3.2:** *"A contract is concluded, modified or terminated by the mere agreement of the parties, without any further requirements."*
5.	Extrinsic Evidence To Establish Missing or Additional Terms of Written Contract	Yes	See **Article 4.8** of the UNIDROIT Principles, which direct that *"[w]here the parties to a contract have not agreed with respect to a term which is important for a determination of their rights and duties, a term which is appropriate in the circumstances shall be supplied."*
6.	Supply Missing Term of Contract on Basis of Commercial Practice	Yes	See **Article 4.8 (2):** In determining what is an appropriate term regard shall be had, among other factors to (a) the intention of the parties; (b) the nature and purpose of the contract; (c) good faith and fair dealing; (d) reasonableness.

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		UNIDROIT	ANNOTATIONS
7.	Extrinsic Evidence of Collateral Agreements to Construe Written Contract Lacking Merger Clause	Yes	See no 6.
8.	Parties Permitted to Exclude Extrinsic Evidence of Collateral Agreements in Construction of Written Contract	Yes	See **Article 2.1.17:** *"A contract in writing which contains a clause indicating that the writing completely embodies the terms on which the parties have agreed cannot be contradicted or supplemented by evidence of prior statements or agreements. However, such statements or agreements may be used to interpret the writing."*
9.	"Battle of Forms" for Contracts for Sale of Goods: "Mirror Image" as to material terms	Yes	See **Article 2.11:** *(1) A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.* *(2) However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do* ***not materially alter*** *the terms of the offer constitutes an acceptance, unless the offeror without undue delay, objects to the discrepancy. If the offeror does not object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.*
10.	"Battle of Forms" for Contract for Sale of Goods – "Mirror Image" as to non-material terms	No	See no 9.
11.	Good Faith as Implied Term of Contracts Generally	Yes	**Art. 1.7** states that *"[e]ach party must act in accordance with good faith and fair dealing in international trade,"* which includes pre-contractual negotiations.
12.	Good Faith in Negotiation of Contracts	Yes	See **Article 2.1.15:** *(1) A party is free to negotiate and is not liable for failure to reach an agreement.* *(2) However, a party who negotiates or breaks off negotiations in bad faith is liable for the losses caused to the other party.* *(3) It is bad faith, in particular, for a party to enter into or continue negotiations when intending not to reach an agreement with the other party.*

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13.	Excuse of Impossibility	Yes	See **Article 7.1.7:** *(1) Non-performance by a party is excused if that party proves that the non-performance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.* *(2) When the impediment is only temporary, the excuse shall have effect for such period as is reasonable having regard to the effect of the impediment on the performance of the contract.* *(3) The party who fails to perform must give notice to the other party of the impediment and its effect on its ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, it is liable for damages resulting from such non-receipt.* *(4) Nothing in this article prevents a party from exercising a right to terminate the contract or to withhold performance or request interest on money due.*
14.	Excuse of Hardship between private parties	Yes	Hardship, under **Article 6.2.2,** is designated as occurring *"Where the concurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party has received has diminished," provided that (1) the events occur or become known to the disadvantaged party after the contract has been concluded, (2) the events could not have reasonably been taken into account by the disadvantaged parties at the time the contract was concluded, (3) the events are beyond the control of the disadvantaged party and (4) the risk of such events was not assumed by the disadvantaged party."* In the case of such a qualifying occurrence of hardship, Article 6.2.3 allows the disadvantaged party to request renegotiations but does not excuse that party's non-performance.
15.	Excuse of Hardship between public and private parties	Yes	See no 14.
16.	"Highest" Good Faith for Business Partnerships	N/A	

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17.	Third Party Beneficiaries Pre-1999	Yes	See **Article 5.2.1:** *(1) The parties (the "promisor" and the "promisee") may confer by express or implied agreement a right on a third party (the "beneficiary").* *(2) The existence and content of the beneficiary's right against the promisor are determined by the agreement of the parties and are subject to any conditions or other limitations under the agreement.*
18.	Third Party Beneficiaries Post-1999	Yes	See above.
19.	Perfect Tender Rule (Between Merchants)	N/A	
20.	Unilateral Grant of Extra Time to Complete Performance, Subject to Contract Avoidance	Yes	See **Article 7.1:** *(1) In a case of a non-performance the aggrieved party may by notice to the other party allow an additional period of time for performance.* *(2) During the additional period the aggrieved party may withhold performance of its own reciprocal obligations and may claim damages but may not resort to any other remedy. If it receives notice from the other party that the latter will not perform within that period, or if upon expiry of that period due performance has not been made, the aggrieved party may resort to any of the remedies that may be available under this Chapter.* *(3) Where in a case of delay in performance which is not fundamental the aggrieved party has given notice allowing an additional period of time of reasonable length, it may terminate the contract at the end of that period. If the additional period allowed is not of reasonable length it shall be extended to a reasonable length. The aggrieved party may in its notice provide that if the other party fails to perform within the period allowed by the notice the contract shall automatically terminate.* *(4) Paragraph (3) does not apply where the obligation which has not been performed is only a minor part of the contractual obligation of the non-performing party.*

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21.	Passage of Title and Passage of Risk Coincide	N/A	The UNIDROIT leaves the question of passage of title to be determined by local law.
22.	Contract Damages (excluding Product Liability)– Strict Liability	Yes	See **Article 7.4.1:** *Any non-performance gives the aggrieved party a right to damages either exclusively or in conjunction with any other remedies except where the non-performance is excused under these Principles.*
23.	Contract Damages (including Product Liability)– Fault	Yes	The UNIDROIT Principles, focus on 'harm' in a way that still suggests a strong role for fault. See generally John Y. Gotanda, "Damages in Lieu of Performance Because of Breach of Contract," Section III(2)
24.	Damages for Loss Foreseeable at Time of Contract Was Signed	Yes	The UNIDROIT Principles in **Article 7.4.4** provide for damages that "reasonably" could have been foreseen at the time of the conclusion of the contract as being likely to result from non-performance.
25.	Damages under Contract Law of Breaching Party Offset by Non-Breaching Party's Contribution to Breach ("Comparative Negligence")	Yes	See **Article 7.4.7:** *Where the harm is due in part to an act or omission of the aggrieved party or to another event as to which that party bears the risk, the amount of damages shall be reduced to the extent that these factors have contributed to the harm, having regard to the conduct of each of the parties.*
26.	Requirement of Mitigation or "Cover" by Non-Breaching Party	Yes	See **Article 7.4.8:** *(1) The non-performing party is not liable for harm suffered by the aggrieved party to the extent that the harm could have been reduced by the latter party's taking reasonable steps.* *(2) The aggrieved party is entitled to recover any expenses reasonably incurred in attempting to reduce the harm.*
27.	Specific Performance Limited to Real Estate or Unique Goods	No	See **Article 7.2.2:** *Where a party who owes an obligation other than one to pay money does not perform, the other party may require performance, unless* *(a) performance is impossible in law or in fact;* *(b) performance or, where relevant, enforcement is unreasonably burdensome or expensive;* *(c) the party entitled to performance may reasonably obtain performance*

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			from another source; *(d) performance is of an exclusively personal character; or* *(e) the party entitled to performance does not require performance within a reasonable time after it has, or ought to have, become aware of the non-performance.*
28.	Liquidated Damages As Penalty	Yes	See **Article 7.4.13:** *(1) Where the contract provides that a party who does not perform is to pay a specified sum to the aggrieved party for such nonperformance, the aggrieved party is entitled to that sum irrespective of its actual harm.* *(2) However, notwithstanding any agreement to the contrary the specified sum may be reduced to a reasonable amount where it is grossly excessive in relation to the harm resulting from the non-performance and to the other circumstances.*
29.	Liquidating Damages as Approximation of Damages ("Reasonable")	Yes	See **Article 7.4.3:** *(1) Compensation is due only for harm, including future harm, that is established with a reasonable degree of certainty.* *(2) Compensation may be due for the loss of a chance in proportion to the probability of its occurrence.* *(3) Where the amount of damages cannot be established with a sufficient degree of certainty, the assessment is at the discretion of the court.*
30.	Anticipatory Breach	Yes	See **Article 7.3.3:** *Where prior to the date for performance by one of the parties it is clear that there will be a fundamental non-performance by that party, the other party may terminate the contract.*
31.	Grounds for Termination of the Contract	Yes	See **Article 7.3.1:** *(1) A party may terminate the contract where the failure of the other party to perform an obligation under the contract amounts to a fundamental performance.* *(2) In determining whether a failure to perform an obligation amounts to a fundamental nonperformance regard shall be had, in particular, to whether* *(a) the non-performance substantially deprives the aggrieved party of what it was entitled to expect under the contract unless the other party did not foresee and could not reasonably have foreseen such result;*

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			(b) strict compliance with the obligation which has not been performed is of essence under the contract; *(c) the non-performance is intentional or reckless;* *(d) the non-performance gives the aggrieved party reason to believe that it cannot rely on the other party's future performance;* *(e) the non-performing party will suffer disproportionate loss as a result of the preparation or performance if the contract is terminated.*

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CONTRACT LAW UNDER THE PRINCIPLES OF EUROPEAN CONTRACT LAW

		PECL	ANNOTATIONS
1.	Consideration	No	In **Article 2:101 (1)** PECL explicityly say: "a contract is concluded if: (a) the parties intend to be legally bound, and (b) they reach a sufficient agreement *without any further requirement."*
2.	Promissory Estoppel (Reliance) as Independent Cause of Action in Contract	Yes	See **Article 2:202:** *(1) An offer may be revoked if the revocation reaches the offeree before it has dispatched its acceptance or, in cases of acceptance by conduct, before the contract has been concluded under Article 2:205(2) or (3).* *(...)* *(3) However, a revocation of an offer is ineffective if:* *(a) the offer indicates that it is irrevocable; or* *(b) it states a fixed time for its acceptance; or* *(c) it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted* ***in reliance on the offer.***
3.	Gift Contracts Enforceable	Yes	Under the PECL, a promise to make a gift is generally enforceable, even if the promise is gratuitous in nature. See Vranken, European Civil Law, Section 532. **Article 2:107:** *A promise which is intended to be legally binding without acceptance is binding.*
4.	Writing Required for Enforceable Contract (as a Matter of Substantial Law)	No	See **Article 2:101 (2):** *A contract need not be concluded or evidenced in writing nor is it subject to any other requirement as to form. The contract may be proved by any means, including witnesses.*
5.	Extrinsic Evidence To Establish Missing or Additional Terms of Written Contract	Yes	See **Article 5:101 (1):** *A contract is to be interpreted according to the common intention of the parties even if this differs from the literal meaning of the words.*
6.	Supply Missing Term of Contract on Basis	Yes	See **Article 5:102:**

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	of Commercial Practice		*In interpreting the contract, regard shall be had, in particular, to:* *(a) the circumstances in which it was concluded, including the preliminary negotiations;* *(b) the conduct of the parties, even subsequent to the conclusion of the contract;* *(c) the nature and purpose of the contract;* *(d) the interpretation which has already been given to similar clauses by the parties and the practices they have established between themselves;* *(e) the meaning commonly given to terms and expressions in the branch of activity concerned and the interpretation similar clauses may already have received ;* *(f) usages; and* *(g) good faith and fair dealing*
7.	Extrinsic Evidence of Collateral Agreements to Construe Written Contract Lacking Merger Clause	Yes	See **Article 2:105 (3)**: *The parties' prior statements may be used to interpret the contract. This rule may not be excluded or restricted except by an individually negotiated clause.*
8.	Parties Permitted to Exclude Extrinsic Evidence of Collateral Agreements in Construction of Written Contract	Yes	While the parol evidence and 'merger' clauses were generally unique to the common law, the concept of precluding oral evidence in the case of agreements that contain an 'entire agreement' clause has been accepted by the Principles of European Contract Law at **Article 2.105 (1)**: *If a written contract contains an individually negotiated clause stating that the writing embodies all the terms of the contract (a merger clause), any prior statements, undertakings or agreements which are not embodied in the writing do not form part of the contract.*
9.	"Battle of Forms" for Contracts for Sale of Goods: "Mirror Image" as to material terms	Yes	See **Article 2:208 (1):** *A reply by the offeree which states or implies additional or different terms that would materially alter the terms of the offer is a rejection and a new offer.*
10.	"Battle of Forms" for Contract for Sale of Goods – "Mirror Image" as to non-material terms	No	See **Article 2:208 (2):** *A reply which gives a definite assent to an offer operates as an acceptance even if it states or implies additional or different terms, provided these do not materially alter the terms of the offer. The additional or different terms then become part of the contract.*

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11.	Good Faith as Implied Term of Contracts Generally	Yes	**Article 1.106** of the Principle of European Contract Law imposes an obligation of *"good faith and fair dealing."*
12.	Good Faith in Negotiation of Contracts	Yes	See **Article 2:301:** *(1) A party is free to negotiate and is not liable for failure to reach an agreement.* *(2) However, a party who has negotiated or broken off negotiations contrary to good faith and fair dealing is liable for the losses caused to the other party.* *(3) It is contrary to good faith and fair dealing, in particular, for a party to enter into or continue negotiations with no real intention of reaching an agreement with the other party.*
13.	Excuse of Impossibility	Yes	See **Article 8:108 (1):** *A party's non-performance is excused if it proves that it is due to an impediment beyond its control and that it could not reasonably have been expected to take the impediment into account at the time of the conclusion of the contract, or to have avoided or overcome the impediment or its consequences.*
14.	Excuse of Hardship between private parties	Yes	The drafters of the European principles have developed a broad range of circumstances by providing that *"where the concurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party has received has diminished,"* the aggrieved party may request renegotiation of the transaction and, if the negotiations fail, judicial relief, which may include termination of the contract or its reform. See **Article 6:111.**
15.	Excuse of Hardship between public and private parties	Yes	See no 14.
16.	"Highest" Good Faith for Business Partnerships	N/A	
17.	Third Party Beneficiaries Pre-1999	N/A	

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18.	Third Party Beneficiaries Post-1999	Yes	See **Article 6:110 (1):** *A third party may require performance of a contractual obligation when its right to do so has been expressly agreed upon between the promisor and the promisee, or when such agreement is to be inferred from the purpose of the contract or the circumstances of the case. The third party need not be identified at the time the agreement is concluded.*
19.	Perfect Tender Rule (Between Merchants)	N/A	
20.	Unilateral Grant of Extra Time to Complete Performance, Subject to Contract Avoidance	Yes	See **Article 8:106:** *(1) In any case of non-performance the aggrieved party may by notice to the other party allow an additional period of time for performance.* *(2) During the additional period the aggrieved party may withhold performance of its own reciprocal obligations and may claim damages, but it may not resort to any other remedy. If it receives notice from the other party that the latter will not perform within that period, or if upon expiry of that period due performance has not been made, the aggrieved party may resort to any of the remedies that may be available under chapter 9.* *(3) If in a case of delay in performance which is not fundamental the aggrieved party has given a notice fixing an additional period of time of reasonable length, it may terminate the contract at the end of the period of notice. The aggrieved party may in its notice provide that if the other party does not perform within the period fixed by the notice the contract shall terminate automatically. If the period stated is too short, the aggrieved party may terminate, or, as the case may be, the contract shall terminate automatically, only after a reasonable period from the time of the notice.*
21.	Passage of Title and Passage of Risk Coincide	N/A	
22.	Contract Damages (excluding Product Liability)– Strict Liability	Yes	See **Article 1:301(4):** *'Non-performance' denotes any failure to perform an obligation under the contract, whether or not excused, and includes delayed performance, defective performance and failure to co-operate in order to give full effect to the contract.*

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23.	Contract Damages (including Product Liability)– Fault	No	See **Article 4:117 (1):** *A party who avoids a contract under this Chapter may recover from the other party damages so as to put the avoiding party as nearly as possible into the same position as if it had not concluded the contract, provided that the other party knew or ought to have known of the mistake, fraud, threat or taking of excessive benefit or unfair advantage.*
24.	Damages for Loss Foreseeable at Time of Contract Was Signed	Yes	See **Article 9:503:** *The non-performing party is liable only for loss which it foresaw or could reasonably have foreseen at the time of conclusion of the contract as a likely result of its non-performance, unless the non-performance was intentional or grossly negligent.*
25.	Damages of Breaching Party Offset by Non-Breaching Party's Contribution to Breach ("Comparative Negligence")	Yes	See **Article 9:504:** *The non-performing party is not liable for loss suffered by the aggrieved party to the extent that the aggrieved party contributed to the non-performance or its effects.*
26.	Requirement of Mitigation or "Cover" by Non-Breaching Party	Yes	See **Article 9:505:** *(1) The non-performing party is not liable for loss suffered by the aggrieved party to the extent that the aggrieved party could have reduced the loss by taking reasonable steps.* *(2) The aggrieved party is entitled to recover any expenses reasonably incurred in attempting to reduce the loss.*
27.	Specific Performance Limited to Real Estate or Unique Goods	No	See **Article 9:102**: *(1) The aggrieved party is entitled to specific performance of an obligation other than one to pay money, including the remedying of a defective performance.* *(2) Specific performance cannot, however, be obtained where: (a) performance would be unlawful or impossible; or (b) performance would cause the debtor unreasonable effort or expense; or (c) the performance consists in the provision of services or work of a personal character or depends upon a personal relationship; or (d) the aggrieved party may reasonably obtain performance from another source.*

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			(3) The aggrieved party will lose the right to specific performance if it fails to seek it within a reasonable time after it has or ought to have become aware of the non-performance.
28.	Liquidated Damages As Penalty	Yes	See **Article 9:509:** *(1) Where the contract provides that a party who fails to perform is to pay a specified sum to the aggrieved party for such non-performance, the aggrieved party shall be awarded that sum irrespective of its actual loss.* *(2) However, despite any agreement to the contrary the specified sum may be reduced to a reasonable amount where it is grossly excessive in relation to the loss resulting from the non-performance and the other circumstances.*
29.	Liquidating Damages as Approximation of Damages ("Reasonable")	Yes	**Article 9.503** provides for damages that *"reasonably"* could have been foreseen at the time of the conclusion of the contract as being likely to result from non-performance. See no 28.
30.	Anticipatory Breach	Yes	See **Article 9:304:** *Where prior to the time for performance by a party it is clear that there will be a fundamental non-performance by it the other party may terminate the contract.*
31.	Grounds for Termination of the Contract	Yes	The notes to PECL Article 8.103 state.*"[the rule that] the aggrieved party can terminate the contract or claim that a defective performance be replaced by a conforming tender only if the non-performance is substantial."* See **Article 8.103:** *A non-performance of an obligation is fundamental to the contract if: (a) strict compliance with the obligation is of the essence of the contract; or (b) the non-performance substantially deprives the aggrieved party of what it was entitled to expect under the contract, unless the other party did not foresee and could not reasonably have foreseen that result; or (c) the non-performance is intentional and gives the aggrieved party reason to believe that it cannot rely on the other party's future performance.*

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Choosing New York Law as Governing Law for International Commercial Transactions

By Michael W. Galligan

Introduction

The state of New York encourages the choice of New York law as the governing law of international commercial transactions by permitting parties to a transaction where the consideration or obligation is not less than $250,000 to choose New York law "whether or not such contract, agreement or undertaking bears a reasonable relation" to New York state.[1] New York also encourages parties to international commercial transactions to use the courts of New York to adjudicate and resolve their disputes where the dispute arises from a contract, agreement or undertaking governed by New York law and where the consideration or obligation is not less than one million dollars.[2]

For most practitioners concerned with business, commercial and corporate law, the starting point of analysis for making a choice of law for an international commercial transaction is contract law. There are a number of salient differences in the approach to contract and commercial law in New York law (and other common law jurisdictions in general) on the one hand and civil law jurisdictions on the other hand. There are some less well known differences between New York law (and the common law of many other U.S. jurisdictions) and English law (and other exemplars of common law).

In addition, one must consider the impact of international treaties to which New York, as one of the United States of America, is bound and which therefore constitute part of New York law and the areas of commercial law relevant to the transaction. In the field of contract law, the most important of these treaties is the United Nations ("Vienna") Convention on the International Sale of Goods ("CISG"). The CISG actually constitutes the law of New York for international sales transactions where all of the parties have their places of business in one of the many countries that have become parties to the Convention (absent an agreement by the parties to "opt out" of the CISG rules under Article 6 of the Convention).[3]

In addition, in the twenty-first century, it is not enough to compare New York law with the law of other countries. There are a growing number of international formulations and "restatements" of law, particularly in the area of contract law, that have themselves become sources of law and that offer options to international businesses making choices about what law should govern their transactions. Chief among these are the UNIDROIT Principles of International Contract Law, the Principles of European Contract Law, the Draft Common Frame of Reference, and the OHADA Uniform Act on Contract Law.

Part I of this article—the longest—discusses key features of New York contract law and compares and contrasts New York's approach with those of English law, French law, German law, the provisions of the CISG (remembering, of course, that, for many international sales transactions, the CISG is itself the law of New York) and two of the most influential international contract restatements, the UNIDROIT Principles and the European Principles.[4] Part II features brief discussions of some distinctive features of New York commercial law. Part III consists of a short reflection on three points of distinction of New York procedural law that are very relevant to choices of substantive law. Part IV summarizes some of the conclusions of Parts I through III (particularly Part I) and offers some constructive proposals for revision or adjustment of New York law to promote a greater harmony between New York law and other sources of the international law of commercial contracts and to make New York law a more effective instrument for the promotion and support of international trade.

I. Contract Law

Common law and civil law all derive from Roman law (at least as articulated by the great legal scholar, Grotius, and his contemporaries) the basic legal principle that contracts must be fulfilled. But they differ in many important respects, including but not limited to (i) what types of contracts will be enforced, (ii) how contracts are to be construed and interpreted, (iii) whether and under what circumstances third parties can have rights under a contract, (iv) under what circumstances performance under a valid and binding contract can be excused or avoided, (v) when conditions on performance apply, and (vi) what remedies are available when obligations under a contract are breached.

A. What Constitutes an Enforceable Contract

Perhaps the most important practical difference between the civil and common law concerns the rules for determining what contracts are enforceable. Both systems doctrinally require an agreement, generally reflected in an offer and an acceptance. Thus, under Article 1101 of the French Civil Code, "[a] contract is an agreement by which one or more persons bind themselves, as to one or more other persons, to give, to do or not to do something." The consent of the party that binds itself, for French contract law purposes, is the key factor in establishing a contract—so long as, in addition, each party undertaking an obligation has legal capacity to do so, the contract has a "subject matter," and the contract has a valid "cause" or purpose.[5]

The UNIDROIT Principles of International Commercial Contract Law are not far removed from this view by providing under Article 2.1.1, that "[a] contract may be concluded either by the acceptance of an offer or by conduct of the parties that is sufficient to show agreement." Under Article 2:101 of the Principles of European Contract Law, a contract is concluded if (i) the parties intend to be legally bound and (ii) they reach a sufficient agreement.

The common law has long required that an agreement, to be valid and enforceable, must reflect some exchange of value—which can consist of promises or performances—that constitutes "consideration." In the words of one court, "[w]ithout consideration there is no contract."[6] For a long time, to demonstrate the existence of consideration, it was thought necessary that one party must receive a benefit and the other party must suffer a detriment; today it seems to be acceptable if both parties benefit. It is also accepted that an exchange of promises that impose duties of some sort on each party itself constitutes valid consideration.

The classic example of the difference the consideration requirement can make has to do with gifts. In the civil law system, a promise to make a gift is generally enforceable, at least if it is in writing, even if the promise is gratuitous in nature.[7] Under English law, such a promise would not be enforceable unless made by deed or under seal.[8] Under New York law, by contrast, such a promise would not be enforceable in the absence of a demonstration of reasonable reliance on the promise and detriment by the promisee.[9]

It is important to be clear that the requirement of consideration is not a rule that consideration must be adequate or fair. The idea that the exchange must have been "bargained for," which has been adopted by courts in New York and in England, is largely intended to preclude the need for courts to delve into examinations of the fairness of contractual exchanges.[10]

Now, it may seem that, for the majority of contractual arrangements emerging from business negotiations and exchanges, the requirement of consideration should make little practical difference, since most commercial agreements are precisely the fruit of the give and take that we associate with bargaining and on which the requirement of consideration seems to be founded. After all, it has even been said that, in New York, "[r]ecitals of 'value received' are nearly conclusive evidence of consideration."[11] But in a number of situations, a lack of consideration under a strict application of the doctrine of consideration can make a difference between enforceability and non-enforceability: these include contract amendments, releases, and irrevocable assignments. New York has very helpfully provided statutory relief from the requirement of consideration for contract amendments and releases that are in writing under Section 5-1103 of the New York General Obligations Law. And Section 2-209(1) of the New York Uniform Commercial Code ("NY UCC") specifically exempts modifications to sales contracts from the consideration requirement. New York General Objections Law Section 5-1107 similarly exempts irrevocable assignments that are in writing from the consideration requirement. Finally, Section 5-1105 of the General Obligations Law actually disqualifies any attack on a promise that is in writing and is based on past consideration or prior obligation if the consideration is proved to have been given or performed and would have been valid consideration but for the time when it was given or performed. English law, by contrast, does not have a scheme of statutory relief in instances like this: a 1937 proposal for that purpose was never enacted. It is said that English courts have cut back the requirement of consideration in many of these circumstances by case law, but cases can always be distinguished. Thus, there is good reason to say that New York law confers more security and certainty on this important issue and thus also "levels the playing field" with civil law systems, for which consideration is not a factor.

In the final analysis, the important role that the doctrine of consideration plays in New York law has less to do with legal formalities and more with the way it contributes to what is sometimes called the "objective" orientation or perspective from which New York law approaches issues of contract law in general. Increasingly, in civil law the elements of subject matter and purpose, at least in the area of commercial contracts, seem to be adventitious and secondary in importance, with the main focus being on the "subjective" state of the parties—that is, whether, in the interchange of offer and acceptance, the parties have formed among themselves a mutual understanding or consent that constitutes an agreement. Thus, under French law, proof that an agreement was the result of mistake or fraud or duress would vitiate the consent that is critical to the existence of a contract and lead to the conclusion that no contract existed at all.[12] Under common law, proof of mistake, fraud or duress would make a contract voidable but, for example, in the case of fraud, the defrauded party usually has the option of having the contract rescinded or affirming the contract and suing for damages.[13]

This objective emphasis also evidences itself in another aspect of New York law: what a court may do to "save" a contract that is missing an important or essential term. A contract is missing an essential term if a basic component, such as price, is missing. On the one hand, an agreement by the parties to negotiate an essential term later on is generally not enforceable; a contract will not be enforced if the only way to fill in the gap is to wait for the parties to agree. But courts look for ways to interpret a contract to supply the missing term, especially if the parties have manifested an intent to be bound and there is evidence from commercial practice or usage in the area of business covered by the contract that would enable

a court to supply the missing term. Notice that the one thing a New York court would generally not do is to attempt to detect the intent of the parties by testimony as to the missing term: this will put a court in the position of having to determine the subjective intentions of the parties—something a common law court is generally loathe to do. But the court can and will, on its own initiative, seek to fill the term if it can make reasonable inferences from the objective evidence of the agreement and the customs and practices of the relevant area of business or commerce.

B. How Contracts Are to Be Construed and Interpreted

New York, like some other common law jurisdictions, requires some written evidence as an additional requirement for the enforcement of many contracts. These include contracts that, of their nature, take more than a year to perform, contracts for the sale of real property, agreements regarding the debt of another and promises to pay a debt discharged in bankruptcy, finder's fees and fees for services payable other than to attorneys, and real estate brokerage fee arrangements. In addition, New York Uniform Commercial Code Section 2-201(1) requires a writing in the case of contracts for the sale of goods in excess of Five Hundred Dollars. French law, while also requiring written evidence for contracts above a certain amount set by regulation, exempts commercial contracts from this requirement. English law, from which New York inherited the so-called "statute of frauds" (which is the origin of these writing requirements), has actually eliminated the requirement of a writing for all contracts except real estate contracts.

Agreements that are strictly oral in nature by necessity have a more subjective component, since there must be much more reliance on memory and mutual subjective understanding to prove the existence of a contract and to interpret it. In maintaining the requirement of at least some written evidence of a contract for enforcing a contract, the "statute of frauds" shifts the balance more in the direction of objective evidence that stands by itself apart from the memory of the parties. It should be noted that the writing that is required here is not necessarily what we would think of as a fully drawn agreement; in many cases a fairly minimum amount of written evidence is sufficient and, in a number of instances, partial or full performance of an obligation eliminates the need for the writing. Of course, it goes without saying that sophisticated international transactions will virtually always be reflected in a detailed written agreement anyway. Thus the importance of the writing requirement is important less for its practical relevance but for the way it tends to support the focus on an "objective" source for determining whether a contract exists and for determining its specific terms and obligations.

In the case of written agreements, however, New York law takes this objective orientation a step further by prohibiting, in the case of a dispute about the terms of an agreement, oral evidence of prior negotiations, representations and inconsistent understandings. Often known as the "parol evidence" rule, it might be better described as the "anti-extrinsic evidence rule." New York is said to have a "hard" parol evidence rule, as expressed in the "four corners" principle, under which a court must decide whether the terms of a contract are ambiguous on the basis of its analysis of the document itself and may only consider extrinsic evidence (written or oral) if it determines, as a matter of law and not of fact, that one or more of the contract terms are ambiguous. New York courts give even greater protection against extrinsic evidence regarding the terms of a contract if the parties have agreed to "merge" or "integrate" their agreement, extending the exclusion of oral evidence about so-called "collateral agreements," *i.e.*, agreements entered into at the same time as the agreement under judicial scrutiny. Such provisions are given almost complete deference by New York courts.[14]

The effect, if not the purpose, of the parol evidence rule and the merger rule is to clearly encourage parties to use agreements that fully set out the terms and obligations of the transactions and relationships. New York courts continue by and large to give effect to the "plain meaning" and "four corners" principles: a court's primary role is to give effect to the parties' intent as evidenced by the written contract. If that intent can be discerned from the plain meaning of the written agreement without recourse to any other document or representations (*i.e.*, "within the four corners" of the agreement), the court's interpretive task is to give effect to the terms of the agreement as thus disclosed.[15] Extrinsic evidence can be admitted to establish the meaning of ambiguous terms only if the court determines that the contract cannot be reasonably construed and interpreted based on the aforementioned principles. Notice that if an essential term of a contract is missing and the issue is not simply the meaning of an ambiguous term, two consequences can follow. One, the agreement may fail to qualify as a legal contract because there was no content to the agreement about which there could be meeting of the minds in the first place—the terms of the agreement would be simply too vague for there to have been an offer and acceptance that could be the basis for agreement. Two, the other possibility, at least in the case of contracts for the sale of goods (especially among business parties), is that courts can supply the missing term based on custom in the relevant industry or reasonable commercial practice in that area of business or the past practice of the parties themselves.[16]

It is often said that New York courts are not prone to substitute their judgment for the terms to which contracting parties have agreed and, indeed, this judicial restraint is one of the major reasons why contracts governed by New York law are said to be "certain" and sure to be confirmed according to their terms. As we can see from some

of the features of New York contract law just described, this is not just a matter of general philosophy but the fruit of the focus of New York law on the elements of bargaining and consideration in determining whether a contract exists at all, in the requirement of a writing for many types of contracts (especially those with longer duration or with more economic value at stake), and the strong deference to the written expression of contractual terms (thus limiting the ability of parties, whether deliberately or unwittingly, to try to amend their contracts by oral recollection and putting the court in a position of having to decide whether a written or oral version of the terms of a contract is more persuasive). This is all in marked contrast to the tendency in the civil law tradition to favor shorter and less exhaustive agreements and the willingness to rely on courts to fill in missing terms and to apply and even reshape contractual arrangements.

1. Excursus on the "Battle of the Forms"

A subsection of contract law that manifests some interesting differences between the law of New York and many other U.S. jurisdictions on the one hand and English law and most civil law jurisdictions on the other hand concerns how a contract is constituted and how it is construed in the often quick-fire world of the sale of goods, where contracts are often not negotiated or carefully drafted and where the terms of the contracts are determined by exchanges of offers and acceptances (with buyers and sellers on both sides of the offer-acceptance dichotomy) on standardized forms that include the buyer's or seller's preferred terms and conditions. These differences are especially relevant when acceptance of an offer is indicated not by an executory promise but by a performance—usually delivering goods or accepting goods and/or rendering payment.

The traditional common law approach is exemplified in the "last shot" rule: a seller who delivers a product in response to an offer to buy accompanied by variations from the terms of the offer can set the terms of the contract if the buyer accepts the goods because the variation in the seller's terms means that the seller has legally rejected the offer and substituted its own offer, which the buyer's acceptance of the goods confirms and ratifies. European law is generally consistent with this approach. For example, classical French jurisprudence would insist that there must be "an agreement of the parties on all the conditions of the contract."[17] The German Civil Code follows this principle when it provides, in Article 150(3), that "[a]n acceptance with amplifications, limitations or other alterations is deemed to be a refusal coupled with a new offer." Article 154 of the *Bürgerliches Gesetzbuch* ("BGB") provides that "So long as the parties have not agreed upon all points of a contract upon which agreement is essential, according to the declaration of even one party, the contract is, in case of doubt, not concluded." All of these approaches focus on "consent" as the key factor in determining if a contract exists—with the focus on searching for the "mirroring" of the subjective intentions of the parties.

The New York Uniform Commercial Code takes a very different approach by providing in Section 2-207(1) that "[a] definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms." Under this approach, acceptance of an offer to buy by delivery of the goods, even if the delivery is accompanied by different terms and conditions, represents an acceptance of the offer so that a contract has been established. This does not mean that the inconsistent terms included in the seller's document necessarily become part of the contract: "The additional terms are to be construed as proposals for additions to the contract."[18] But, as between merchants, "such terms become part of the contract" subject to certain exceptions, the most interesting of which is that "they materially alter it."[19] Thus, even terms that materially alter the contract do not necessarily invalidate the contract, but rather create an issue about the terms of the contract. In such cases, "the terms of the particular contract consist of these terms in which the writing of the parties agree, together with any supplemental terms incorporated under any other provisions of the Act."[20]

Section 2-207(2) of the New York Uniform Commercial Code provides no express guidance as to the criteria for determining whether an additional term materially alters the terms of an offer under Section 2-207(1), although Comment 4 to Section 207 suggests that the test of material alteration is whether the additional term would "result in surprise or hardship if incorporated without express awareness of the other party." It has been suggested that evidence that the offeror never objected to the addition of a term similar to that added by the offeree and accepted by the offeror in previous transactions between the parties establishes a "course of dealing" between them and therefore cannot arise to the requisite "surprise" needed to meet the materiality test.[21] Under NY UCC Section 1-205, "a course of dealing...is fairly to be regarded as establishing a common basis of understanding for interpreting [the] expressions and other conduct" of parties to a particular transaction. Reference to courses of dealing between contracting parties for establishing the terms of a contract seems to be blessed by NY UCC Section 2-207(3), according to which "[c]onduct by both parties" recognizing the existence of a contract can be sufficient to establish a contract, the terms of which agreement will consist of the writings of the parties...together with any supplementary terms incorporated under any other provisions of this Act," including presumably Section 1-205. However, it should be noted that NY UCC Section 2-207(3) usually applies when the parties have failed to establish a contract under Sections 207(1) and (2) and that

the terms proposed to be added by the offeree under Section 207(2) may not avail if the contract is established by conduct of the parties under Section 207(3) rather than by the exchange of express contractual terms under Sections 207(1) and (2).[22]

England has not passed any legislation similar to NY UCC Section 2-207. Lord Denning, in the much-discussed case of *Butler Machine Tool Co Ltd v. Ex-cell-O Corporation (England) Ltd.*,[23] proposed that "[t]he better way is to look at all the documents passing between the parties—and glean from them, or from the conduct of the parties, whether they have reached agreement on all material points." But it is unclear how widely this approach has been accepted in England. The rule of Uniform Commercial Code Section 2-207 makes more sense in a jurisprudential environment where the focus on the subjective intentions and meaning of the parties is less important than the outer or objective inferences that can be drawn from the conduct of the parties and where courts focus more on what a "reasonable person" might think the parties intended or meant. Ironically, by requiring that the terms to which the parties have agreed be supplemented by terms incorporated under other provisions of the Act, Section 2-207 seems to create an opportunity for New York courts to become involved in contract supplementation more familiar to civil law practice than to common law practice.

2. Excursus on "Plain Meaning"

It should be pointed out that adoption of the plain meaning rule does not mean that courts in either New York or England are bound to a purely literalist construction of contracts based on the dictionary meaning of the words. Lord Hoffman, in *Investors Compensation Scheme Ltd v. West Bromwich Building Society*,[24] set forth a so-called "modern" approach to contract construction that emphasizes not so much the meaning of words in dictionaries and grammars but rather what "the parties using those words against the relevant background would reasonably have been understood to mean." New York courts have emphasized the importance of the "purpose of the contract" and interpreting the terms of a contract consistently therewith.[25]

3. Excursus on "Entire Agreement" Clauses

Under New York law, the parol evidence rule does not by itself preclude evidence of collateral agreements or understandings. To preclude evidence of such other agreements and understandings, a contract must contain a provision that recites that it represents the sole and complete ("entire") expression of the parties' understanding, thus "integrating" or "merging" any other agreement or understandings into the contract.[26] The same option is available for purposes of contracts for the sale of goods, under Uniform Commercial Code Section 2-202. English law generally follows the same concept.[27] While the parol evidence and "merger" clauses were generally unique to the common law, the concept of precluding oral evidence in the case of agreements that contain an "entire agreement" clause has been accepted by the UNIDROIT Principles of International Commercial Contacts at Section 2.1.17 and by the Principles of European Contract Law at Section 2.05.

Notwithstanding the general acceptance of entire agreement clauses by New York law as well as English law, it appears that English courts are inclined to read these provisions more strictly, especially when issues of misrepresentations have been raised. The issue is whether such undertakings preclude evidence of pre-contractual representations. Thus, in *Thomas Witter Ltd v. TBP Industries Ltd*,[28] and *EA Grimstead & Son Ltd v. McGarrigan*,[29] the court held than an "entire agreement" clause did not exclude remedies for alleged pre-contractual understandings where the agreement incorporated in the contract contained an acknowledgement that the plaintiff party had not been induced to enter the contract by any representation or warranty other than the statements contained in the warranty schedule.[30] It has been suggested that, in England, taking into account the provisions of the Unfair Contract Terms Act 1977, any such non-reliance clause must distinguish between innocent and negligent misrepresentation, on the one hand, and fraudulent misrepresentation, on the other.[31] New York courts are more likely to bar fraudulent as well as non-fraudulent misrepresentation claims where the contract has a specific statement of nonreliance with regard to representations on which, under the clause, the parties have agreed they have not relied. The authority for this broader enforcement was set forth by the New York Court of Appeals in *Danann Realty v. Harris*,[32] and applied in *Grumman Allied Industries Inc., v. Rohr Industries*.[33]

C. The Role and Application of Good Faith Under New York Contract Law

New York law (and to a certain extent a number of other U.S. jurisdictions—though not all) stands in an interesting "middle" position between the civil law on the one hand and English law on the other hand when it comes to the doctrine of "good faith" in the law of contracts. Perhaps the most noted example of the legal requirement of good faith is to be found in Section 242 of the German Civil Code, which provides that all contractual obligations must be performed with "faith and trust" ("*Treu und Glauben*"). Article 1143(3) of the French Civil Code similarly provides that contracts must be carried out in "good faith" ("*bonne foi*"). Several articles of the Italian Code also impose a "good faith" requirement: Article 1375 requires that a "contract must be performed in good faith"; Article 1366 provides that a "contract must be interpreted in good faith"; and Article 1337 imposes obligations of "good faith and fair dealing" in debtor-creditor relations. The principle of good faith has become enshrined in efforts to harmonize European and international laws of contract. Thus, Article 1.106 of the Principle

of European Contract Law imposes an obligation of "good faith and fair dealing." The UNIDROIT Principles of International Contract Law impose a similar obligation. The Convention on Controls for the International Sale of Goods does not have an express provision imposing a duty of good faith in the performance of contracts, but it does provide that regard must be had for "promoting the observance of good faith in international trade" in the interpretation of the Convention.

New York courts were the first courts in the United States to introduce the implied covenant of good faith into contract law jurisprudence. In *New York Central Iron Works Co. v. United States Radiator Co.*,[34] a case involving a long-term requirements contract, the Court of Appeals declared that "[t]he obligation of good faith and fair dealing towards each other is an implied concept of this character." Another landmark case was *Wood v. Lucy*,[35] in which Justice Benjamin Cardozo, then sitting on the New York Court of Appeals, opined that the contract at issue was "instinct with an obligation, imperfectly expressed" of good faith performance. The duty of good faith was further strengthened under New York contract and commercial law when New York, in 1962, adopted the Uniform Commercial Code. Section 1-203 of the Uniform Commercial Code provides that "[e]very contract or duty within this Act imposes an obligation of good faith in its performance or enforcement." Section 2-103 of the Uniform Commercial Code defines good faith for purposes of the sale of good as "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade."

New York continues to adhere to this principle.[36] For New York law, the duty to act in good faith under a contract is not generally separable from a duty to perform one's duties under the contract itself. Thus, a breach of a covenant of good faith is generally not seen as giving rise to an independent cause of action.[37] It is supposed to aid the interpretation and performance of the terms of the contract itself "by protecting the promise against breach of the reasonable expectations derived from an agreement of the parties."

In the early New York cases, such as *New York Central Iron Works*, the implied covenant was introduced to construe contracts in a manner that was commercially reasonable and fair without compromising New York law's adherence to the plain meaning and parol evidence rules.[38] As recently as 1995, the Court of Appeals suggested that, within the parameters of protecting the reasonable expectations of the parties, courts can read or imply into a contract "a promise that a reasonable person in the place of the promisee would justifiably believe was included within the contract."[39] But in an age where more and more contracts between commercial parties are written with the assistance of counsel, the need and inclination of New York courts to use the covenant for the purpose of essentially supplementing or revising contracts can be said to have waned. A few years before *Dalton*, the Court of Appeals had noted that "[f]reedom of contract prevails in an arms-length transaction between sophisticated parties and, in the absence of countervailing public policy concerns, these parties will not be relieved of the consequences of their bargain."[40] In *Reiss v. Financial Performance Corp.*,[41] the Court of Appeals declined to imply a contractual term to a contract for the purchase of stock warrants to deal with the contingency of a reverse stock split after the terms of the purchase were set. To the Court, the possibility of a stock split was reasonably foreseeable and the parties had to be assumed to have advisedly declined to address modifying the purchase price in the event of any such split. While this decision seems to run contrary to an earlier decision of the U.S. Court of Appeals for the Second Circuit in *Bank of China v. Chan*,[42] which suggested a more generous approach to implying terms not expressly addressed, the *Reiss* case seems to underscore the policy of New York law not to allow the covenant of good faith and fair dealing to become an excuse for commercially sophisticated parties not to carefully consider and address all foreseeable issues that could arise under the terms of their transactions.[43]

Thus, in many ways, the covenant of good faith, as between sophisticated commercial parties, tends to serve primarily as a "negative protection," *i.e.*, allowing the court to imply prohibitions on conduct that would undermine the performance of obligations of an agreement or deprive a party of the benefit of its bargain. "The covenant applies only where an implied promise is so interwoven with the contract as to be necessary for the effectuation of the purpose of the contract. For a violation of the covenant to occur, the defendant's action must directly violate an obligation which may be presumed to have been intended by the parties."[44] In such cases, at least one New York court has suggested that a separate claim for violation of the covenant of good faith might exist, even if there is no viable breach of contract claim, if a defendant has used its rights under the contract for its own gain or to deprive the plaintiff of benefits under the contract or to realize gains that the contract implicitly denied to the defendant.[45]

The reluctance of New York courts to apply the covenant of good faith and fair dealing to impose additional positive obligations on parties or to address contingencies the parties declined to address themselves contrasts with the more expansive view of the duty of good faith taken by civil law courts. For example, Section 242 of the German Civil Code, which imposes a duty of "trust and faith" ("*Treu und Glauben*") on contracting parties, was used very broadly by the German courts in the aftermath of the inflation after the First World War to relieve parties from the perceived loss of financial position that resulted from the massive devaluation of the German currency. Similar adjustments were made in cases arising after the conclusion of World War II. Implementation of this

provision in recent decades has been less dramatic but is still much more expansive than the New York approach. German courts are seen as having a broader ability to fill in gaps and to supply contractual provisions that will enable the transactions contemplated to be completed. According to a recent review of comparative perspectives on the notion of contractual good faith, Section 242 "notably permits the completion, limitation and concretization of existing agreements."[46]

French law has long been known for its insistence on the principle that contracts must be followed. The role of the principle of good faith has been said to be "moderating" and "a valve of commutative justice or of 'contractual solidarity.'"[47] The duty of good faith under French contract law is said to be "classically defined as the expression of the duty of loyalty by each co-contractor so as not to offend the confidence that gave rise to the contract [so that]...[t]he parties must act towards one another with loyalty, without fraud or malice." Expressed this way, the duty of good faith has led some legal scholars to conclude that the principle of good faith gives rise to a positive obligation of cooperation, and, at least in cases of "flagrant abuse," to imply obligations of information or security, in order to provide suitable remedies.

English law has, at least to date, steadfastly declined to adopt the principle of good faith into its contract law. English courts, it is said, have a reluctance to "generalize abstract principles" and a preference "to work with particular instances of duty which can be identified in particular cases."[48] Secondly, English judges have expressed concerns "about the lack of certainty in defining the duty of good faith in the context of the relationship between contracting parties"—particularly as this may apply to negotiations between parties before agreement is reached.[49] The discomfort about "abstract principles" seems, to this author, itself to be somewhat theoretical, as even the notions of consideration and agreement with which English courts are comfortable are themselves general principles that gather their meaning and application from particular cases. In the case of New York, it is clear that the principle of good faith has been handled very cautiously and with great discretion. It is not, except in some highly unusual situations, the basis of a cause of action or a claim separate from a claim of breach, and it has been used very sparingly to supply terms in existing contracts, especially in the case of written agreements between sophisticated commercial parties. At the same time, it places a certain "floor" as to the range of activities that parties to contracts may take in reference to the obligations they have undertaken. It recognizes that, while negotiations in certain contexts may indeed be adversarial at least in inception, many contracts, beyond those for discrete purchases of goods, entail longer relationships and therefore require a degree of mutual respect and cooperation that needs to be taken into account in determining the constraints that a party may need to place on its actions in order to perform its contractual obligations.

The principle of good faith has led to developments in two important areas of European law that New York law has been more hesitant to adopt: pre-contractual liability and adaptation of contracts for hardship or dramatic changes in economic circumstances.

1. Pre-Contractual Liability

A corollary of the rule that contracts must be observed would seem to be that no such duty arises until agreement has been reached. French law and German law have been more willing to find that certain remedies can be available for conduct that constitutes bad faith in pre-contractual negotiations. English law, by contrast, has been very reluctant to find any such liability. New York law admits the possibility of such liability in certain cases where parties have contractually bound themselves to conduct negotiations, but cabins any such liability very closely.

The concept of good faith and fair dealing in business negotiations received perhaps its best known formulation in the writings of the German nineteenth century legal scholar, Rudolph von Jhering. He argued that parties to pre-contractual negotiations have a duty of good faith, fair dealing, care and loyalty.[50] It has been suggested that this is consistent with the civil law's focus on the relationship between the parties (*i.e.*, their consent to be bound in duties to each other), as distinguished from the common law's stress on the bargain between them. Under French law, remedies for violation of duties inherent in pre-contractual negotiations arise under tort law, not contract law itself. Bases for liability can include "unjustified and abusive rupture of negotiations" as well as negotiation without serious intent to contract, failure to cooperate, misuse of information provided in confidence, entry into negotiations in order to prevent someone from entering into an agreement with another party, and failure to disclose essential and material facts. The chief factors that seem to increase the chance of a finding of liability are (i) the advanced stage of negotiations, (ii) the amount of work already undertaken, and (iii) the suddenness of the breaking off of negotiations.

Under German law, duties and liabilities with regard to pre-contractual liabilities are inferred from Section 242 of the Civil Code, so that the principle of good faith and fair dealing applies in the pre-contractual as well as the contractual stages. English law, by contrast, assumes that the relationship between the parties during negotiations, far from being one of mutual cooperation and loyalty, is intrinsically adversarial. Granted the assumed adversarial nature of the negotiation context, under English law, a party has the right to withdraw from negotiations at any time up to the point where a contract or agree-

ment has been reached. One exception to this approach is when there is an express agreement to renegotiate an agreement.[51]

The New York Court of Appeals, in *American Broadcasting Companies, Inc. v. Wolf*,[52] opened the door to possible pre-contractual liability for failure to negotiate in good faith in a case involving a contract between the famous sportscaster Warner Wolf and the American Broadcasting Company ("ABC"). The agreement between Wolf and ABC required that he "enter into good faith negotiations...for the extension of his agreement on mutually agreeable terms," and the Court of Appeals ordered Wolf to comply. But New York courts have been very careful not to extend this case beyond its facts. There can be an obligation only to negotiate in good faith when the parties use definite language indicating a present intent to be bound and "the subject of negotiations must be both specific and backed by ascertainable indications of intent regarding the anticipated outcome of the process."[53] Significantly, New York courts give great deference to stated intentions by the parties that they intended to execute their agreement in a written form. Thus, in *R.G. Group, Inc. v. Horn & Hardart Co.*,[54] the court stated that "when a party gives forthright, reasonable signals that it means to be bound only by a written agreement, courts should not frustrate that intent." An effort to try to find contractual liability in the absence of a concluded contract based on promissory reliance or estoppel was firmly rejected by the Federal Court of Appeals for the Second Circuit, per Judge Learned Hand, in *Baird v. Gamble Brothers*.[55] There, the court, applying New York law, declined to find a subcontractor accountable to the general contractor because the general contractor obtained a contract in reliance on the subcontractor's bid, which the subcontractor withdrew before the general contractor's offer was accepted by the contractor. Thus, while New York law may be slightly more open to enforcing express agreements to negotiate in good faith where a contract already exists or where sufficient terms have already been agreed to, New York law does not seem inclined to extend the duty of good faith and fair dealing in any significant way outside the contours of concluded contracts.

2. Notions of Impossibility, Impracticability and Hardship

One of the most salient issues of contract law—especially in the case of contracts that take a long time to perform—is whether circumstances could so dramatically change the obligations of the parties to each other so as to cause any of them to have a legal basis for suspending or terminating performance under the contract. In civil law systems, the adjudication of cases rests on concepts of *force majeure* and hardship, while in common law systems, the relevant concepts are impossibility of performance, frustration of contractual purpose, and commercial impracticality. In general, the concepts of *force majeure*, impossibility and frustration stand on one side of the more restrictive continuum while the concepts of commercial impracticality and hardship stand on the more expansive side.

Section 1148 of the French Civil Code enshrines the concept of *force majeure*. To grant relief from the duty to perform one's contract, one most show that performance has been rendered dischargeable by reason of some event that was unforeseeable, irresistible and external. An explanatory note to Section 1148 explains that the concept of *force majeure* "applies to events that make performance impossible, but not to those that make performance only more difficult."[56]

The Court of Appeals for the Second Circuit has explained the distinction between impossibility and frustration of purpose: "Impossibility may be equated with an inability to perform as promised due to intervening events such as an act of state or destruction of the subject matter of the contract...Frustration of purpose, on the other hand, focuses on events which materially affect the consideration received by one party for its performance."[57] In the case of frustration, "[b]oth parties can perform but, as a result of the unforeseeable events, performance by party X would no longer give party Y what induced him to make the bargain in the first place." In either case, the fact that performance has become more burdensome, difficult or expensive does not absolve a party from performing its obligations. As with cases of impossibility, discharge on the basis of frustration is "generally limited to instances where a virtually cataclysmic, wholly unforeseeable event has rendered the contract valueless to one party."[58]

Section 2-615(a) of the New York Uniform Commercial Code excuses delay in delivery or even non-delivery "if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic regulation or order whether or not it later proves to be invalid." As the Official Comment notes, "[i]ncreased cost alone does not excuse performance unless the rise in cost is due to some unforeseen contingency which alters the essential nature of the performance." English law and New York law seem here not to differ greatly: "Frustration is exceptional, and cannot be invoked lightly. If frustration is extended to cover the case where the fixed price becomes "so unfair to the contractor that he ought not to be held to his original price," then "there would be an untold range of contractual obligations rendered uncertain, and possibly unforseeable."[59]

Providing on the continuum to the most flexible of these concepts, "[h]ardship refers to performance being rendered more difficult, but not impossible, by an unforseeable change in circumstances beyond the parties' control."[60] Hardship makes its appearance in French law under the concept of *imprevision*, but French law does not

grant a remedy for hardship between private parties, but only to parties to contracts with government agencies. The Algerian and Egyptian Civil Codes have adopted provisions that, in cases of hardship, allow judges not to rescind a contract between private parties but to adjust the obligations of the parties. In 2002, Germany enacted a substantial revision of the relevant sections of its Civil Code regarding obligations, including a new Section 313, which addresses the "collapse of the foundation of a contract" (*"Wegfall der Geschaeftsgrundlage"*): "If circumstances at the basis of the contract formation have substantially changed and the parties would not have entered into the contract at all or with a different contents if they could have anticipated this change, a claim for an adjustment of the contractor can be made, provided that, given all circumstances of the individual case, especially the contractual or statutory risk distribution, one cannot be expected to continue with the contract as it is."

The UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law are considered by some to have adopted rules that come close to reflecting the German perspective. Section 6.2.1 reiterates the basic principle that contracts must be performed subject to its provision on hardship. Hardship, under Article 6.2.2, is designated as occurring "where the concurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party has received has diminished," provided that (i) the events occur or become known to the disadvantaged party after the contract has been concluded, (ii) the events could not have reasonably been taken into account by the disadvantaged parties at the time the contract was concluded, (iii) the events are beyond the control of the disadvantaged party and (iv) the risk of such events was not assumed by the disadvantaged party. In the case of such a qualifying occurrence of hardship, Article 6.2.3 allows the disadvantaged party to request renegotiations but does not excuse that party's non-performance. Upon failure to reach agreement, either party may resort to a court and, if the court finds that hardship has been established, it may, "if reasonable," terminate the contract on a date and on terms to be fixed or adapt the contract with a view "to restoring its equilibrium." Article 6.111 of the European Principles follows the UNIDROIT Principles, except that it also provides that "the court may award damages for the loss suffered through a party refusing to negotiate or breaking off negotiations contrary to good faith and fair dealing." Article 79 of the CISG provides a more limited form of "exemption" in the case of a party's failure to perform because of "an impediment beyond its control"; the exemption is available only for the period during which the impediment lasts and the party claiming the exemption must give the other party notice within a "reasonable time" after the impediment came to (or should have come to) the affected party's knowledge.

3. *"Force Majeure"* and Material Adverse Change Clauses

New York as well as English courts generally pride themselves on honoring the terms of the agreement the parties have agreed to, without substituting their own business judgment for that of the parties. General discomfort with granting relief based on change of circumstances and hardship can cause them to construe provisions that call for the renegotiation of contract terms in the event of an event of *force majeure* or material adverse change more narrowly than civil law courts, in part perhaps because of the general common law discomfort with enforcing "agreements to agree."[61]

In *IBP, Inc. Shareholders Litigation v. Tyson Foods, Inc.*,[62] the Delaware Court of Chancery applied New York law to adjudicate the effort of Tyson Foods to withdraw from its agreement to acquire IBP, Inc., based on a change of IBP's projected earnings after the "9/11" attacks. The Delaware Chancellor held that a New York court would incline toward a view that a buyer ought to have to make a strong showing to invoke a "material adverse change" exception to its obligation to close a very heavily negotiated merger agreement covering many details with great specificity and detail. Interestingly, the Chancellor acknowledged that the "Material Adverse Change" or "MAC" clause was very broadly drafted, most likely in an effort not to undercut the MAC clause by allowing it to be limited, under the doctrine of *"eiusdem generis,"* to a list of specific circumstances. Still, the court concluded that the MAC clause "is best read as a backstop protecting the acquiror from the occurrence of unknown events that substantially threaten the overall earnings of the target in a durationally significant manner" and found that the change of earnings invoked by Tyson did not meet that test.[63] Other New York cases tend to support the preference for enforcing *force majeure* clauses only to specific types of occurrences expressly mentioned in the clause.[64]

Strict as New York law may seem to be, English law may be ever more restrictive. Thus, the UK Take Over Panel, in the *WIP/Tempus* case, declined to accept WPP's invocation of the MAC clause in its agreement to acquire Tempus, stating that a "material" change of circumstance "requires an adverse change of very considerable significance striking at the heart of the purpose of the transaction, *analogous…to something that would justify frustration of a legal contracts.*" (Emphasis added.) This seems to be a very strict test indeed, which renders MAC clauses almost meaningless if the circumstances in which it is invoked falls short of frustration of purpose.[65]

D. The Principle Under New York Law of Fiduciary Loyalty Among Business Partners

A discussion of New York law on the issue of good faith cannot be complete without considering the very high standard of conduct New York law imposes on business partners in regard to each other. This standard

amounts to the duty of a fiduciary and was memorably articulated by Justice Benjamin Cardozo, then sitting as a Judge of the New York Court of Appeals, when he wrote: "Joint venturers, like co-partners, owe to one another, while the enterprise continues, the duty of the finest loyalty." Justice Cardozo elevated the relationship of those in business partnerships to "those bound by fiduciary ties," as if each partner were a trustee to the other. For trustees, Cardozo noted "the standard of behavior" is "[n]ot honesty alone but the punctilio of an honor the most sensitive."[66] Joint ventures and partnerships (whether formally structured as partnerships, corporations or limited liability companies) are all governed by agreements or contracts—and therefore the agreements that business partners make among themselves, and the standard for their implementation and interpretation, should be as much taken into account when weighing the merits of New York contract law as agreements to buy and sell goods and other relatively short-term transactions.

The law of England knows the duty of business partners to each other as *uberrimae fidei*; French and German law do not speak in this exact terminology but interpret the principle of good faith very fully to what French legal scholars increasingly recognize as "agreements of cooperation." Interestingly, many states of the United States have adopted a non-fiduciary, so-called "contractarian" approach to the mutual duties of business partners by adopting the Revised Uniform Partnership Act of 1994 ("RUPA"), which "[m]oves away for a reliance on this broad fiduciary duty to regulate partner conduct" and instead "limit[s] fiduciary duty to a duty of loyalty, which is further limited... to specific conduct instead of being a general concept tailored by courts to cover a broad array of impermissible conduct."[67] Significantly, unlike almost forty other states of the United States, New York has not adopted RUPA. Thus, the same judge whose dissenting appellate decision opinion in the *Reiss* case[68] (later adopted by the New York Court of Appeals) declined to adjust the terms of the warrant purchase agreement despite appeals to the principle of good faith firmly upheld the standards of utmost good faith and fiduciary loyalty in *Rickbell Information Services, Inc. et al. v. Jupiter Partners et al.*[69] There, Judge Saxe determined that fiduciary obligations could arise between parties to a joint venture even in the absence of an express agreement between them and that these obligations can impose limits on the parties' otherwise unfettered exercise of their contract rights.

In a perhaps further ironic turn, a Singapore legal scholar, in an article now posted on the website of the Singapore Academy of Law, suggests that the decision in *Rickbell* shows that New York courts cannot be counted on to strictly interpret and enforce contracts on their own terms.[70] There is a double confusion here. The fact that New York law holds business partners to a very high standard of mutual conduct does not mean that New York law has imposed the same high standard on what Justice Cardozo termed the "workaday world for those acting at arm's length," as the well documented aversion of New York courts to upset private contractual arrangements demonstrated in the *Reiss* case clearly attests.

E. Third-Party Beneficiaries

A corollary of the common law doctrine of consideration is the doctrine of contractual privity—the rule that says the benefits and detriments of a contract can only adhere to persons who are parties to that contract. As a consequence, common law (before changes made in New York and other states in the nineteenth century and changes in English law introduced in 1999), as a general proposition, did not permit persons who were not parties to a contract to enforce any rights or benefits conferred on them by the contract that required the performance of obligation in their regard. There were, of course, exceptions to this rule, in areas like trust law and insurance law, but at least in England the exclusion of third-party remedies was still strong until relatively recently. As discussed earlier, consideration is not a factor in constituting a valid contract under civil law and, at least under German law, third parties could more easily claim benefits and rights in respect of a contract to which they were not a party. BGB Section 328, for example, provides that "a contract may stipulate performance for the benefit of a third party, so that the third party acquires the right directly to demand performance." A third party may also, under German law, seek damages for failure of a party to perform its duty under the contract.[71] The French Civil Code does not contain provisions regarding third-party rights. On the other hand, as with most civil law systems, French law does not draw a rigid distinction between tort law and contract law in the style of the common law, and therefore tort remedies are more easily available with regard to contractual matters.

England overcame the traditional common law aversion to providing third parties the possibility of having rights under contracts by enacting "The Contracts (Rights of Third Parties) 1999." The Act provides that, subject to the provisions of the Act, "...a person who is not a party to a contract (a 'third party') may in his own right enforce a term of the contract if (a) the contract expressly provides that he may, or (b) subject to Section (2), the term purports to confer a benefit on him"; Section 2 provides that the provision just mentioned "does not apply if on a proper construction of the contract it appears that the parties did not intend the term to be enforceable by the third party."

New York law has been far less hostile to third-party beneficiaries. As far back as 1918, the New York Court of Appeals recognized that the doctrine of privity should be set aside in the case of contracts made for the benefit of a third party.[72] In 1985, the Court of Appeals adopted

the principles put forth in Section 302 of the Restatement (Second) of Contracts regarding third party beneficiaries. Under this test, a third-party beneficiary has the burden of demonstrating that (i) a valid and binding contract exists, (ii) it was an intended beneficiary of the contract, and (iii) the benefit to it is sufficiently immediate to indicate that the contracting parties intended to compensate the third party if it lost its benefit.[73] Under New York law, a third-party beneficiary takes no greater rights to enforce a contract than the actual parties would, "'its rights are subject to the same defenses as the rights of the promisee,'" and it is bound by the same limitations on liability that are provided for in the contract.[74] Anecdotally, this author understands that advisors often feel more comfortable with the longer tradition of respect for third-party beneficiary rights under New York law, where the courts are not bound by a statutory scheme in the mode of the 1999 English Act. Thus, for example, it is considered much easier and reliable to provide for the rights of purchasers in the structuring of American Depositary Receipts under New York law than it is under English law.

F. Performance Issues: Perfect Tender, Substantial Performance, *"Nachfrist"*

Under the law of New York (NY UCC Section 2-601(a)), subject to certain exceptions, "if the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may (a) reject the whole; or (b) accept the whole; or (c) accept any commercial unit or units and reject the rest." Section 35 of the English Sale of Goods Act 1994 is to the same effect. Article CISG 52 does allow a buyer to reject goods "if the seller delivers the goods before the date fixed" or "if the seller delivers a quantity of goods greater than that provided for in the contract." But, upon delivery, CISG Article 49(1)(a) allows the buyer to avoid the contract once goods have been delivered *only* "if the failure by the seller to perform any of its obligations under the contract or this Convention amounts to a fundamental bread of contract."

Article 25 of the CISG defines a breach of contract as "fundamental" only if "it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract..." CISG Advisory Council Opinion No. 5 advises that the following factors should be taken into account in determining whether a breach is "fundamental": (i) the terms of the contract; (ii) the purpose for which the goods are bought; and (iii) the possibility of repair or replacement. Article 7.3.1 of the UNIDROIT Rules adopts the same rules not just for contracts for the sale of goods but on a broader basis for when the failure of a party to perform an obligation under a contract amounts to a "fundamental non-performance," and sets forth a broader set of circumstances where non-performance can be "fundamental," including where the non-performance is "intentional or reckless" or where strict compliance is "of the essence" under the contract.

The CISG offsets the loss of the "perfect tender" rule for the buyer under Article 50 by allowing the buyer, under Article 50, "[if] the goods do not confirm with the contract and whether or not the price has already been paid...[to] reduce the price in the same proportion as the value that the goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at the same time." This is a remedy not available under New York law or English law. Under the CISG, the buyer has all the other remedies for damages provided by Articles 74-77 as well. The CISG makes it very important for the buyer to inspect goods received quickly and not to tarry in pursuing remedies. Article 38(1) requires the buyer to examine the goods within as short a period as is practicable under the circumstances and Article 39 requires that the buyer give notice to the seller of any non-conformity "within a reasonable time after he has discovered it or ought to have discovered it." Section 2-607(3)(a) of the New York Uniform Commercial Code is arguably less stringent when it provides that "[w]here a tender has been accepted, the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from remedy."

Under CISG Article 48, a seller may "remedy at his expense any failure to perform his obligations if he can do so without unreasonable delay and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer." However, CISG Article 49, borrowing the German concept of "*Nachfrist*," gives the buyer a measure of self-help in the case of delay in the seller's performance. CISG Article 47 allows the buyer "to fix an additional period of time of reasonable length before performance by the seller of its obligations." If the seller fails to perform within the time set by the buyer, under CISG Article 49(1)(b), "the buyer may declare the contract avoided...if the seller does not deliver the goods within the additional period of time fixed by the buyer."

G. Passage of Title and Risk (Sale of Goods)

In a somewhat unusual confluence, English law as well as French law provide that, in the absence of agreement to the contrary, title to specific goods under a contract of sale passes upon the conclusion of the contract of sale.[75] New York's UCC Section 2-401(2) provides a presumptive rule that title passes "at the time and place at which the seller completes his performance with reference to the physical delivery of the goods." The CISG leaves the question of passage of title to be determined by local law.

It should be noted that passage of risk of loss does not necessarily follow passage of title. Thus, under English law, while title often passes on conclusion of the contract, passage of risk follows when the goods are transferred to the buyer.[76] On the other hand, under French law, where

title also passes on conclusion of the contract, passage of risk follows as soon as the buyer acquires title to the goods. Under NY UCC 2-509, in the case of a sale where shipment is required but not to a particular destination, risk of loss passes to the buyer when the goods are delivered to the carrier—as long as they are conforming. Where delivery must be made to a particular destination, risk passes when the goods are tendered at the specific place indicated. With regard to goods that are not delivered but stored, title passes when a negotiable bill of lading is delivered to the buyer. The provisions of CISG Article 67 on issues of passage of title are very similar to those of the NY UCC.[77]

Section 2-509(4) of the New York Uniform Commercial Code provides that the provisions of Section 2-509 dealing with the risk of loss in contracts for the sale of goods are "subject to contrary agreement of the parties."

The "International Commercial Terms" published by the International Chamber of Commerce, or so-called "Incoterms," provide a convenient menu of options denominated in three letter trade terms for allocating the costs and risks of transporting and delivering goods under contracts for the sale of goods and are equally useful whether the CISG or Article 2 of the New York Uniform Commercial Code applies to a particular transaction.[78] Significantly, Incoterms do not endeavor to regulate when title passes, but rather regulate only when risk of loss passes.

H. Remedies

In addition to the contrasting approaches the civil law and the common law traditions take to hardship and fundamental changes of circumstances, the civil law and the common law differ substantially, at least in theory, in several other matters related to remedies, including the basic criteria for determining liability for loss, the role of foreseeability in determining damages, the availability of specific performance and the availability of liquidated damages.

By way of introduction, under common law concepts, contracting parties are strictly liable for breach of contractual obligations whereas, under civil law, liability is generally based on fault.[79] Under New York law, "[w]hen a contract is breached, the non-breaching party may assert a claim to recover damages for the loss it suffered as a result of the breach."[80] Fault is simply not a relevant issue. English law is of the same view: "Non-performance and defective performance are not seen as 'wrongs' in the same sense that a tort is a wrong."[81]

For civil law, the issue of liability turns on whether the breach arose from the fault of the breaching party. Thus, Article 1147 of the French Civil Code provides that: "[t]he debtor is held...to the payment of damages, whether because of the non-performance of the obligation or because of the delay in performance, whenever he fails to show that the non-performance is due to a foreign cause, and further that there was no bad faith on his part at all." The introduction of the issue of good faith into the determination of liability essentially allows the breaching party to lessen or even avoid liability if it can be shown that he did everything reasonable to attempt to perform the breaching party's obligations. Article 254 of the German Civil Code establishes a general principle of contributory negligence in contract law as well as in tort law. French case law also allows set-off for the responsibility of the non-breaching party; on the other hand French law does not impose a duty to mitigate losses on the injured party.[82] Notwithstanding the prevailing fault-based regime of French law, it does, unlike common law, allow parties to provide for *obligations de resultat*, where liability can arise on a single demonstration that a promise was not performed.[83]

1. Consequential Damages

Under New York and English law, the major categories of contract damages are (i) general or compensatory, (ii) reliance damages, and (iii) consequential or indirect damages. Punitive damages are not allowed unless a claim can be made out in tort.

German law acknowledges the fundamental principle that damages should compensate for loss of profit or gain but the range of the loss, following the general tort-like analysis of the civil law even in the area of contracts, looks more to the damages that can be causally tied to the breach and, as for foreseeability, focuses more on the damages that could be foreseen at the time of breach rather than at the time the contract was formed.[84]

The notion of foreseeability, which became so prominent for the common law in the aftermath of the seminal English case of *Hadley v. Baxendale*,[85] may have actually been borrowed from Articles 1150-1151 of the French Civil Code. But under French law, in the case of deliberate non-performance, the focus narrows to the damage caused by the breach, even if the damage was not foreseeable.[86] Under the rule of *Hadley v. Baxendale*, a breaching party's liability includes not only loss that would ordinarily flow "in the normal course of things" from a breach at the time the contract was entered into but also loss that follows from breach due to special circumstances known to the parties at the time the contract was formed. The 2008 decision of the House of Lords in *The Achilleas*[87] appeared to require proof that the defendant expressly assumed the risk of loss that could be expected to arise in the ordinary course from a breach of the contract—a requirement that would not only significantly change English law but cause English law to differ from New York law. However, the 2010 decision of the High Court in *Sylvia Shipping*[88] appears to have limited *The Achilleas* case to its facts and declined to apply the assumption of responsibility test that *The Achilleas* seemed to introduce.[89]

Under New York law, under the *Hadley v. Baxendale* rule, general damages compensate the non-breaching party for economic loss because of the non-performance of a contractual obligation, but "special damages" compensate the non-breaching party for losses that could arise under special circumstances the parties contemplated at the time the contract was entered into. The analysis looks to whether there has been any conscious assumption to pay the claimed special damages and whether, by words or deeds, the defendant reasonably led the plaintiff to believe the defendant had assumed such liability.[90]

It should be noted that both the UNIDROIT Principles of International Commercial Contracts in Article 7.4.4 and the Principles of European Contract Law in Article 9.503 provide for damages that "reasonably" could have been foreseen at the time of the conclusion of the contract as being likely to result from non-performance. If by "reasonably" there is intended an objective test, "special damages" seem to be excluded. As with "entire agreement" clauses and MAC clauses, parties can limit their exposure to consequential special damages by careful drafting. New York law generally enforces such clauses if they are not "unconscionable" and NY UCC Section 2-719(3) applies the same principle to contracts for the sale of goods.[91] As with MAC clauses, specificity in the drafting of such clauses makes them more likely to be enforced. Thus, while the "demarcation between direct and consequential damages is a question of fact usually left for resolution at trial," in *Roneker v. Kenworth Truck Co.*[92] the court determined that the waivers in the contract at issue included a detailed listing of the consequential damages to be excluded that permitted the court to determine "as a matter of law" whether the trucker's damages were direct or consequential.[93] Drafting waivers under English law requires awareness that English courts have held that "consequential loss" is a synonym for "indirect loss" and therefore that a general waiver of "consequential losses" might not preclude damages that arise from, "special circumstances" under the second branch of the *Hadley v. Baxendale* test. Thus, if the parties intend to exclude "lost production, profits, business, revenue or the like," it is best that these be expressly referred to in the waiver clause.[94]

2. Specific Performance

Under New York law, "the proper measure of damages for money withheld is lost interest" and the plaintiff cannot claim consequential damages. European law recognizes the right of a creditor to require the performance of a contractual obligation by payment of money.[95] Under civil law, a party generally has a right to seek specific performance of a non-monetary obligation. Thus, Article 1184(2) of the French Civil Code provides that "[t]he party towards whom the undertaking has not been fulfilled has the chance whether to compel the other to fulfill the agreement when it is possible, or to request its avoidance with damages." While the common law makes specific performance an essentially discretionary remedy available in equity, specific performance is not available when a remedy at law (basically monetary damages) will suffice.[96] So far, English law has resisted a tendency to give the remedy of specific performance a broader application.[97] In reality, parties to contract disputes in the civil law jurisdictions resort to specific performance as a desired remedy in far fewer instances than the general doctrine might lead one to suppose. Specific performance is not available if it would be unreasonable, involves services or work of a personal character or depends on a personal relationship.[98] It has been found to be rarely applied, based on a detailed study of the use of the remedy in Denmark, Germany and France, in part due to a reluctance to incur the administrative costs of enforcement.[99]

3. Liquidated Damages

Civil law and common law countries also have different doctrinal points of departures regarding the enforceability of liquidated damage clauses. The French Civil Code was noteworthy for allowing penalty clauses—clauses that exact a very high cost for non-performance as a means of determining breach. This permissive attitude towards penalty clauses was consistent with the theory of the civil law, which sees contracts and torts as part of one overarching law of obligations, where the concept of fault applies to breach of contract as well as to tort injury. In the common law, penalty clauses have been seen as a form of punitive damages, which are generally not allowable as a remedy in contract because of the strict liability of contractual breach and the general irrelevance of issues of fault.

But the two systems have moved closer toward each other. New York courts generally recognize and give effect to liquidated damage clauses when the damages represent reasonable estimates of the cost of breach, especially under circumstances where establishing the cost of breach may not be easy. They are enforceable as long as they are neither unconscionable nor contrary to public policy, but penalties for violations of contractual obligations are still not enforceable.[100] English law is of the same view, save for the fact that the courts are very reluctant to interfere with liquidated damage clauses as between sophisticated commercial parties.[101] On the civil law side, there has been a tendency to mitigate penalty clauses in some courts. The Council of Europe issued a "Resolution on Penalty Clauses" in 1971 with the aim of recommending a uniform application of penalty clauses under which "the penalty amount may be reduced by the courts if they are manifestly excessive, or if part of the main contractual obligation has been performed." Many countries have passed legislation consistent with the Resolution, including France and Germany.[102]

4. Early Termination of Contract

Perhaps the most fundamental remedy for breach to which a party to a contract can resort is unilateral termi-

nation of the contract and suspension of its obligations under the contract. All of the legal systems discussed here, as well as the international instruments, recognize the availability of this remedy if the defaulting party's breach is "substantial" or goes to the heart of the contract. The aggrieved party is given a choice between terminating the contract and seeking damages on one hand, or continuing with the contract on the other.[103] Section 1147 of the French Civil Code provides that non-performances of a contract "for no external reasons" is grounds for termination. Article 7.3.1 of the UNIDROIT Principles puts forth the most comprehensive list of circumstances where termination is justified: (i) the non-performance substantially deprives the aggrieved party of what it is entitled to expect unless the defaulting party did not foresee and could not reasonably have foreseen that result; (ii) strict performance of the obligation in question is "of issue" under the contract; (iii) the non-performance is intentional or reckless; and (iv) the non-performance gives the aggrieved party reason to believe that it cannot rely on the other party's future performance. Section 323 (1) of the German Civil Code requires that, in the case of a reciprocal contract, the aggrieved party may revoke the contract "if he has specified, without result, an additional period for performance or cure."

The fourth UNIDROIT criterion for establishing the "fundamental" or "material" nature of a breach justifying the remedy of termination, which looks to the likelihood of future performance, raises the issue of when the remedy of termination is available for anticipatory breach of contract. Under New York law, "where one party clearly and unequivocally repudiates his contractual obligations...prior to the time performance is required, the non-repudiating party may deem the contract breached and immediately sue for damages."[104] The same essential rule for "repudiatory breach" holds under English law[105] and under German law.[106] French law appears to be less open to the remedy of termination for anticipatory or repudiatory breach: Section 1186 of the Civil Code provides that when the performance of an obligation is due only on a certain event (i.e., a specific date), its performance cannot be claimed before the contract.

II. Commercial Law Topics

A. Negotiable Instruments

The law of negotiable instruments has two major sources. For the common law, the primary source is the English Bills of Exchange Act, which formed the background against which Articles 3 and 4 of the UCC were drafted. For the civil law, the two major sources of law are the Geneva Convention Uniform Law for Bills of Exchange and Promissory Notes and the Geneva Convention Uniform Law for Cheques. Perhaps the most striking difference between the two systems has to do with the effect of a fraudulent endorsement on a bill for the subsequent negotiation of the bill. Under the Geneva system, a holder acquiring an instrument in good faith and without gross negligence by an uninterrupted series of endorsements can be a good faith purchaser even though the instrument was lost or stolen and one of the signatures was forged. But under the New York Uniform Commercial Code and similar common law provisions, at least in regard to instruments made out to a payee, a thief can never be a holder (and therefore not a holder in due course) because an individual qualifies as a holder only by showing that the person is in possession of the instrument and that the order or promise on the bill "runs" to that person. Since, by definition, the instrument cannot be made to the order of a person who is not the payee, the thief cannot be a holder within the meaning of NY UCC Section 1-102(20) and therefore the thief cannot endorse the instrument to someone else within the meaning of NY UCC Section 3-302.[107]

The Geneva approach, it has been said, better reflects the interest of the law merchant in the free circulation and negotiability of instruments, while the New York and common law approach is more attentive to property law concerns. At least one commentator believes that the approach of the UCC is an instance where "better policies necessitated the law to prefer the protection of property, unless the dispossessed owner has been at some fault or in a position to avoid loss."[108]

B. Letters of Credit

Letters of credit are governed in New York by NY UCC Article 5. Perhaps the most fundamental characteristic of a letter of credit is that the issuing bank cannot withhold payment on the basis of breach by a party to the underlying transaction that gave rise to the issuance of the letter in the first place. This substantially diminishes the risks to issuing banks and makes banks more willing to support these payment mechanisms, on which so much of international trade depends. No set-offs or counterclaims are generally allowed and the bank cannot be impleaded in any action between the applicant for the letter and the beneficiary of the letter related to the underlying obligations as between the letter's applicant and its beneficiary.[109]

In general, some civil law jurisdictions, particularly in Latin America, are said to have difficulty in completely isolating the documentary commitment from the underlying transaction. The courts of England and New York have been very firm in upholding the "abstraction" of the letter of credit from other circumstances affecting the applicant or beneficiary. However, New York, following the lead of the Supreme Court of New York County in *Sztejn v. J. Henry Schroder Banking Corp et al.*,[110] has made an exception where a bank has received notice of actual fraud on the applicant by the beneficiary. There, the court distinguished between a breach of warranty and an intentional failure to deliver the goods, and denied a defendant's motion to dismiss the claim of the buyer to stop

the payment where there was credible evidence that the bill of lading had been falsified. Although recognizing an exception to the independent status of a letter of credit in principle, English courts have been very reluctant to give relief, while New York courts have continued to be more willing to issue temporary injunctions in cases where credible allegations of fraud have been raised. New York's UCC Section 5-109 provides guidance for certain situations under which an issuing bank should honor a demand for payment despite allegations of fraud, gives the bank discretion in other cases, and permits New York courts to issue injunctions stopping payment upon compliance with a detailed list of requirements.

C. Bills of Lading

In New York, bills of lading are governed by NY UCC Article 7. A salient issue with regard to bills of lading has been whether a carrier is responsible for misrepresentations by the ship's master. Under the leading (although very counter-intuitive) English case of *Grant v. Norway*,[111] a shipping company could not be held responsible for the master's misrepresentation about goods the master never received. The New York Court of Appeals, in *Bank of Batavia v. New York, Lake Erie & Western Railroad*,[112] became one of the first courts in the United States to dissent from the English view and find that a carrier was not estopped from liability on the bill when the carrier's freight agent issued a bill of lading without having received the goods. The Comments to UCC Section 7-507 provide that the carrier who issues a bill of lading is liable for the bill when the carrier's agent has received no goods.[113] The English Carriage of Goods By Sea Act 1992 effectively repeals the rule of *Grant v. Norway* as to transferable bills of lading, but not "straight bills of lading" and waybills made to specific consignees.[114]

D. Providing for Security Interests

Article 9 of the New York UCC provides a framework for secured lending. It contains provisions for creating and perfecting a security interest in personal property and enforcing it. New York's UCC Article 9 provides for liquid collateral, which means that a creditor may acquire a security interest in categories of property (including not only many categories of personal property but also some categories of real property). The lien can be "floating"—*i.e.*, apply to property that may exist in the future as well as property that exists at the time the security interest is established—a very important feature that facilitates security interests in accounts receivable and inventory that necessarily change over time. New York's UCC Article 9 provides a uniform filing system for perfecting security interests by providing that a secured party may register its security interest at a designated depositary and need not give individual notice to all actual or suspected creditors of the debtor. By providing for centralized registration of security interests, New York's UCC Article 9 also provides a more efficient and reliable system for prioritizing interests. Finally, NY UCC Article 9 provides for various forms of self-help in the event a security interest holder needs to execute against the collateral.[115]

The system of security interests is generally more limited under French law. French law does not recognize the concept of a "floating lien" as a way of acquiring a security interest in inventory. A security interest in accounts receivable would be limited to existing accounts. Under special legislation passed in 1981 ("*Loi Dailly*"), a lien may be placed on future accounts receivable but only if the debtor periodically provides information about them. The effect of the lien is that the secured lender actually takes title to the accounts receivable and can give notice to the obligors on the accounts to pay the secured lender directly. But there is considerable doubt as to whether creditors who are not French or European banks can avail themselves of the benefits of the *Loi Dailly*. German law technically recognizes floating liens, but requires that collateral be described with a degree of specificity that would be strange to New York requirements. In the case of inventory, security interests may be taken out only in inventory described and located at a specific place. There is no national system of registration in either France or Germany. Under both German and French law, executing on the collateral requires application to a court; in France, an insolvency administrator must be appointed, although it is easier to attain an order of attachment (*saisie-conservatoire*) against a borrower's assets or even an order of payment (*injunction de payer*).[116]

The English system of security interests bears more resemblance to the New York system. English law recognizes floating liens. However, English law makes a distinction between "fixed charges" and "floating charges." A fixed charge carries a higher priority against other claimants. But to enjoy this benefit, the secured lender must have a high degree of control over the collateral, which make this approach to security interests unattractive to borrowers. Floating charges leave the borrower in effective control of the assets, with the lien only becoming "fixed" upon an actual default. Floating charges are in turn divided into "equitable" and "legal" charges. But while England has a central registration system, "legal" charges over receivables—which have a higher degree of priority—only apply if account debtors have been given individual notice. Also, registering a security interest only satisfies the notice requirements for parties *likely to search*—so notice to specific creditors still remains preferable, even if not as absolutely necessary as in France or Germany. English law does give the holder of a lien over substantially all of a Borrower's assets and a form of self-help through a right to appoint an "administrative receiver" who answers to the secured lender and who can take control of the assets as long as an "ordinary receiver" has not been appointed by a court. The administrative receiver may apply to a court to sell an asset subject to a proper lien if the administrative receiver can show that superior recovery could be had.[117]

Of course, the ability of parties to stipulate what law would apply in a secured loan is limited by local laws protecting the debtor or the assets that will constitute collateral. But the benefits of NY UCC Article 9 can be achieved by creative planning, including organizing collateral in a way that would give it a situs in New York or making the debtor take on a form of legal personality or presence in New York that may give New York courts jurisdiction over it.

III. Considering the Interaction of Contract Law and Civil Procedure

The 2011 Report of the New York State Bar Association's Task Force on New York Law and International Matters focuses on issues that have been raised about the alleged length, complexity and cost of litigation in New York, as distinguished from other common law centers such as London and Singapore or civil law centers such as Paris or Frankfurt. The Task Force Report also explains the many ways in which parties can adjust or ameliorate these concerns by agreements to waive jury trials, shorten or limit pre-trial discovery, adjust the allocation of legal costs among the parties and so forth.

However, there is a larger issue, which has to do with the effectiveness of proceedings conducted under a given form of civil procedure to afford effective and equitable remedies and relief. This is critical because the evaluation of the procedural rules available in the jurisdiction where disputes would be resolved cannot be totally separated from the area of substantive law likely to govern any dispute likely to arise. Those who counsel clients about choosing governing laws and dispute resolution should consider whether the legal principles that may be most meaningful for the client can be effectively applied within the confines of the procedural rules that the forum of choice will employ.

A. Oral Contracts

Most jurisdictions other than New York do not require a writing to make a contract enforceable. However, an oral contract, by its very nature, has to be proved by evidence and, when there is no writing to confirm the obligations in question, testimony has to be given to prove the contract. In common law jurisdictions, oral testimony by witnesses is usually a key component in the proof because affidavits do not present opportunities for cross-examination and for the exploration of questions that the litigating parties or the judges themselves may think important to resolve the matter. In civil law jurisdictions, there is generally much greater dependence on written testimony: Having a witnesses testifying in support of a claim on direct examination—that is, giving the witness the opportunity to tell the story behind the claim to the judge in person—is generally not possible, since testimony is usually quite limited and is ordinarily based on questions posed by the judge. Attorneys often do not question the witness directly but rather present questions for the judge to ask.[118] Thus, a forum that entertains oral testimony almost necessarily has to be the better forum in which to prove an oral contract.

B. Fraudulent Conduct

As we have seen, New York law implies an obligation of good faith in matters of contract—applied perhaps in a somewhat more constrained way than in many civil law jurisdictions. And, as we have also seen, in several areas of commercial law, New York law tends to be more protective of parties that have been the victim of fraud than the law of civil law jurisdictions. Parties engaging in fraud, almost by definition, try to conceal facts or conditions they do not want others to see; they are certainly not going to volunteer them. Under the procedural rules of most civil law jurisdictions, parties do not have the right to ask for documents they cannot specifically identify and therefore the ability to review a party's entire record with regard to a transaction is not generally available.[119] By contrast, under the rules of procedure of New York, a party can obtain access to a range of documents without which it is unlikely the fraud could be discovered or proven. In situations that may involve significant sums of money and major commitments of resources and personnel, especially among parties who do not know each other and whose honesty and integrity have not been really tested, it stands to reason that there is a greater risk that fraudulent representations may be made, material facts not disclosed, or obligations not undertaken in good faith. Having the ability to obtain relief if any of these circumstances were to occur can be critical: thus, the possible need to prove fraud and to obtain relief from it has to be weighed against the supposed economies in cost and time associated with civil law forums and also common law jurisdictions such as England that do not usually permit pre-trial depositions.

C. Commercial Practice in Technical Specialties

Finally, one must consider the importance of expert testimony in the event it should be necessary to seek judicial remedies for breach of contractual obligations. Many areas of commerce involve highly specialized issues of technology, finance and commercial practice, about which even the most qualified jurist would need expert advice. Under the rule of civil procedure of most civil law countries, the court selects experts to advise it, sometimes after taking into account recommendations from the parties. This, of course, puts the expert chosen by the court—especially in cases that primarily turn on knowledge of practice and custom in highly technical areas of business or production—almost in the position of the court itself. Under New York law, the court does not generally choose a single expert, but rather the parties choose their own experts, with the court having the opportunity to hear the testimony and perspective of each side's expert. While it is easy to lampoon so-called "battles of the experts," in

many areas of commerce there can be substantial differences of professional opinion on technical issues that may be material to the disposition of a case. Depending on the nature of the science involved in a particular transaction, parties to joint ventures that are especially dependent on intellectual property may want to preserve their right to make a full presentation of their side on technical issues rather than risk that the entire case turns on a court's choice of an expert.[120]

IV. Summary and Proposals

Our survey has highlighted legal principles and rules within the domain of contract and commercial law, identified the approach of New York law to them, and compared and contrasted the New York approach with the laws of England, France, Germany, the CISG, and the UNIDROIT and European Principles of International Commercial Contract law.

This article has emphasized the so-called "objective" focus of New York law in the construction and enforcement of contractual obligations, highlighting the important place of the requirement of consideration and the parol evidence rule. New York law (and, to a large extent, English law) have adhered to these principles despite the weight of disfavor they receive in civil law systems and in the international restatements. The Task Force Report emphasizes the respect that New York courts give to the contractual arrangements of private parties and their reluctance to substitute their judgment for the choices made by such parties. It can be argued that the claim of New York to have such a high level of respect for the contractual autonomy of parties to commercial and corporate transactions derives from and is supported by the New York practice embodying contractual undertakings in detailed and comprehensive agreements, which may be of considerably greater length and detail than their civil law counterparts. Whether the noninterventionist predilections of New York courts is the cause of this custom of highly articulated contracts or whether private legal practice in commercial matters has encouraged this policy of New York law, the requirements of consideration and the parol evidence rule encourage commercial parties carefully to think through and address the issues that are most likely to arise in their relationship—rather than rely on the courts to solve their problems for them. *At the same time, I think it is at least worth considering whether, in the long-run, the stringency of the discipline that New York courts seem to expect of commercial parties should be more carefully calibrated to deal with the cross-cultural and cross-linguistic context of international commerce, at least in instances that I discuss below.*

A. Eliminating or Reducing the Applicability of the Statute of Frauds

New York, as we have seen, continues to require that certain obligations be embedded in writing in order to be enforceable, while England—the "mother" of the statute of frauds—has virtually eliminated this requirement, and most civil law jurisdictions, the CISG and the international restatements never adopted it. There are two provisions that deserve special comment: the requirement of a writing under the New York Uniform Commercial Code for transactions of more than Five Hundred Dollars and the requirement of a writing under the New York General Obligations Law for transactions that are not to be performed within one year. The Five-Hundred-Dollar limit appears to date back to 1962, when the New York first adopted the Uniform Commercial Code; the National Commissioners on Uniform State Laws have encouraged states to raise this limit to Five Thousand Dollars. This seems clearly advisable, at least in the case of contracts between merchants. The "more than one year" rule is not always easy to apply and, for an international lawyer not steeped in New York law and even for New York lawyers, it can be another trap for the unwary. It is not clear what purpose it really serves in today's context. *Eliminating—or at least reducing—the instances where a writing is a condition of a contract's enforceability (and at least raising the monetary limit for contracts for the sale of goods) would also introduce greater consistency between domestic New York law and the CISG and thus reduce mistakes about when the New York domestic rule or the CISG rule applies.*

B. Using Commercial Practice in the Construction of Contracts

As for construction of contracts, in the case of written contracts, as already noted, New York courts are loathe to admit extrinsic evidence about additional terms or even collateral terms when it appears the contract's essential terms can all be gleaned from "the four corners of the written agreement." But, at least in the absence of a merger or "entire agreement" clause, when an essential term is missing, there is a general trend in New York law, perhaps encouraged by the policies embedded in the New York Uniform Commercial Code, toward supplying the missing term from evidence of the party's conduct and general commercial practice in the relevant field of trade or business.[121] The tendency to use objective evidence to supply "missing terms" is consistent with the objective emphasis of New York contract law. *This tendency is also consistent with Articles 8 and 9 of the CISG and should be encouraged, among other reasons, to eliminate needless divergence between the New York law of domestic sales transaction and the New York's default law for most international transactions.* It is also consistent with the principles enshrined in the UNIDROIT and European Principles. As to "entire agreement" clauses, it is noteworthy that the UNIDROIT and European Principles, despite the strong civil law influence evident in both documents, have adopted the concept of excluding extrinsic evidence in the determination of contract terms where agreements contain "entire agreement" or merger clauses.

C. Return to a Modified Mirror Image Rule?

One of the innovations of Article 2 of the UCC was to reverse the "mirror image" rule, under which an acceptance of a purported offer does not constitute an effective acceptance if the acceptance is subject to the change of any terms proposed in the offer, but rather is viewed as a new offer proposed to the original offeror. The purpose of the UCC in reversing the traditional rule was said to be to "save contracts" and facilitate the flow of commerce. Be that as it may, the statute is recognized in many quarters as having been drafted in a confusing manner and, ironically, going against the general drift of New York law of encouraging parties to take responsibility for creating their contractual arrangements by not placing courts in the position of having to determine the material terms on which the parties could not agree. It is noteworthy that not only civil law jurisdictions continue to follow the "mirror image" rule as to essential or substantive terms but the international restatements do as well. Most importantly, Article 19 of the CISG maintains the "mirror-image" rule as to material terms of an offer. Thus, in the recent case of *Hanwha Corporation v. Cedar Petrochemicals, Inc.*,[122] where the litigants were businesses in New York and Korea, the CISG applied, with the result that no contract was formed because the parties could not agree on the substantive law that would replace the CISG! *Therefore, to avoid traps for the unwary (especially for New York parties to international transactions that are not the subject of fully negotiated executory contracts), adoption of the "mirror image" as to material terms, at least as between international merchants, seems advisable.*

D. Applying the Principle of Good Faith

The recognition by New York law of the implied obligation of "good faith" in the performance (if not the negotiation) of contracts places New York in a position closer to the civil law tradition than to the English common law version as well as the articulation of international contract law adopted by the international restatements. As we have noted, New York courts have applied the obligation in a very restrained fashion and New York law does not appear, at this time, to embrace the broad mandate of the UNIDROIT Principles that "[e]ach party must act in accordance with good faith and fair dealing in international trade," especially in pre-contractual negotiations. No doubt, New York's restrained approach enables it to continue to put itself forward as a jurisdiction that encourages parties to structure their own transactions and to determine for themselves the rules and conditions to which they want to be subject in carrying them out. Likewise, this restraint supports the position that New York courts are loathe to substitute their business judgment for the decisions private parties make about weighing and balancing the risks and rewards of their transactions—a position that, at least according to some recent research, helps to make New York law, among jurisdictions in the United States, a far more popular choice of law than the law of California, whose courts appear to apply common law contract rules in a manner more reminiscent of the German tradition and some features of the international restatements.[123]

But caution should be taken here because the studies and surveys that appear to favor New York's generally "formalist" and "non-contextualist" approach appear primarily to test the preferences of U.S. domestic private parties. Should it not be wondered if the sole value international businesses, merchants and traders look for in choosing a governing law—especially in the case of international businesses that may not have the resources to retain the most sophisticated cross-border counsel and advisors—is a completely formalist approach to contract construction, especially if a purely formalist approach can lead to a disproportionate allocation of risks that the parties may well not have contemplated? Does it always help New York law when a very learned commentator can say that "New York's tenderness for freedom of contract expresses itself, at times, in a seemingly atavistic pleasure in imposing the consequences of bad bargains?"[124]

In this context, let us revisit the *Reiss* case discussed above. There, the party exercising its warrants gained what the Court of Appeals admitted was a "windfall" when it became entitled to acquire the shares of stock after a five-to-one reverse stock split for the same price it had contracted to purchase the shares before the split. The court reasoned that the agreement had been entered into by experienced business parties and that the parties must have addressed the issue, notwithstanding the complete silence of the purchase agreement on the issue, because the company had issued warrants to other parties under agreements that did address the effect of a reverse split on an exercise of warrants. The court declined the company's invitation to imply a term or otherwise reform the contract on the basis that the contract was in writing, that the agreement was complete (at least in the sense that, in the court's opinion, no essential terms were missing), that there were no ambiguities as far as the writing was concerned, and therefore, under the parol evidence rule, the court was not permitted to find or add terms for the unaddressed contingency.

On the basis of these principles, the decision is very consistent with what one might expect of New York law. On the other hand, one wonders, as a general matter of policy, whether the parol evidence rule should operate to exclude consideration of gaps where, "within the four corners of the agreement," it is hard to say whether the failure to address a key issue was deliberate or not. Because the *Reiss* case did not involve businesses from different countries and also because sales of securities are excluded from the province of the CISG, the CISG did not apply. But in an analogous case among international par-

ties where the CISG would apply, the parol evidence rule would not apply and, under CISG Article 8, if the intent of the parties was not evident from their statements and conduct, a "reasonable person" standard would be applied, "due consideration" being given "to all relevant circumstances of the case, including the negotiations, any practices which the parties have established for themselves, usages and any subsequent conduct of the parties." It is not too far a distance between CISG Article 8 and Article 4.8 of the UNIDROIT Principles, which directs that "[w]here the parties to a contract have not agreed with respect to a term which is important for a determination of their rights and duties, a term which is appropriate in the circumstances shall be supplied."

Interestingly, the principle behind UNIDROIT Principle 4.8 was essentially adopted in *Reiss* by the majority opinion of the Appellate Division on the initial appeal by the warrant holders from the decision of the New York Supreme Court, which adjusted the terms of the warrants by holding that the failure of the warrants to address the contingencies of a split or a reverse split constituted an omission of an essential term of the warrant transaction. "[F]ormalistic literalism serves no function but to contravene the essence of proper contract interpretation, which, of course, is to enforce a contract in accordance with the true expectations of the parties in light of the circumstances existing at the time of the formation of the contract."[125] *This reasoning seems more consistent with the application of the principle of good faith and commercial reasonableness that we see in what appears to be a developing consensus of international commercial jurisprudence and it is one to which New York courts might well consider giving a more robust application.* (See Part IV(H) below for more details.)

E. Hardship and Commercial Impracticality; the Issue of Foreseeability

A related area that may be very relevant to a decision to choose New York law for an international transaction is how New York law deals with contracts whose economic balance has been fundamentally altered by major changes in economic, political or meteorological circumstances, especially macro-economic factors for which it may be very difficult for private parties to foresee or anticipate. Aside from the ameliorative rule of NY UCC 2-615 in cases involving the sale of goods, the doctrines of impossibility and frustration of purpose generally offer very little relief to a party for whom performance may have become extremely burdensome or ruinous because of the limited circumstances to which they apply.

As noted above, CISG Article 79, which represents New York contract law for a very substantial portion of international sales transactions involving New York parties, provides a limited form of "exemption" in the case of a party's failure to perform because of "an impediment beyond its control" for the period of time during which the impediment applies, where the party claiming the exemption could not reasonably be expected to have taken the impediment into account at the time their contract was entered into or to have overcome it. The drafters of the UNIDROIT and European principles have developed what appears to be a careful and cabined rule for a broader range of circumstances by providing, as provided in Article 6.1.1.1 of the European Principles, that "where the concurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party has received has diminished," the aggrieved party may request renegotiation of the transaction and, if the negotiations fail, judicial relief, which may include termination of the contract or its reform. *It may be advisable to consider whether such a provision dealing with hardship and commercial impracticability would make a prudent addition to New York's common law or even the General Obligations Law.*

The crux of hardship cases, as even the language of the UNIDROIT and European Principles demonstrate, is the definition of foreseeability. It has been recently observed, in reference to NY UCC Section 2-615, that "... despite the implication that the test should be whether the event was unforeseen by the parties at the time of contracting, courts have frequently required that the event be unforeseeable or outside of the realm of logical possibility."[126] *Thus, as valuable as adding provisions to New York law dealing with hardship or commercial impractability on a wider scale than UCC Section 2-615 may be, even more valuable would be judicial or statutory guidance as to what contingencies may be considered reasonable to think the parties should have contemplated themselves and those that are not.* Certain circumstances may be simply too unlikely or, even if predictable, too difficult to measure or to meaningfully analyze, or the efforts to account for them too speculative and burdensome to penalize the parties for not having resolved them contractually.

F. Limiting Perfect Tender Rule

One of the major divergences between New York law on the one hand and the CISG and the laws of many other jurisdictions on the other hand concerns the right of a buyer to reject goods that do not completely conform to the requirements of the contract, even if they substantially conform thereto. In a number of cases, the New York UCC limits the application of the rule—perhaps most importantly by excluding its application to installment sales but also by making rejection of the product subject to the UCC's requirement of good faith as well as to trade usage and prior or current courses of dealing.[127] The adoption of the substantial performance standard under the CISG derives from the view that the distances and expenses of transporting of goods in international commerce makes a perfect tender rule less sensible and therefore the substan-

tial performance rule better reflects the likely expectations of parties in international trade. Putting New York law in conformity with the CISG on this topic eliminates another possible area of confusion and mistake, especially when parties may not be sure whether the NY UCC or the CISG applies or, worse—as one suspects is still often the case—not even aware that there is an issue and a difference here. *Consideration, therefore, should be given as to whether NY UCC Section 2-601 should be modified so that the perfect tender rule, under New York law, would not apply to international merchants (leaving it in place for consumers and domestic merchants).*

G. Integrating New York Law Standards for Commercial Transactions and Business Collaboration

We have considered that New York applies the principle of good faith in a relatively sparing way, at least among sophisticated commercial parties, but imposes a very strict duty of fiduciary among business partners. The distinction between "contracts of exchange" and "contracts of co-operation" is well-known in contemporary French jurisprudence and seemingly reflected in New York law's restrained application of the "good faith" standard for commercial trade and it is much more generous application of the "fiduciary duty" standard for business collaboration seems to reflect this distinction very sharply. But one may well ask, especially in the context of international commercial transactions and relationships, whether this distinction should not be tempered. Contractual relations span a spectrum of commitments of time, financial resources, proprietary technology and human energy. There are many types of contract relationships that do not invoke the long-term commitments of a joint venture or business partnership but involve more resources and more mutual dependence than the purchase and sale of fungible products of manufacture, agriculture or mining. *New York courts could use the New York legal principles of good faith and business loyalty to effect a compelling "bridge" between the hyper-literalist philosophy of some common law contract jurisprudence and the overly malleable and unpredictable contextual tendencies of at least some branches of the civil law tradition.*

Much litigation around the issue of "good faith" turns on the question of what terms are essential to a contract, without which the contract, even if valid, cannot be said to be complete, and whether the courts should supply or imply any such missing terms. It could be helpful if New York courts—or perhaps even the New York legislature—were to identify the terms that, for New York law purposes, are essential for a range of basic forms of commercial contracts. The typical trio of price, term and product may be sufficient for most contracts for the sale of goods but the sale of goods should not necessarily be the sole model or paradigm for the great variety of contracts that are necessary for commerce—domestic or international—especially those for which the stakes in the allocation of risk of loss are especially high. "Entire agreement" or "merger" clauses could still bar any implication of missing terms, but otherwise, in the absence of an express provision allocating the relevant risks, New York courts would be permitted to supply a missing term in order to prevent extreme or even absurd outcomes. Whatever the merits of the Court of Appeals' decision in *Reiss*, on its particular facts, its seems to me that Judge Friedman's method, in his decision for the Appellate Division, of inferring additional "essential terms" relevant to the type of contract at issue, represents, for the long run, a more nuanced, insightful and creative way of developing New York law on these issues. This could provide the courts a way to give precise and significant meaning to the implied covenant of good faith without compromising the dedication of New York jurisprudence to the enforcement of contracts in accordance with their express terms.

H. Dealing with Passage of Risk; Damages

New York's correlation of delivery and passage of risk seems sensible, consistent with the CISG and also more or less consistent with the part of the civil law tradition based in German law, while, in this area, the English and French rules seem more difficult to apply and even counter-intuitive. The general approach of New York law to damages also seems consistent with the approach of the CISG, which focuses, like New York law, primarily on loss and less on fault. In this, the international restatements, particularly the UNIDROIT Principles, focus on "harm" in a way that still suggests a strong role for fault, which at the one and the same time, makes expectations of relief less certain (because willfulness or negligence may have to be established) and also liable to a broader scope of claims (even for emotional damages under the UNIDROIT Principles).[128] *In dealing with contract provisions excluding or limiting consequential damages, as with entire agreement clauses and hardship provisions, drafting must be especially careful and complete.* Notwithstanding the general deference by New York courts to the "private ordering" for which parties provide in their agreements, it appears New York courts (as common law courts in general) tend to interpret provisions that limit remedies under New York law (such as consequential damage exclusions) or that provide relief where New York law might not ordinarily provide it (such as allowing for hardship or providing a remedy of specific performance) or that limit liability (such as "entire agreement" clauses seeking to exclude relief for misrepresentation) by applying a very strict standard of specificity and comprehensiveness in such areas where common law courts are generally loathe to tread. Providing a detailed map for navigating the rights and obligations of contracting parties in such uncharted legal waters is clearly the best way to win the adherence and support of New York courts.

Endnotes

1. NY General Obligations Law Section 5-1401 ("NY GOL").
2. *Id.* §5-1402. *See* Final Report of the New York State Bar Association's Task Force on New York Law in International Matters, Section II(A)(1)(e) (25 June 2011).
3. Pursuant to the Declaration made by the United States at the time it deposited its ratification of the CISG, the Convention is applied in the United States to contracts of sale under which all contracting parties have their businesses in countries that have ratified the Convention but not to contracts where the law of a U.S. jurisdiction would apply by application of principles of conflicts of laws. See Appendix B hereto: *Sample Governing Law and Choice of Form Clauses*, Part I, n. 3.
4. More space could allow for consideration of other national laws. But English law has been the "fount of law" for most common law jurisdictions, and French law and German law have had a pervasive influence on the law of most civil law jurisdictions—whether in Europe, Latin America or Asia. Nor should one overlook the important influence of the CISG on the shape of national laws, perhaps most notably in the case of China.
5. See French Civil Code, Article 1108.
6. Glen Banks, NEW YORK CONTRACT LAW §2:27 (2006), *citing Express Industries v. Elsevier Sciences, Ltd.*, 927 F. Supp. 2d 688, 703 (S.D.N.Y. 1996).
7. See Vranken, EUROPEAN CIVIL LAW §532.
8. John Cartwright, CONTRACT LAW: AN INTRODUCTION TO THE ENGLISH LAW OF CONTRACT FOR THE CIVIL LAWYER 114-116 (2007).
9. *See* G. Banks, note 6 *supra*, §4:26.
10. *Id.* §§2.29 and 6.27. Note that the important role that the principle of good faith plays in the German tradition and, to an important extent, also in the French tradition, even in pre-contractual negotiations, makes it somewhat more likely that civilian courts will become involved in assessing and adjusting the terms of contracts than New York or English courts would be inclined to do. *See generally* Richard Zimmerman and Simon Whitaker, GOOD FAITH IN EUROPEAN CONTRACT LAW.
11. Miller, *Bargaining on the Red-Eye: New Light on Contract Theory* at 55, *available at* http://papers.ssrn.com/ sol3/papers.cfm?abstract_id=1129805.
12. *See generally* Martin Vranken, FUNDAMENTALS OF EUROPEAN CIVIL LAW, §§508-525; and Jan Dalhuisen, 2 TRANSNATIONAL COMPARATIVE, COMMERCIAL, FINANCIAL AND TRADE LAW §1.4.2 (4th ed.).
13. G. Banks, note 6 *supra*, §12:4.
14. *See* Miller, note 11 *supra*, at 40.
15. G. Banks, note 6 *supra*, §§9:3-9:4.
16. *Id.* §§2:19-2:21.
17. Vergne, *The "Battle of the Forms" under the 1980 United Nations Convention on Contracts for the International Sale of Goods, available at* http://www.cisg.law.pace.edu/cisg/biblio/vergne.html *citing* Cass. Civ. lère, 17 juillet 1967, Bull. Civ. III, 29.
18. NY UCC §2-207(2).
19. *Id.* §2-207(2)(b).
20. *Id.* §2-207(3).
21. *Isn't 60 Some Years of Litigation Enough?*, 48 THE UNIFORM COMMERCIAL LAW LETTER 7 (March 2014).
22. *See Coastal & Native Plant Specialties, Inc. v. Engineered Textile Products, Inc. v. Occidental Chemical Corporation*, 139 F. Supp. 2d 1326 (N.D. Fla. 2001) (applying New York law).
23. [1979] 1 WLR 401 (CA). The case is discussed in J. Cartwright, note 8 *supra*, at 96.
24. [1985] AC 191, 201, discussed in J. Cartwright, note 8 *supra*, at 186-188.
25. G. Banks, note 6 *supra*, §9:5 *citing Cromwell Towers Redevelopment Co. v. City of Yonkers*, 41 N.Y.2d 1, 6 (1976): "Where the document makes clear the parties' overall intentions, the construction that would effectuate the plain purpose and object of the agreement should be given to the particular language at issue." *See also id.*, §9:6, *citing Kass v. Kass*, 91 N.Y.2d 554, 567 (1998). "In interpreting contract terms," the New York Court of Appeals has stated, "the court considers the matter from the perspective of the ordinary business person making an ordinary business contract," *Michaels v. City of Buffalo*, 85 N.Y.2d 754, 757 (1995), "keyed to the level of business sophistication and acumen of the particular parties." *Uribe v. Merchants Bank of New York*, 91 N.Y.2d 336 (1983). *See* G. Banks, note 6 *supra*, §§9:6-9:7.
26. G. Banks, note 6 *supra*, §8:18.
27. J. Cartwright, note 8 *supra*, at 184.
28. [1996] 2 All ER 573.
29. [1999] WL 852482.
30. Jones Day, *Some Differences in Law and Practice Between U.K. and U.S. Stock Purchase Agreements*, 16 April 2007.
31. Kamya and Thompson (Steptoe & Johnson LLP), *Entire Agreement Clauses—Are You Adequately Protected?* (October 2010).
32. 184 N.Y.2d 599 (1959).
33. 748 F.2d 729 (2d Cir. 1984).
34. 174 N.Y. 331 (1903).
35. 222 N.Y. 88 (1917).
36. *See, e.g., Dalton v. Educ. Testing Serv.*, 87 N.Y.2d 384, 389 (N.Y. 1995) (covenant of good faith and fair dealing in the course of contractual performance is implicit in all contracts).
37. G. Banks, note 6 *supra* §11:16. *See also* Official Comment to NY UCC 2-103.
38. *See* Harold Dubroff, *Implied Covenant of Good Faith in Contract, available at* http://www.stjohns.edu/ academics/graduate/law/journals/lawreview/issues/80_2/Dubroff.stj.
39. G. Banks, note 6 *supra*, §11:17, *citing 511 West 232nd Owners Co. v. Jennifer Really Co.*, 98 N.Y.2d 144 (2002), *quoting Dalton v. Educational Testing Service*, 87 N.Y.2d 384, 389 (1995).
40. G. Banks, note 6 *supra*, §6:23, *citing Oppenheimer & Co. Inc. v. Oppenheim, Appel, Dixon & Co.*, 86 N.Y.2d 685,695 (1991).
41. 97 N.Y.2d 195 (2001).
42. 937 F.2d 780 (2d Cir. 1991).
43. *See* G. Banks, note 6 *supra*, §11:20, *citing Gillman v. Chase Manhattan Bank, N.A.*, 73 N.Y.2d 1 (1988) (implied covenant cannot be used to interpret away rights expressly given to parties under a contract).
44. G. Banks, note 6 *supra*, §11:17, *citing Thyroff v. Nationwide Mut. Ins. Co.*, 460 F.3d 400, 407, *certified question accepted*, 7 N.Y.3d 837, 824 (2006).
45. Howard Hunter, MODERN LAW OF CONTRACTS §8:8 (2011), *discussing Gross v. Empire Healthchoice Assurance, Inc.*, 126 Misc. 3d 112(A) (Sup. Ct. N.Y. Cty. 2007).
46. See section on German law in Squire Sanders, *The Notion of Contractual Good Faith: Perspectives from Comparative Law, available at* http://larevue.ssd.com/The-Notion-of-Contractual-Good-Faith-Perspectives-from-Comparative-Law_a1010.html.
47. *Id.*

48. J. Cartwright, note 8 *supra*, at 59.

49. *Id.* at 60.

50. *See* Polkinghorne & Korman, *Paris Energy Series No. 3, available at* http://www.whitecase.com/files/ Publication/04a3da7b-fef6-40ee-88a0-8340c02c68a3/Presentation/PublicationAttachment/7d60a026-379c-42ce-8c0c-889a36bb7ea4/article_ParisEnergySeries%20_Disputes_No3.pdf.

51. J. Cartwright, note 8 *supra*, at 69.

52. 52 N.Y.2d 394 (1981).

53. Miller, note 11 *supra*.

54. 751 F.2d 69 (2d Cir. 1984).

55. 64 F.2d 344 (2d Cir. 1933).

56. Polkinghorne and Kirkman, *The Paris Energy Series No. 4, available at* http://www.whitecase.com/files/ Publication/83c9518e-90da-48b1-8ec3-3b6b3d8dbee4/Presentation/Publication Attachment/f260d894-23ee-4728-8471-3c6bdbe29c2f/The_Paris_Energy_Series_No_4.pdf.

57. *U.S. v. General Douglas MacArthur Senior Village, Inc.*, 508 F.2d 377, 381 (2d Cir. 1974).

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60. Polkinghorne and Kirkman, note 56 *supra*.

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65. *See* Kirsten Birkett, note 63 *supra*; Suhrud Mehta (Milbank), *Material Adverse Change Clauses in Adverse Markets, available at* http://www.milbank.com/images/content/7/8/783/Material_Adverse_Change_Clauses_Mehta .pdf.

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120. This is not to gainsay the importance of the Recommendation of the Litigation Subcommittee of the Task Force on New York Law and International Matters regarding the adoption of special chambers within the Commercial Division of the New York Supreme Court that could apply a variety of rules of procedure, including those of London or Paris. As the Task Force Report emphasizes, New York courts are very familiar with applying the substantive law of other countries, in accordance with the governing law clauses of the contracts that may come before them. Having the ability to apply diverse procedural rules would enhance the international character of the New York courts and allow parties the greatest flexibility and autonomy in making choices that may combine what contracting parties may see as the best advantages of one system for governing law and another system for civil procedure.

121. *See* G. Banks, note 6 *supra*, §2:18-2:22.

122. 09 Civ. 10559 (S.D.N.Y. 01/18/11) (Hellerstein, J.).

123. *See* Eisenberg and Miller, *The Flight to New York, An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-Held Companies' Contracts*, 30 CARDOZO L. REV. 1475 (2009); Miller, note 11 *supra*.

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125. *Reiss et al. v. Financial Performance Corporation*, 279 A.D.2d 13 (1st Dep't 2000), *rev'd*, 97 N.Y.2d 195 (2001).

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Mr. Galligan is a partner in the law firm of Phillips Nizer LLP in New York City, and is a Past Chair of the International Section of the NYSBA.

Appendix A

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Appendix B

Sample New York Governing Law and Choice of Forum Clauses Adapted from the Sample Clauses of the NYSBA Task Force on New York Law and International Matters[1]

Part I: Sample New York Governing Law Clauses

Dispute resolution agreements and clauses are found across a wide section of transactional contracts—from complex merger documents to royalty agreements, oil exploration contracts and joint venture agreements.

At its best, the drafting of a dispute resolution clause is the convergence of the business lawyer's negotiating skills and ability to foresee difficulties for the lawyer's client and the arbitration/litigation lawyers' insights about what clauses work best in what types of agreements and circumstances.

At its worst, drafting is a haphazard, last-minute guessing exercise by transaction lawyers at the eleventh hour of a deal's closing—which down the road can cost the client significantly in terms of outcome and costs.

Assuming the parties wish to submit any disputes to the New York courts, and provided the parties want their contract to be governed by New York, the provisions in this and the next two parts may be considered for adaptation to the circumstances of a particular international agreement.

A. Governing Law—General Contract

This Agreement shall be governed by and construed in accordance with the laws of the State of New York, without regard to conflicts or choice of law rules that would result in the application of the substantive laws of any other jurisdiction.

B. Governing Law for Contracts for International Sale of Goods[2]

(1) Contract for International Sale of Goods Where Application of CISG is Desired and All Parties Have Their Place of Business in Jurisdictions That Are Parties to the Convention:

This Agreement shall be governed by and construed in accordance with the laws of the State of New York, without regard to any conflicts of law rules that may cause the substantive law of another jurisdiction to apply, it being assumed for all purposes of this Agreement that the 1980 United Nations Convention on Contracts for the International Sale of Goods is an integral part of the law of contracts of the State of New York with regard to international sales transactions governed by the said Convention.

(2) Contract for International Sale of Goods Where Application of CISG is Desired but One or More Parties Have Places of Business in Jurisdictions That Are Not Parties to the CISG:[3]

This Agreement shall be governed by and construed in accordance with the laws of the State of New York, without regard to any conflicts of law rules that may cause the substantive law of another jurisdiction to apply, it being assumed for all purposes of this Agreement that the 1980 United Nations Convention on Contracts for the International Sale of Goods (the "Convention") is incorporated as an integral part of the law of contracts of the State of New York with regard to international sales transactions governed by the Convention, without regard to whether (or to what extent) any jurisdiction in which any party to this Agreement has its place of business or otherwise has authority to resolve a dispute hereunder has ratified or acceded to the Convention or made any declaration under Article 95 thereof.

(3) Contract of International Sale of Goods Where Application of the CISG Is Not Desired:

First Alternative:

This Agreement shall be governed by and construed in accordance with the laws of the State of New York, without regard to any conflicts of law rules that may cause the substantive law of another jurisdiction to apply and without application of the 1980 United Nation Convention on Contracts for the International Sale of Goods (the "Convention") as if none of the jurisdictions in which parties to this Agreement have their places of business are parties to the Convention.

Second Alternative:

This Agreement shall be governed by and construed in accordance with the laws of the State of New York, without regard to any conflicts of law rules that may cause the substantive law of another jurisdiction to apply, provided, however, that the parties hereto agree that the provisions of the 1980 United Nations Convention on Contracts for the International Sale of Goods are excluded in their entirety.

C. Governing Law for Trusts and Wills[4]

First Alternative (Trusts):

I hereby direct, pursuant to Section 7-1-10 of the New York Estates, Powers & Trusts Law, that the law of the State of New York shall apply to the validity, effect and interpretation of all provisions of this Agreement in so far as they govern property located in New York State as well as property located outside of New York State.

Second Alternative (Wills):

I direct that this Will be submitted for, and I request that this Will be admitted to, original probate in the State of New York and I hereby elect, pursuant to Section 3-5.1(h) of the Estates, Powers and Trusts Law of the State of New York, that the formal validity, interpretation and effect of this Will with respect to all property of mine situated in New York as well as all property of mine situated anywhere else outside of New York State shall be governed by the laws of the State of New York and that my estate shall be governed by and under said laws.

Part II: Sample New York Dispute Resolution Clauses (Submission to Jurisdiction and Governance of Proceedings)

A. General Submission to the New York Courts

The parties agree that the New York Supreme Court (_____ County) and the United States District Court for the _____ District of New York shall be the exclusive forums for the resolution of any dispute, claim or controversy arising out of or relating to this Agreement, or the breach, termination, enforcement, termination or validity thereof, submit irrevocably to the exclusive jurisdiction of the said Courts and irrevocably waive any objections thereto based on lack of personal or subject matter jurisdiction, improper venue, or the doctrine of forum non conveniens.

B. Submission to New York Supreme Court, Commercial Division, Waiver of Right to Remove to Federal Courts

The parties agree that the New York Supreme Court (_____ County), Commercial Division, shall be the exclusive forum for the resolution of any dispute, claim or controversy arising out of or relating to this Agreement, or the breach, termination, enforcement, termination or validity thereof, submit irrevocably to the exclusive jurisdiction of the New York Supreme Court (_____ County) Commercial Division, and irrevocably waive any objections thereto based on lack of personal or subject matter jurisdiction, improper venue or the doctrine of forum non conveniens, as well as any right to seek to remove any such proceedings to the Federal courts of the United States of America, whether based on diversity of the parties, Federal subject matter jurisdiction or any other basis.[5]

C. Optional Additional Clauses

Having included the provisions of paragraphs A or B above, the parties may wish to add some or all of the following:

(1) *Service of Process*:

The parties agree that service of process shall be complete if timely, made by delivery a copy of same upon _____, whose address is _____, _____, New York.

(2) *Jury Trials:*

The parties to this Agreement hereby irrevocably waive the right to trial by jury.

(3) *Damages:*

In any action arising out of or related to this Agreement, the parties irrevocably waive the right to recover punitive or exemplary damages and stipulate hereby that the court shall not be empowered to award any such damages.

(4) *Discovery:*

In any action arising out of or related to this Agreement, the parties waive the right to discovery as follows:

(i) There shall be no interrogatories or requests to admit;

(ii) *First Alternative:*

There shall be no discovery depositions except as shall be authorized by the Court upon a showing of good cause shown and, in the event such depositions are permitted by the court, there shall be no more than _____ (__) depositions per side, with no deposition to exceed _____ (__) hours in length;

Second Alternative:

There shall be no pre-trial depositions except (1) depositions of witnesses for whom there is a reasonable basis to believe they will not be able to testify at trial or for whose testimony there may be otherwise a compelling need to preserve and (2) depositions of such witnesses whose pre-trial testimony any Court seized with responsibility for adjudicating a dispute hereunder shall determine is necessary in order to avoid mani-

fest injustice or a significant waste of Court resources.[6]

(iii) Documents requested by the parties shall be limited to those relevant to a claim or defense in the action and shall be restricted in terms of time frame, subject matter and persons or entities to which the requests pertain and shall not include broad phrases such as "all documents directly or indirectly related to..."

(5) Enforcement of Judgments:

The parties agree that a final judgment against it in any action, suit or proceeding taken in any Court to whose jurisdiction the parties have entrusted the resolution of any dispute shall be conclusive and may be enforced in any jurisdiction in the world by suit on the judgment, a certified copy of which judgment shall be conclusive evidence thereof, or by any other means provided by law.

D. E-Disclosure

Given the special considerations that may be required with respect to any request by a party for electronic records, the parties may wish to tailor the following provisions to the circumstances of the action:

In any action arising out of or relating to this Agreement:

(i) There shall be production of electronic documents only from sources used in the ordinary course of business. Absent a showing of compelling need, no such documents are required to be produced from backup servers, tapes or other media.

(ii) Absent a showing of compelling need, the production of electronic documents shall normally be made on the basis of generally available technology in a searchable format which is usable by the party receiving the e-documents and convenient and economical for the producing party. Absent a showing of compelling need, the parties need not produce metadata, with the exception of header fields for email correspondence.

(iii) The description of custodians from whom electronic documents may be collected shall be narrowly tailored to include only those individuals whose electronic documents may reasonably be expected to contain evidence that is material to the dispute.

(iv) Where the costs and burdens of e-discovery are disproportionate to the nature of the dispute or to the amount in controversy, or to the relevance of the materials requested, the parties consent and stipulate that the court shall either deny such requests or order disclosure on condition that the requesting party advance the reasonable cost of production to the other side, subject to the allocation of costs in the final judgment.

Part III: Sample New York Arbitration and ADR Clauses

International agreements most frequently contain arbitration clauses for the resolution of disputes since parties generally wish to avoid the risk of litigating in the courts of an unfamiliar jurisdiction. Arbitral institutions offer "standard" arbitration clauses for inclusion in such contracts, but the better practice is to adapt arbitration clauses to the particular circumstances of the business relationship reflected in the overall agreement. The following provisions are a starting point for the adaptation process.

A. Simple Agreement—Arbitration

Any and all disputes, controversies and claims arising out of or relating to this Agreement, including the formation, interpretation, breach or termination thereof, and also including whether the claims asserted are arbitrable, and any transactions pursuant thereto, shall be finally determined by arbitration in accordance with the [insert institutional arbitration rules]. The Tribunal shall consist of [one/three] arbitrator[s]. The place of the arbitration shall be New York, New York. The language of the arbitral proceeding, including the parties' written submissions, shall be English. Judgment upon the award rendered by the arbitrator[s] may be entered in any court having jurisdiction thereof.

B. Additional Provisions—More Complex Arbitration Agreement

(1) Enforcement of Awards:

Without limiting the foregoing, the parties to this Agreement agree that any Award rendered by arbitration may be entered in the Courts of the State of New York, and the said parties hereby submit to the non-exclusive jurisdiction of the said Courts in any proceeding for the recognition and enforcement of the Award and hereby designate _____, whose address is _____, _____, New York, as each such party's agent for purposes of service of process in connection with any such proceeding.

(2) Allocation of Costs and Fees:

In any arbitration arising out of or related to this Agreement, the arbitrators may [shall] include in their award an allocation to the prevailing party of

all or part of such costs and expenses, including arbitrators' fees, attorneys' fees and expert witness fees and disbursements, as the arbitrators shall deem reasonable.

(3) *Punitive Damages*:

In any arbitration arising out of or related to this Agreement, the arbitrators are not empowered to award punitive or exemplary damages, and each party hereby waives any right to seek or recover punitive or exemplary damages with respect to any dispute resolved by arbitration.

(4) *Disclosure—Exchange of Evidence*:

The parties shall be entitled to reasonable production of relevant and material, non-privileged documents carried out expeditiously. If the parties are unable to agree on such production, the arbitral tribunal shall have the power, upon application of any party, to make all appropriate orders for production of relevant and material, non-privileged documents by any party. There shall be no other form of disclosure or discovery, including pre-hearing depositions upon oral examination [nor shall there by any disclosure or discovery requests to any third parties].

(5) *E-Discovery*:

(i) There shall be production of electronic documents only from sources used in the ordinary courses of business. Absent a showing of compelling need, no such documents are required to be produced from backup servers, tapes or other media.

(ii) Absent a showing of compelling need, the production of electronic documents shall normally be made on the basis of generally available technology in a searchable format which is usable by the party receiving the e-documents and convenient and economical for the producing party. Absent a showing of compelling need, the parties shall not produce metadata, with the exception of a header fields for email correspondence.

(iii) The description of custodians from whom electronic documents may be collected shall be narrowly tailored to include only those individuals whose electronic documents may reasonably be expected to contain evidence that is material to the dispute.

(iv) Where the costs and burdens of e-discovery are disproportionate to the nature of the dispute or to the amount in controversy, or to the relevance of the materials requested, the arbitrator will either deny such requests or order disclosure on condition that the requesting party advance the reasonable cost of production to the other side, subject to the allocation of costs in the final award.

(6) *Confidentiality*:

The parties and the arbitrator(s) shall use only for the purposes of the arbitration and keep confidential all awards in the arbitration, together with all arbitral proceedings, all materials in the proceedings created for the purpose of the arbitration and all other documents produced by another party in the proceedings not otherwise in the public domain, save and to the extent that disclosure may be required of a party or arbitrator by legal duty, to protect or pursue a legal right or to enforce or challenge an award in legal proceedings before a court or other judicial authority.

(7) *Provisional Measure—Interim Relief*:

The arbitrator(s) shall be empowered to grant injunctive relief, including restraining orders and orders for specific performance, in addition to monetary damages. Nothing in this Agreement shall prevent either party from seeking provisional measures, including, but not limited to, pre-award attachments and injunctive relief, from any court of competent jurisdiction and any such request shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate.

(8) *Time Limits*:

Notwithstanding any provision to the contrary in the Rules otherwise applicable to any arbitration arising out of or related to this Agreement, the parties shall complete all necessary steps in any arbitration, including the hearing on the merits, within [12] months of the commencement of the proceeding. The arbitrator(s) shall render a final award within [30] days of the close of the hearings. The arbitrators may determine that the interest of justice or the complexities of the arbitration requires that these time limits be extended.

(9) *Multi-Step or Phased Dispute Resolution, Including Negotiation, Mediation and Arbitration*:

The parties shall promptly attempt to resolve amicably by negotiation between party representatives, with authority to settle the dispute, any dispute arising out of or related to this Agreement, including the existence, validity, termination or breach thereof. If the dispute has not been resolved within [30] calendar days after any party requested in writing negotiation under this provision, then the parties shall promptly proceed to mediation as described below.

The parties shall promptly attempt to resolve amicably by mediation any dispute, not resolved by negotiations described above, arising out of or related to this Agreement, including the existence, validity, termination or breach thereof, under the [designated] Mediation Rules in New York, New York. If the dispute has not been resolved within [60] calendar days after any party requested in writing mediation under this provision, then the parties shall promptly proceed to arbitration as described below.

All communications during the negotiation and mediation described above shall be treated as made in the course of compromise and settlement negotiations for purposes of any applicable rules of evidence and any additional confidentiality and professional secrecy protections provided by applicable law.

(10) Reasoned Awards:

Any Award hereunder shall be in writing and shall set forth the reasons for supporting the Award in writing.[7]

(11) Scope of Arbitrators' Authority

The arbitrators shall be empowered to sit as "*amiable compositeurs*" and shall [not] be bound to apply strictly the law that would otherwise govern the resolution of any dispute hereunder.[8]

Endnotes

1. This set of sample clauses substantially replicates but expands on the clauses contained in Exhibits C and D to the Report of the NYSBA Task Force on New York Law and International Matters issued on 25 June 2011. Modifications, additions and annotations are by Michael W. Galligan, Partner, Phillips Nizer LLP. The additions include sample clauses for contracts for the international sale of goods and also for trust agreements and wills; additional clauses for choice of New York courts as a forum for dispute resolution and limitation of discovery, and some additional clauses for choice of arbitral procedures. For an excellent overview and additional sample clauses, see Pollack, *Drafting an International Contract: Jurisdiction and Arbitration Clauses*, FIRST ANNUAL FUNDAMENTALS OF INTERNATIONAL PRACTICE at 183-199 (NYSBA CLE Dept., 2009).
2. For helpful guidance, see Drago and Zoccolillo, *Be Explicit: Drafting Choice of Law Clauses in International Sale of Goods Contracts*, THE METROPOLITAN CORPORATE COUNSEL at 9 (May 2002).
3. NY UCC § 1-105 provides, under certain circumstances, that parties to a sales transaction may apply the law of a state or nation other than New York. It is unclear to what extent this provision precludes a New York court from applying a choice of law provision electing the rules of an international treaty such as the UN Convention on the International Sale of Goods, especially where a party to a transaction has its place of business in a jurisdiction that is not a party to the Convention and the Convention, pursuant to the U.S. Declaration under Article 95 of the Convention, would not otherwise apply. Parties who nonetheless wish the Convention to apply may consider adopting this clause, but may also be well advised to elect to have disputes be governed by arbitration rather than by litigation. Please note that, pursuant to NY UCC § 1-105(2), if the Convention were to serve as governing judicial law strictly by private choice, it could not supplant the applicability of NY UCC § 2-402 (rights of creditors against sold goods).

   To ensure that this clause would be respected and applied in a judicial proceeding before a New York court, it would be best if NY UCC Section 1-1.05 were to be amended to provide that parties to contracts for the sale of goods with "reasonable connections" to both New York and other domestic and national jurisdictions may elect not only that their contracts be governed by the laws of the other relevant states or nations but by the 1980 Convention on the International Sale of Goods ("CISG").

   New York law, as a state of the United States, pursuant to the Supremacy Clause of the U.S. Constitution, must incorporate the law of any treaty to which the United States is a party. When the United States ratified the CISG, it entered a Declaration, as allowed by Article 95 of the Convention, to the effect that the Convention would only be applied by the United States to contracts of sale under which all contract parties had their businesses in countries that had ratified the Convention, even if the conflicts laws of another relevant jurisdiction not itself a party to the Convention should determine that the law of a state of the United States like New York should apply. Thus, in the case of a contract of sale between a French seller and a U.S. buyer located in New York, a New York court will apply the Convention rules because both France and the United States are parties to the Convention. But, in the case of a contract of sale between a UK seller and a New York buyer, it appears that, pursuant to NY UCC Section 1-105, a New York court is not required—and may not even be permitted—to apply the Convention rules, even if the parties have expressly agreed that the law of New York *incorporating the Convention rules* should apply, because the UK is not a party to the Convention.

   It would be well if the United States withdrew its Declaration under Article 95 of the CISG (ironically introduced into the Convention at the behest of certain "command-economy" states that have now converted to market economies), in order to effect a more stable and consistent set of rules for the international sale of goods throughout the world. (Singapore, one of the few market economy states other than the United States to make a similar Declaration, is said to be about to withdraw its Declaration). But in the meantime, an amendment to the New York UCC would be very helpful.
4. For some background, see *Buying USA: Minimizing US Transfer Taxes on US property Interests of Non-US Persons*, STEP**USA** at 11-15 (June 2007).
5. On the ability of parties to waive the right of removal to federal courts, see *Excell, Inc. v. Sterling Boiler & Mechanical, Inc.*, 106 F.3d 318 (10th Cir. 1997); *Archdiocese of Milwaukee v. Underwriters at Lloyd's*, 955 F. Supp. 2d. 1066 (E.D.Wis., 1997).
6. This sample clause aims to replicate to a reasonable extent the approach that courts in England might take to pre-trial depositions. See Cohen, *Voyages of Discovery: Obtaining Orders for Discovery in England in Support of Proceedings in the U.S.*, Volume 220, N.J. LAWYER at 52-55 (Feb. 2003).
7. Compare with Article 1471 of the Code of Civil Procedure of France.
8. Compare with Article 1474 of the Code of Civil Procedure of France.

Vienna Convention on the Law of Treaties
1969

Done at Vienna on 23 May 1969. Entered into force on 27 January 1980.
United Nations, *Treaty Series*, vol. 1155, p. 331

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2005

Vienna Convention on the Law of Treaties
Done at Vienna on 23 May 1969

The States Parties to the present Convention,

Considering the fundamental role of treaties in the history of international relations,

Recognizing the ever-increasing importance of treaties as a source of international law and as a means of developing peaceful cooperation among nations, whatever their constitutional and social systems,

Noting that the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognized,

Affirming that disputes concerning treaties, like other international disputes, should be settled by peaceful means and in conformity with the principles of justice and international law,

Recalling the determination of the peoples of the United Nations to establish conditions under which justice and respect for the obligations arising from treaties can be maintained,

Having in mind the principles of international law embodied in the Charter of the United Nations, such as the principles of the equal rights and self-determination of peoples, of the sovereign equality and independence of all States, of non-interference in the domestic affairs of States, of the prohibition of the threat or use of force and of universal respect for, and observance of, human rights and fundamental freedoms for all,

Believing that the codification and progressive development of the law of treaties achieved in the present Convention will promote the purposes of the United Nations set forth in the Charter, namely, the maintenance of international peace and security, the development of friendly relations and the achievement of cooperation among nations,

Affirming that the rules of customary international law will continue to govern questions not regulated by the provisions of the present Convention,

Have agreed as follows:

PART I.
INTRODUCTION

Article 1
Scope of the present Convention

The present Convention applies to treaties between States.

Article 2
Use of terms

1. For the purposes of the present Convention:

(*a*) "treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation;

(*b*) "ratification", "acceptance", "approval" and "accession" mean in each case the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty;

(*c*) "full powers" means a document emanating from the competent authority of a State designating a person or persons to represent the State for negotiating, adopting or authenticating the text of a treaty, for expressing the consent of the State to be bound by a treaty, or for accomplishing any other act with respect to a treaty;

(*d*) "reservation" means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State;

(*e*) "negotiating State" means a State which took part in the drawing up and adoption of the text of the treaty;

(*f*) "contracting State" means a State which has consented to be bound by the treaty, whether or not the treaty has entered into force;

(*g*) "party" means a State which has consented to be bound by the treaty and for which the treaty is in force;

(*h*) "third State" means a State not a party to the treaty;

(*i*) "international organization" means an intergovernmental organization.

2. The provisions of paragraph 1 regarding the use of terms in the present Convention are without prejudice to the use of those terms or to the meanings which may be given to them in the internal law of any State.

Article 3
International agreements not within the scope of the present Convention

The fact that the present Convention does not apply to international agreements concluded between States and other subjects of international law or between such other subjects of international law, or to international agreements not in written form, shall not affect:

(*a*) the legal force of such agreements;

(*b*) the application to them of any of the rules set forth in the present Convention to which they would be subject under international law independently of the Convention;

(*c*) the application of the Convention to the relations of States as between themselves under international agreements to which other subjects of international law are also parties.

Article 4
Non-retroactivity of the present Convention

Without prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention, the Convention applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States.

Article 5
Treaties constituting international organizations and treaties adopted within an international organization

The present Convention applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization.

PART II.
CONCLUSION AND ENTRY INTO FORCE OF TREATIES
SECTION 1. CONCLUSION OF TREATIES

Article 6
Capacity of States to conclude treaties

Every State possesses capacity to conclude treaties.

Article 7
Full powers

1. A person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State to be bound by a treaty if:

(*a*) he produces appropriate full powers; or

(*b*) it appears from the practice of the States concerned or from other circumstances that their intention was to consider that person as representing the State for such purposes and to dispense with full powers.

2. In virtue of their functions and without having to produce full powers, the following are considered as representing their State:

(*a*) Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty;

(*b*) heads of diplomatic missions, for the purpose of adopting the text of a treaty between the accrediting State and the State to which they are accredited;

(*c*) representatives accredited by States to an international conference or to an international organization or one of its organs, for the purpose of adopting the text of a treaty in that conference, organization or organ.

Article 8
Subsequent confirmation of an act performed without authorization

An act relating to the conclusion of a treaty performed by a person who cannot be considered under article 7 as authorized to represent a State for that purpose is without legal effect unless afterwards confirmed by that State.

Article 9
Adoption of the text

1. The adoption of the text of a treaty takes place by the consent of all the States participating in its drawing up except as provided in paragraph 2.

2. The adoption of the text of a treaty at an international conference takes place by the vote of two thirds of the States present and voting, unless by the same majority they shall decide to apply a different rule.

Article 10
Authentication of the text

The text of a treaty is established as authentic and definitive:

(*a*) by such procedure as may be provided for in the text or agreed upon by the States participating in its drawing up; or

(*b*) failing such procedure, by the signature, signature ad referendum or initialling by the representatives of those States of the text of the treaty or of the Final Act of a conference incorporating the text.

Article 11
Means of expressing consent to be bound by a treaty

The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.

Article 12
Consent to be bound by a treaty expressed by signature

1. The consent of a State to be bound by a treaty is expressed by the signature of its representative when:

(*a*) the treaty provides that signature shall have that effect;

(*b*) it is otherwise established that the negotiating States were agreed that signature should have that effect; or

(*c*) the intention of the State to give that effect to the signature appears from the full powers of its representative or was expressed during the negotiation.

2. For the purposes of paragraph 1:

(*a*) the initialling of a text constitutes a signature of the treaty when it is established that the negotiating States so agreed;

(*b*) the signature ad referendum of a treaty by a representative, if confirmed by his State, constitutes a full signature of the treaty.

Article 13
Consent to be bound by a treaty expressed by an exchange of instruments constituting a treaty

The consent of States to be bound by a treaty constituted by instruments exchanged between them is expressed by that exchange when:

(*a*) the instruments provide that their exchange shall have that effect; or

(*b*) it is otherwise established that those States were agreed that the exchange of instruments should have that effect.

Article 14
Consent to be bound by a treaty expressed by ratification, acceptance or approval

1. The consent of a State to be bound by a treaty is expressed by ratification when:

(*a*) the treaty provides for such consent to be expressed by means of ratification;

(*b*) it is otherwise established that the negotiating States were agreed that ratification should be required;

(*c*) the representative of the State has signed the treaty subject to ratification; or

(*d*) the intention of the State to sign the treaty subject to ratification appears from the full powers of its representative or was expressed during the negotiation.

2. The consent of a State to be bound by a treaty is expressed by acceptance or approval under conditions similar to those which apply to ratification.

Article 15
Consent to be bound by a treaty expressed by accession

The consent of a State to be bound by a treaty is expressed by accession when:

(*a*) the treaty provides that such consent may be expressed by that State by means of accession;

(*b*) it is otherwise established that the negotiating States were agreed that such consent may be expressed by that State by means of accession; or

(*c*) all the parties have subsequently agreed that such consent may be expressed by that State by means of accession.

Article 16
Exchange or deposit of instruments of ratification, acceptance, approval or accession

Unless the treaty otherwise provides, instruments of ratification, acceptance, approval or accession establish the consent of a State to be bound by a treaty upon:

(*a*) their exchange between the contracting States;

(*b*) their deposit with the depositary; or

(*c*) their notification to the contracting States or to the depositary, if so agreed.

Article 17
Consent to be bound by part of a treaty and choice of differing provisions

1. Without prejudice to articles 19 to 23, the consent of a State to be bound by part of a treaty is effective only if the treaty so permits or the other contracting States so agree.

2. The consent of a State to be bound by a treaty which permits a choice between differing provisions is effective only if it is made clear to which of the provisions the consent relates.

Article 18
Obligation not to defeat the object and purpose of a treaty prior to its entry into force

A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

(*a*) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or

(*b*) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

SECTION 2. RESERVATIONS

Article 19
Formulation of reservations

A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

(*a*) the reservation is prohibited by the treaty;

(*b*) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or

(*c*) in cases not failing under subparagraphs (*a*) and (*b*), the reservation is incompatible with the object and purpose of the treaty.

Article 20
Acceptance of and objection to reservations

1. A reservation expressly authorized by a treaty does not require any subsequent acceptance by the other contracting States unless the treaty so provides.

2. When it appears from the limited number of the negotiating States and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties.

3. When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.

4. In cases not falling under the preceding paragraphs and unless the treaty otherwise provides:

(*a*) acceptance by another contracting State of a reservation constitutes the reserving State a party to the treaty in relation to that other State if or when the treaty is in force for those States;

(*b*) an objection by another contracting State to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is definitely expressed by the objecting State;

(*c*) an act expressing a State's consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation.

5. For the purposes of paragraphs 2 and 4 and unless the treaty otherwise provides, a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

Article 21
Legal effects of reservations and of objections to reservations

1. A reservation established with regard to another party in accordance with articles 19, 20 and 23:

(*a*) modifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and

(*b*) modifies those provisions to the same extent for that other party in its relations with the reserving State.

2. The reservation does not modify the provisions of the treaty for the other parties to the treaty inter se.

3. When a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation.

Article 22
Withdrawal of reservations and of objections to reservations

1. Unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State which has accepted the reservation is not required for its withdrawal.

2. Unless the treaty otherwise provides, an objection to a reservation may be withdrawn at any time.

3. Unless the treaty otherwise provides, or it is otherwise agreed:

(*a*) the withdrawal of a reservation becomes operative in relation to another contracting State only when notice of it has been received by that State;

(*b*) the withdrawal of an objection to a reservation becomes operative only when notice of it has been received by the State which formulated the reservation.

Article 23
Procedure regarding reservations

1. A reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing and communicated to the contracting States and other States entitled to become parties to the treaty.

2. If formulated when signing the treaty subject to ratification, acceptance or approval, a reservation must be formally confirmed by the reserving State when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.

3. An express acceptance of, or an objection to, a reservation made previously to confirmation of the reservation does not itself require confirmation.

4. The withdrawal of a reservation or of an objection to a reservation must be formulated in writing.

SECTION 3. ENTRY INTO FORCE AND PROVISIONAL, APPLICATION OF TREATIES

Article 24
Entry into force

1. A treaty enters into force in such manner and upon such date as it may provide or as the negotiating States may agree.

2. Failing any such provision or agreement, a treaty enters into force as soon as consent to be bound by the treaty has been established for all the negotiating States.

3. When the consent of a State to be bound by a treaty is established on a date after the treaty has come into force, the treaty enters into force for that State on that date, unless the treaty otherwise provides.

4. The provisions of a treaty regulating the authentication of its text, the establishment of the consent of States to be bound by the treaty, the manner or date of its entry into force, reservations, the functions of the depositary and other matters arising necessarily before the entry into force of the treaty apply from the time of the adoption of its text.

Article 25
Provisional application

1. A treaty or a part of a treaty is applied provisionally pending its entry into force if:

(*a*) the treaty itself so provides; or

(*b*) the negotiating States have in some other manner so agreed.

2. Unless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State shall be terminated if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty.

PART III.
OBSERVANCE, APPLICATION AND INTERPRETATION OF TREATIES

SECTION 1. OBSERVANCE OF TREATIES

Article 26
"Pacta sunt servanda"

Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

Article 27
Internal law and observance of treaties

A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.

SECTION 2. APPLICATION OF TREATIES

Article 28
Non-retroactivity of treaties

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.

Article 29
Territorial scope of treaties

Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.

Article 30
Application of successive treaties relating to the same subject matter

1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States Parties to successive treaties relating to the same subject matter shall be determined in accordance with the following paragraphs.

2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.

3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.

4. When the parties to the later treaty do not include all the parties to the earlier one:

(*a*) as between States Parties to both treaties the same rule applies as in paragraph 3;

(*b*) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.

5. Paragraph 4 is without prejudice to article 41, or to any question of the termination or suspension of the operation of a treaty under article 60 or to any question of responsibility which may arise for a State from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State under another treaty.

SECTION 3. INTERPRETATION OF TREATIES

Article 31
General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(*a*) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(*b*) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(*a*) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(*b*) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(*c*) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32
Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(*a*) leaves the meaning ambiguous or obscure; or

(*b*) leads to a result which is manifestly absurd or unreasonable.

Article 33
Interpretation of treaties authenticated in two or more languages

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.

3. The terms of the treaty are presumed to have the same meaning in each authentic text.

4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

SECTION 4. TREATIES AND THIRD STATES

Article 34
General rule regarding third States

A treaty does not create either obligations or rights for a third State without its consent.

Article 35
Treaties providing for obligations for third States

An obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing.

Article 36
Treaties providing for rights for third States

1. A right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all States, and the third State assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides.

2. A State exercising a right in accordance with paragraph 1 shall comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty.

Article 37
Revocation or modification of obligations or rights of third States

1. When an obligation has arisen for a third State in conformity with article 35, the obligation may be revoked or modified only with the consent of the parties to the treaty and of the third State, unless it is established that they had otherwise agreed.

2. When a right has arisen for a third State in conformity with article 36, the right may not be revoked or modified by the parties if it is established that the right was intended not to be revocable or subject to modification without the consent of the third State.

Article 38
Rules in a treaty becoming binding on third States through international custom

Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such.

PART IV.
AMENDMENT AND
MODIFICATION OF TREATIES

Article 39
General rule regarding the amendment of treaties

A treaty may be amended by agreement between the parties. The rules laid down in Part II apply to such an agreement except insofar as the treaty may otherwise provide.

Article 40
Amendment of multilateral treaties

1. Unless the treaty otherwise provides, the amendment of multilateral treaties shall be governed by the following paragraphs.

2. Any proposal to amend a multilateral treaty as between all the parties must be notified to all the contracting States, each one of which shall have the right to take part in:

(*a*) the decision as to the action to be taken in regard to such proposal;

(*b*) the negotiation and conclusion of any agreement for the amendment of the treaty.

3. Every State entitled to become a party to the treaty shall also be entitled to become a party to the treaty as amended.

4. The amending agreement does not bind any State already a party to the treaty which does not become a party to the amending agreement; article 30, paragraph 4 (b), applies in relation to such State.

5. Any State which becomes a party to the treaty after the entry into force of the amending agreement shall, failing an expression of a different intention by that State:

(*a*) be considered as a party to the treaty as amended; and

(*b*) be considered as a party to the unamended treaty in relation to any party to the treaty not bound by the amending agreement.

Article 41
Agreements to modify multilateral treaties between certain of the parties only

1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:

(*a*) the possibility of such a modification is provided for by the treaty; or

(*b*) the modification in question is not prohibited by the treaty and:

(i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;
(ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.

2. Unless in a case falling under paragraph 1 (*a*) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides.

PART V.

INVALIDITY, TERMINATION AND SUSPENSION OF THE OPERATION OF TREATIES

SECTION 1. GENERAL PROVISIONS

Article 42
Validity and continuance in force of treaties

1. The validity of a treaty or of the consent of a State to be bound by a treaty may be impeached only through the application of the present Convention.

2. The termination of a treaty, its denunciation or the withdrawal of a party, may take place only as a result of the application of the provisions of the treaty or of the present Convention. The same rule applies to suspension of the operation of a treaty.

Article 43
Obligations imposed by international law independently of a treaty

The invalidity, termination or denunciation of a treaty, the withdrawal of a party from it, or the suspension of its operation, as a result of the application of the present Convention or of the provisions of the treaty, shall not in any way impair the duty of any State to fulfil any obligation embodied in the treaty to which it would be subject under international law independently of the treaty.

Article 44
Separability of treaty provisions

1. A right of a party, provided for in a treaty or arising under article 56, to denounce, withdraw from or suspend the operation of the treaty may be exercised only with respect to the whole treaty unless the treaty otherwise provides or the parties otherwise agree.

2. A ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty recognized in the present Convention may be invoked only with respect to the whole treaty except as provided in the following paragraphs or in article 60.

3. If the ground relates solely to particular clauses, it may be invoked only with respect to those clauses where:

(*a*) the said clauses are separable from the remainder of the treaty with regard to their application;

(*b*) it appears from the treaty or is otherwise established that acceptance of those clauses was not an essential basis of the consent of the other party or parties to be bound by the treaty as a whole; and

(*c*) continued performance of the remainder of the treaty would not be unjust.

4. In cases falling under articles 49 and 50, the State entitled to invoke the fraud or corruption may do so with respect either to the whole treaty or, subject to paragraph 3, to the particular clauses alone.

5. In cases falling under articles 51, 52 and 53, no separation of the provisions of the treaty is permitted.

Article 45
Loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty

A State may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under articles 46 to 50 or articles 60 and 62 if, after becoming aware of the facts:

(*a*) it shall have expressly agreed that the treaty is valid or remains in force or continues in operation, as the case may be; or

(*b*) it must by reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be.

SECTION 2. INVALIDITY OF TREATIES

Article 46
Provisions of internal law regarding competence to conclude treaties

1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.

Article 47
Specific restrictions on authority to express the consent of a State

If the authority of a representative to express the consent of a State to be bound by a particular treaty has been made subject to a specific restriction, his omission to observe that restriction may not be invoked as invalidating the consent expressed by him unless the restriction was notified to the other negotiating States prior to his expressing such consent.

Article 48
Error

1. A State may invoke an error in a treaty as invalidating its consent to be bound by the treaty if the error relates to a fact or situation which was assumed by that State to exist at the time when the treaty was concluded and formed an essential basis of its consent to be bound by the treaty.

2. Paragraph 1 shall not apply if the State in question contributed by its own conduct to the error or if the circumstances were such as to put that State on notice of a possible error.

3. An error relating only to the wording of the text of a treaty does not affect its validity; article 79 then applies.

Article 49
Fraud

If a State has been induced to conclude a treaty by the fraudulent conduct of another negotiating State, the State may invoke the fraud as invalidating its consent to be bound by the treaty.

Article 50
Corruption of a representative of a State

If the expression of a State's consent to be bound by a treaty has been procured through the corruption of its representative directly or indirectly by another negotiating State, the State may invoke such corruption as invalidating its consent to be bound by the treaty.

Article 51
Coercion of a representative of a State

The expression of a State's consent to be bound by a treaty which has been procured by the coercion of its representative through acts or threats directed against him shall be without any legal effect.

Article 52
Coercion of a State by the threat or use of force

A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.

Article 53
Treaties conflicting with a peremptory norm of general international law ("jus cogens")

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

SECTION 3. TERMINATION AND SUSPENSION OF THE OPERATION OF TREATIES

Article 54
Termination of or withdrawal from a treaty under its provisions or by consent of the parties

The termination of a treaty or the withdrawal of a party may take place:

(*a*) in conformity with the provisions of the treaty; or

(*b*) at any time by consent of all the parties after consultation with the other contracting States.

Article 55
Reduction of the parties to a multilateral treaty below the number necessary for its entry into force

Unless the treaty otherwise provides, a multilateral treaty does not terminate by reason only of the fact that the number of the parties falls below the number necessary for its entry into force.

Article 56
Denunciation of or withdrawal from a treaty containing no provision regarding termination, denunciation or withdrawal

1. A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless:

(*a*) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or

(*b*) a right of denunciation or withdrawal may be implied by the nature of the treaty.

2. A party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty under paragraph 1.

Article 57
Suspension of the operation of a treaty under its provisions or by consent of the parties

The operation of a treaty in regard to all the parties or to a particular party may be suspended:

(*a*) in conformity with the provisions of the treaty; or

(*b*) at any time by consent of all the parties after consultation with the other contracting States.

Article 58

Suspension of the operation of a multilateral treaty by agreement between certain of the parties only

1. Two or more parties to a multilateral treaty may conclude an agreement to suspend the operation of provisions of the treaty, temporarily and as between themselves alone, if:

(*a*) the possibility of such a suspension is provided for by the treaty; or

(*b*) the suspension in question is not prohibited by the treaty and:

(i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;

(ii) is not incompatible with the object and purpose of the treaty.

2. Unless in a case falling under paragraph 1 (*a*) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of those provisions of the treaty the operation of which they intend to suspend.

Article 59

Termination or suspension of the operation of a treaty implied by conclusion of a later treaty

1. A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject matter and:

(*a*) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or

(*b*) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.

2. The earlier treaty shall be considered as only suspended in operation if it appears from the later treaty or is otherwise established that such was the intention of the parties.

Article 60

Termination or suspension of the operation of a treaty as a consequence of its breach

1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.

2. A material breach of a multilateral treaty by one of the parties entitles:

(*a*) the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either:

(i) in the relations between themselves and the defaulting State; or

(ii) as between all the parties;

(*b*) a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;

(*c*) any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.

3. A material breach of a treaty, for the purposes of this article, consists in:

(*a*) a repudiation of the treaty not sanctioned by the present Convention; or

(*b*) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.

4. The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach.

5. Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties.

Article 61
Supervening impossibility of performance

1. A party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty.

2. Impossibility of performance may not be invoked by a party as a ground for terminating, withdrawing from or suspending the operation of a treaty if the impossibility is the result of a breach by that party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

Article 62
Fundamental change of circumstances

1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

(*a*) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and

(*b*) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:

(*a*) if the treaty establishes a boundary; or

(*b*) if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

3. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty.

Article 63
Severance of diplomatic or consular relations

The severance of diplomatic or consular relations between parties to a treaty does not affect the legal relations established between them by the treaty except insofar as the existence of diplomatic or consular relations is indispensable for the application of the treaty.

Article 64
Emergence of a new peremptory norm of general international law ("jus cogens")

If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.

SECTION 4. PROCEDURE

Article 65
Procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty

1. A party which, under the provisions of the present Convention, invokes either a defect in its consent to be bound by a treaty or a ground for impeaching the validity of a treaty, terminating it, withdrawing from it or suspending its operation, must notify the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the reasons therefor.

2. If, after the expiry of a period which, except in cases of special urgency, shall not be less than three months after the receipt of the notification, no party has raised any objection, the party making the notification may carry out in the manner provided in article 67 the measure which it has proposed.

3. If, however, objection has been raised by any other party, the parties shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations.

4. Nothing in the foregoing paragraphs shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes.

5. Without prejudice to article 45, the fact that a State has not previously made the notification prescribed in paragraph 1 shall not prevent it from making such notification in answer to another party claiming performance of the treaty or alleging its violation.

Article 66
Procedures for judicial settlement, arbitration and conciliation

If, under paragraph 3 of article 65, no solution has been reached within a period of 12 months following the date on which the objection was raised, the following procedures shall be followed:

(*a*) any one of the parties to a dispute concerning the application or the interpretation of article 53 or 64 may, by a written application, submit it to the International Court of Justice for a decision unless the parties by common consent agree to submit the dispute to arbitration;

(*b*) any one of the parties to a dispute concerning the application or the interpretation of any of the other articles in part V of the present Convention may set in motion the procedure specified in the Annex to the Convention by submitting a request to that effect to the Secretary-General of the United Nations.

Article 67
Instruments for declaring invalid, terminating, withdrawing from or suspending the operation of a treaty

1. The notification provided for under article 65, paragraph 1, must be made in writing.

2. Any act of declaring invalid, terminating, withdrawing from or suspending the operation of a treaty pursuant to the provisions of the treaty or of paragraphs 2 or 3 of article 65 shall be carried out through an instrument communicated to the other parties. If the instrument is not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the representative of the State communicating it may be called upon to produce full powers.

Article 68
Revocation of notifications and instruments provided for in articles 65 and 67

A notification or instrument provided for in article 65 or 67 may be revoked at any time before it takes effect.

SECTION 5. CONSEQUENCES OF THE INVALIDITY, TERMINATION OR SUSPENSION OF THE OPERATION OF A TREATY

Article 69
Consequences of the invalidity of a treaty

1. A treaty the invalidity of which is established under the present Convention is void. The provisions of a void treaty have no legal force.

2. If acts have nevertheless been performed in reliance on such a treaty:

(*a*) each party may require any other party to establish as far as possible in their mutual relations the position that would have existed if the acts had not been performed;

(*b*) acts performed in good faith before the invalidity was invoked are not rendered unlawful by reason only of the invalidity of the treaty.

3. In cases falling under article 49, 50, 51 or 52, paragraph 2 does not apply with respect to the party to which the fraud, the act of corruption or the coercion is imputable.

4. In the case of the invalidity of a particular State's consent to be bound by a multilateral treaty, the foregoing rules apply in the relations between that State and the parties to the treaty.

Article 70
Consequences of the termination of a treaty

1. Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention:

(*a*) releases the parties from any obligation further to perform the treaty;

(*b*) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.

2. If a State denounces or withdraws from a multilateral treaty, paragraph 1 applies in the relations between that State and each of the other parties to the treaty from the date when such denunciation or withdrawal takes effect.

Article 71
Consequences of the invalidity of a treaty which conflicts with a peremptory norm of general international law

1. In the case of a treaty which is void under article 53 the parties shall:

(*a*) eliminate as far as possible the consequences of any act performed in reliance on any provision which conflicts with the peremptory norm of general international law; and

(*b*) bring their mutual relations into conformity with the peremptory norm of general international law.

2. In the case of a treaty which becomes void and terminates under article 64, the termination of the treaty:

(*a*) releases the parties from any obligation further to perform the treaty;

(*b*) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination, provided that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm of general international law.

Article 72
Consequences of the suspension of the operation of a treaty

1. Unless the treaty otherwise provides or the parties otherwise agree, the suspension of the operation of a treaty under its provisions or in accordance with the present Convention:

(*a*) releases the parties between which the operation of the treaty is suspended from the obligation to perform the treaty in their mutual relations during the period of the suspension;

(*b*) does not otherwise affect the legal relations between the parties established by the treaty.

2. During the period of the suspension the parties shall refrain from acts tending to obstruct the resumption of the operation of the treaty.

PART VI.
MISCELLANEOUS PROVISIONS

Article 73
Cases of State succession, State responsibility and outbreak of hostilities

The provisions of the present Convention shall not prejudge any question that may arise in regard to a treaty from a succession of States or from the international responsibility of a State or from the outbreak of hostilities between States.

Article 74
Diplomatic and consular relations and the conclusion of treaties

The severance or absence of diplomatic or consular relations between two or more States does not prevent the conclusion of treaties between those States. The conclusion of a treaty does not in itself affect the situation in regard to diplomatic or consular relations.

Article 75
Case of an aggressor State

The provisions of the present Convention are without prejudice to any obligation in relation to a treaty which may arise for an aggressor State in consequence of measures taken in conformity with the Charter of the United Nations with reference to that State's aggression.

PART VII.
DEPOSITARIES, NOTIFICATIONS, CORRECTIONS AND REGISTRATION

Article 76
Depositaries of treaties

1. The designation of the depositary of a treaty may be made by the negotiating States, either in the treaty itself or in some other manner. The depositary may be one or more States, an international organization or the chief administrative officer of the organization.

2. The functions of the depositary of a treaty are international in character and the depositary is under an obligation to act impartially in their performance. In particular, the fact that a treaty has not entered into force between certain of the parties or that a difference has appeared between a State and a depositary with regard to the performance of the latter's functions shall not affect that obligation.

Article 77
Functions of depositaries

1. The functions of a depositary, unless otherwise provided in the treaty or agreed by the contracting States, comprise in particular:

(*a*) keeping custody of the original text of the treaty and of any full powers delivered to the depositary;

(*b*) preparing certified copies of the original text and preparing any further text of the treaty in such additional languages as may be required by the treaty and transmitting them to the parties and to the States entitled to become parties to the treaty;

(*c*) receiving any signatures to the treaty and receiving and keeping custody of any instruments, notifications and communications relating to it;

(*d*) examining whether the signature or any instrument, notification or communication relating to the treaty is in due and proper form and, if need be, bringing the matter to the attention of the State in question;

(*e*) informing the parties and the States entitled to become parties to the treaty of acts, notifications and communications relating to the treaty;

(*f*) informing the States entitled to become parties to the treaty when the number of signatures or of instruments of ratification, acceptance, approval or accession required for the entry into force of the treaty has been received or deposited;

(*g*) registering the treaty with the Secretariat of the United Nations;

(*h*) performing the functions specified in other provisions of the present Convention.

2. In the event of any difference appearing between a State and the depositary as to the performance of the latter's functions, the depositary shall bring the question to the attention of the signatory States and the contracting States or, where appropriate, of the competent organ of the international organization concerned.

Article 78
Notifications and communications

Except as the treaty or the present Convention otherwise provide, any notification or communication to be made by any State under the present Convention shall:

(*a*) if there is no depositary, be transmitted direct to the States for which it is intended, or if there is a depositary, to the latter;

(*b*) be considered as having been made by the State in question only upon its receipt by the State to which it was transmitted or, as the case may be, upon its receipt by the depositary;

(*c*) if transmitted to a depositary, be considered as received by the State for which it was intended only when the latter State has been informed by the depositary in accordance with article 77, paragraph 1 (*e*).

Article 79
Correction of errors in texts or in certified copies of treaties

1. Where, after the authentication of the text of a treaty, the signatory States and the contracting States are agreed that it contains an error, the error shall, unless they decide upon some other means of correction, be corrected:

(*a*) by having the appropriate correction made in the text and causing the correction to be initialled by duly authorized representatives;

(*b*) by executing or exchanging an instrument or instruments setting out the correction which it has been agreed to make; or

(*c*) by executing a corrected text of the whole treaty by the same procedure as in the case of the original text.

2. Where the treaty is one for which there is a depositary, the latter shall notify the signatory States and the contracting States of the error and of the proposal to correct it and shall specify an appropriate time-limit within which objection to the proposed correction may be raised. If, on the expiry of the time-limit:

(*a*) no objection has been raised, the depositary shall make and initial the correction in the text and shall execute a procès-verbal of the rectification of the text and communicate a copy of it to the parties and to the States entitled to become parties to the treaty;

(*b*) an objection has been raised, the depositary shall communicate the objection to the signatory States and to the contracting States.

3. The rules in paragraphs 1 and 2 apply also where the text has been authenticated in two or more languages and it appears that there is a lack of concordance which the signatory States and the contracting States agree should be corrected.

4. The corrected text replaces the defective text ab initio, unless the signatory States and the contracting States otherwise decide.

5. The correction of the text of a treaty that has been registered shall be notified to the Secretariat of the United Nations.

6. Where an error is discovered in a certified copy of a treaty, the depositary shall execute a procès-verbal specifying the rectification and communicate a copy of it to the signatory States and to the contracting States.

Article 80
Registration and publication of treaties

1. Treaties shall, after their entry into force, be transmitted to the Secretariat of the United Nations for registration or filing and recording, as the case may be, and for publication.

2. The designation of a depositary shall constitute authorization for it to perform the acts specified in the preceding paragraph.

PART VIII.
FINAL PROVISIONS

Article 81
Signature

The present Convention shall be open for signature by all States Members of the United Nations or of any of the specialized agencies or of the International Atomic Energy Agency or parties to the Statute of the International Court of Justice, and by any other State invited by the General Assembly of the United Nations to become a party to the Convention, as follows: until 30 November 1969, at the

Federal Ministry for Foreign Affairs of the Republic of Austria, and subsequently, until 30 April 1970, at United Nations Headquarters, New York.

Article 82
Ratification

The present Convention is subject to ratification. The instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article 83
Accession

The present Convention shall remain open for accession by any State belonging to any of the categories mentioned in article 81. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 84
Entry into force

1. The present Convention shall enter into force on the thirtieth day following the date of deposit of the thirty-fifth instrument of ratification or accession.

2. For each State ratifying or acceding to the Convention after the deposit of the thirty-fifth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after deposit by such State of its instrument of ratification or accession.

Article 85
Authentic texts

The original of the present Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, being duly authorized thereto by their respective Governments, have signed the present Convention.

DONE at Vienna this twenty-third day of May, one thousand nine hundred and sixty-nine.

ANNEX

1. A list of conciliators consisting of qualified jurists shall be drawn up and maintained by the Secretary-General of the United Nations. To this end, every State which is a Member of the United Nations or a party to the present Convention shall be invited to nominate two conciliators, and the names of the persons so nominated shall constitute the list. The term of a conciliator, including that of any conciliator nominated to fill a casual vacancy, shall be five years and may be renewed. A conciliator whose term expires shall continue to fulfil any function for which he shall have been chosen under the following paragraph.

2. When a request has been made to the Secretary-General under article 66, the Secretary-General shall bring the dispute before a conciliation commission constituted as follows:

The State or States constituting one of the parties to the dispute shall appoint:

(*a*) one conciliator of the nationality of that State or of one of those States, who may or may not be chosen from the list referred to in paragraph 1; and

(*b*) one conciliator not of the nationality of that State or of any of those States, who shall be chosen from the list.

The State or States constituting the other party to the dispute shall appoint two conciliators in the same way. The four conciliators chosen by the parties shall be appointed within sixty days following the date on which the Secretary-General receives the request.

The four conciliators shall, within sixty days following the date of the last of their own appointments, appoint a fifth conciliator chosen from the list, who shall be chairman.

If the appointment of the chairman or of any of the other conciliators has not been made within the period prescribed above for such appointment, it shall be made by the Secretary-General within sixty days following the expiry of that period. The appointment of the chairman may be made by the Secretary-General either from the list or from the membership of the International Law Commission. Any of the periods within which appointments must be made may be extended by agreement between the parties to the dispute.

Any vacancy shall be filled in the manner prescribed for the initial appointment.

3. The Conciliation Commission shall decide its own procedure. The Commission, with the consent of the parties to the dispute, may invite any party to the treaty to submit to it its views orally or in writing. Decisions and recommendations of the Commission shall be made by a majority vote of the five members.

4. The Commission may draw the attention of the parties to the dispute to any measures which might facilitate an amicable settlement.

5. The Commission shall hear the parties, examine the claims and objections, and make proposals to the parties with a view to reaching an amicable settlement of the dispute.

6. The Commission shall report within twelve months of its constitution. Its report shall be deposited with the Secretary-General and transmitted to the parties to the dispute. The report of the Commission, including any conclusions stated therein regarding the facts or questions of law, shall not be binding upon the parties and it shall have no other character than that of recommendations submitted for the consideration of the parties in order to facilitate an amicable settlement of the dispute.

7. The Secretary-General shall provide the Commission with such assistance and facilities as it may require. The expenses of the Commission shall be borne by the United Nations.

FUNDAMENTALS OF INTERNATIONAL PRACTICE

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International Regulation of Trade

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www.mscustoms.com

I. What is the International Regulation of Trade?

a. Every country regulates its imports and exports. There are numerous texts on the subject that describe how international trade is regulated. *See, e.g.* Curtis R. Reitz, Cases and Materials on the International Regulation of Trade and Investment (University of Pennsylvania Law School 2006); Michael J. Trebilcock and Robert Hawse, The Regulation of International Trade (Routledge 2nd Edition, 1999).

b. There are international regimes, conventions and trade agreements to which many of the world's nations are parties. However, the rules agreed to under those regimes, conventions and trade agreements are interpreted by the signatory country, and almost without exception, must be adopted into that country's law. Therefore it is the individual countries that regulate international trade by adhering to international, multinational conventions and agreements. This paper and presentation will explain the basics of international trade regulation, and discuss examples of the most prominent regulated areas.

II. WTO

a. The World Trade Organization describes itself the best at www.wto.org:

There are a number of ways of looking at the WTO. It's an organization for liberalizing trade. It's a forum for governments to negotiate trade agreements. It's a place for them to settle trade disputes. It operates a system of trade rules.

Above all, it's a negotiating forum … *Essentially, the WTO is a place where member governments go, to try to sort out the trade problems they face with each other. The first step is to talk. The WTO was born out of negotiations, and everything the WTO does is the result of negotiations. The bulk of the WTO's current work comes from the 1986-94 negotiations called the Uruguay Round and earlier negotiations under the General Agreement on Tariffs and Trade (GATT). The WTO is currently the host to new negotiations, under the "Doha Development Agenda" launched in 2001.*

Where countries have faced trade barriers and wanted them lowered, the negotiations have helped to liberalize trade. But the WTO is not just about liberalizing trade, and in some circumstances its rules support maintaining trade barriers — for example to protect consumers or prevent the spread of disease.

It's a set of rules … *At its heart are the WTO agreements, negotiated and signed by the bulk of the world's trading nations. These documents provide the legal ground-rules for international commerce. They are essentially contracts, binding governments to keep their trade policies within agreed limits. Although negotiated and signed by governments, the goal is to help producers of goods and services, exporters, and importers conduct their business, while allowing governments to meet social and environmental objectives.*

The system's overriding purpose is to help trade flow as freely as possible — so long as there are no undesirable side-effects — because this is important for economic development and

well-being. That partly means removing obstacles. It also means ensuring that individuals, companies and governments know what the trade rules are around the world, and giving them the confidence that there will be no sudden changes of policy. In other words, the rules have to be "transparent" and predictable.

And it helps to settle disputes … *This is a third important side to the WTO's work. Trade relations often involve conflicting interests. Agreements, including those painstakingly negotiated in the WTO system, often need interpreting. The most harmonious way to settle these differences is through some neutral procedure based on an agreed legal foundation. That is the purpose behind the dispute settlement process written into the WTO agreements.*

b. History - The basis for the WTO began in 1948, as the General Agreement on Tariffs and Trade (GATT), which provided rules for the international system. The members of GATT held negotiation "rounds", to further define and expand world trade. The "Uruguay Round" began in 1986 and ended in 1994 with the WTO's creation. While GATT primarily dealt with trade in goods, the WTO and its agreements now cover trade in services, and in traded intellectual property rights (www.wto.org).

c. The WTO currently has 164 member countries. The list is available at: http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm . Individual entities cannot become members of the WTO but can be "Non-Government Observers" (NGOs).

d. The WTO sets rules that its member countries should follow. Each country adopts the WTO agreements as their own law. For example, the U.S. adopted and enacted the WTO's Uruguay Round agreements to take effect on January 1, 1994. Uruguay Round Agreements Act (URAA), Pub.L. No. 103-465, 103d Cong., 2d Sess., 108 Stat. 4809.

III. WTO Agreements

a. **Valuation** refers to the legal principles that WTO members are to use to appraise goods entering the country. The entered value is what the duties and any fees, like Customs fees or VAT, are based on. The WTO allows for a sequential assessment using five standard rules: Transaction Value, Transaction Value of Identical Merchandise; Transaction Value of Similar Merchandise; Computed Value, Deductive Value and if each of those is inapplicable the final method is the "fallback" method. Annex 1A, Article VII of GATT 1994.

The GATT Valuation Code also covers related party transfer pricing, which are also reflected in U.S. law. While there are U.S. tax implications (*See*, IRS Code § 482), US Customs law prohibits using the related party price for Transaction Value unless certain conditions are met.

In the U.S. valuation is controlled by 19 USC §1401a and 19 CFR § 152.100.

b. **Antidumping/Countervailing Duties (AD/CVD)** are trade laws to prevent "unfair trade." Rather than use existing antitrust laws, the U.S. first adopted antidumping laws in 1916 (Antidumping Act of 1916, 15 U.S.C § 72, *repealed*, Pub. L. 108–429, title II, § 2006(a), Dec. 3, 2004, 118 Stat. 2597). Those laws were adopted and adapted by the GATT, and then the WTO (Annex 1A, Article VI of GATT 1994). Antidumping refers to addressing the selling of goods in one country at a less than fair value (usually less than the cost of production in the country of export). Countervailing duties refers to addressing the practice of countries giving subsidies to manufacturers and/or exporters that they do not give in the same amount, or at all, to solely domestic manufacturers. The Agreements allow countries to impose additional duties on imports found to be dumped or subsidized in order to "level the playing field."

   In the U.S., Countervailing duties and Antidumping procedures are controlled by 19 U.S.C. § 19 USC §§ 1671-1671f and 19 USC §§ 1673-1673i, respectively.

c. **IPR** -The WTO has the agreement for Trade Related Aspects of Intellectual Property ("TRIPS") which sets forth rules for the regulation of Intellectual Property Rights (Annex 1C of GATT 1994). While there are many conventions on IPR, those conventions have to be recognized by the legislatures of each country. In the US, imports that infringe patents can be dealt with by 19 U.S.C. § 1337. U.S. Customs and Border Protection also allows a company to record its trademarks and copyrights, which offers protection against infringing imports (19 CFR Part 133).

d. **Dispute Settlement** – Of course, all these agreements envision how trade is supposed to work. And when it does not work as planned, WTO member countries can file cases against each other (Annex 2 of GATT 1994). If the WTO Dispute Settlement panel rules against a country, the ruling may be appealed. If the country loses the appeal, it is required to change the offending law or regulation or the winning country can obtain compensation in the form of higher tariffs or restraints on imports from the offending country.

IV. WCO

The World Customs Organization ("WCO") was founded as the Customs Co-operation Council in 1950 (Convention Establishing a Customs Co-Operation Council, signed in Brussels on December 15, 1950, came into force on November 4, 1952) and is also best self-described (www.wcoomd.org). It has 182 members and changed its name in 1994:

> *The World Customs Organization (WCO) is the only intergovernmental organisation exclusively focused on Customs matters. With its worldwide membership, the WCO is now recognised as the voice of the global Customs community. It is particularly noted for its work in areas covering the development of global standards, the simplification and*

> *harmonisation of Customs procedures, trade supply chain security, the facilitation of international trade, the enhancement of Customs enforcement and compliance activities, anti-counterfeiting and piracy initiatives, public-private partnerships, integrity promotion, and sustainable global Customs capacity building programmes. The WCO also maintains the international Harmonized System goods nomenclature, and administers the technical aspects of the WTO Agreements on Customs Valuation and Rules of Origin.*

The Customs organizations are the members for each country and non-governmental entities cannot be members, however they can observe ("NGOs") and give advice when asked. Just like the WTO, any proposed changes to customs procedures or rules, must be adopted by each member country to become effective.

As stated above, the WCO maintains the world-wide classification system, the Harmonized System goods nomenclature. Classification is the assignment of a 10 digit number to each and every article imported into the country. The WCO oversees the updating of the Harmonized System, which is the international system that codes each article at the 6 digit level.

V. Harmonized System

The Harmonized System or "HS" entered into force in 1988 (The International Convention on the Harmonized Commodity Description and Coding System, World Customs Organization (Amended June 24, 1986)). According to the WCO (*http://www.wcoomd.org/files/1.%20Public%20files/PDFandDocuments/Conventions/Hsconve21.pdf*):

> *It comprises about 5,000 commodity groups, each identified by a six digit code, arranged in a legal and logical structure and is supported by well-defined rules to achieve uniform classification. The system is used by more than 200 countries and economies as a basis for their Customs tariffs and for the collection of international trade statistics. Over 98 % of the merchandise in international trade is classified in terms of the HS.*

Each country should use the same six-digit code, with the eight digits (denoting duty rates) and the ten digits (denoting statistical breakouts) varying by country. The member countries submit and debate changes to the six-digits and the accompanying legal notes (Section, Chapter and Explanatory Notes). Generally, every seven years the WCO will announce agreed upon changes for the members to adopt into their national law. In the U.S. the Harmonized Tariff System of the U.S. ("HTSUS") is part of the U.S. Code (19 U.S.C. § 1202).

VI. Kyoto Convention

There are also other international agreements that affect international trade and the facilitation of imports. For example, Annex A of the Uruguay Round Agreements includes agreements on Technical Barriers to Trade and Preshipment Inspection. Generally, the WCO is the organization that "regulates" the more technical customs issues. Currently, there are negotiations underway in Geneva (WTO) and Brussels (WCO) to continue trade facilitation.

Perhaps the primary convention on trade facilitation is the "Kyoto Convention" (World Customs Organization International Convention on the Simplification and Harmonization of Customs Procedures (Kyoto Convention), May 18, 1973 (Last amendment entered into force February 3, 2006)). Again, while each country must enact this convention into its domestic law, it represents the international standard for the regulation of customs procedures.

VII. Export Specific

Someone's import is someone else's export, and regulation of exports or "export controls" is just as certain as import regulation. Neither the WTO or WCO manage or oversee export agreements but there still is international regulation of exports, with the controls to be adopted at the country level.

a. Wassenaar Arrangement is a multilateral export control agreement wherein the 40 member countries agree to common principles. It began in 1996. Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies, May 12, 1996. The Arrangement established a Secretariat to oversee its meetings and maintain its records. The following summary describes its goals (www.wassenaar.org):

   The Wassenaar Arrangement has been established in order to contribute to regional and international security and stability, by promoting transparency and greater responsibility in transfers of conventional arms and dual-use goods and technologies, thus preventing destabilising accumulations. Participating States seek, through their national policies, to ensure that transfers of these items do not contribute to the development or enhancement of military capabilities which undermine these goals, and are not diverted to support such capabilities.

b. The U.S. has a very strict and far reaching export controls program. Most U.S. exports are controlled under the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. § 1701. The U.S. also maintains embargoes (*See*, Iran embargo, 31 CFR § 560) and prohibits U.S. companies from fostering other country boycotts with which the U.S. does not agree (50 U.S.C. App. 2407(a)).

1. A prime example is the Arab League boycott of Israel. U.S. entities furthering that boycott would face penalties under IEEPA and elimination of tax benefits under the Ribicoff Amendment to the Tax Reform Act of 1976 (26 U.S.C. §1 *et seq*).

c. U.S. laws not only affect exports from the U.S. but also re-exports from third countries. U.S. export laws also affect international trade between second and third countries where there is no shipment from the U.S. and/or where no U.S. entity is party to the subsequent sale. Many of our trading partners see U.S. export control law as unilateral regulation of international trade.

i. A good description of this can be found in John W. Boscariol, *US Export Controls on Non-US Transactions: A Practical Guide*, Export Compliance Training Institute, Montreal, Quebec, May 20-22, 2009.

d. Sanctions against foreign countries and entities are multilateral like the UN Arms https://www.un.org/sc/suborg/en/sanctions/un-sc-consolidated-list, multi-country (US and EU sanctions against Russian entities) or unilateral (US sanctions versus Cuba).

The US joins in and leads on the "global" type of sanctions and implements them in US law (for example, North Korea 31 CFR 510). The same occurs for "regional" type of sanctions, for example the "Ukraine Related Sanctions" versus Russian entities (31 CFR 539, 589) or the Iran sanctions (31 CFR 560). US sanctions against Cuba are purely unilateral (31 CFR 515).

These sanctions are long-standing, although they have undergone changes in the past several years. The Iran and Cuba sanctions were relaxed and are tightening again, while the Ukraine Related sanctions have been expanded. *See,* "CAATSA" – Countering America's Adversaries Through Sanctions Act, Public Law No. 115-44

VIII. U.S. Regulation

a. Each country has many laws regulating trade and the U.S. is no exception. Attached is a list of the primary U.S. trade laws. Their scope includes every product imported into or exported from the U.S.

IX. Conclusion

Quite simply the international regulation of trade is the responsibility of each country, with direction from multilateral agreements and conventions. With the world getting "smaller", the need increases for uniform trade laws and regulations, with uniform interpretation. While there is agreement on that goal, the "how to get there" is still very much a work in progress and regional trade agreements with varying rules proliferate in the meantime. As a result, lawyers

versed in international trade law should remain in high demand and will provide a benefit to their clients.

One of the effects of global trade is the application of U.S. import and export laws and regulations. These laws are often amended to consider U.S. policy to control certain imports into the U.S. or prevent transshipment of U.S. exports. As trade appears to become less open, the trade statutes and regulations can bedevil the best global company and their counsel.

US CUSTOMS LAWS AFFECTING IMPORTS

19 USC § 1202 – Harmonized Tariff Schedule of the U.S.
19 USC § 1304 – Marking statute
19 USC § 1401a – Valuation statute
19 USC § 1484 – Entry statute
19 USC § 1508 – Recordkeeping statute
19 USC § 1592 - Penalties
19 USC § 1595 - Seizures
19 USC § 1618 - Liquidated Damages

CUSTOMS REGULATIONS FOR IMPORTS

19 CFR § 12.130 - marking
19 CFR § 102.21 – origin
19 CFR § 132 - quotas
19 CFR § 133 - intellectual property
19 CFR § 134 – marking (general)
19 CFR § 141 - entry
19 CFR § 152- valuation
19 CFR §§ 159.58, 351 – CVD
19 CFR §§ 159.58, 351 - AD
19 CFR §§ 162.70-80 penalties
19 CFR §§ 162.21-23, 162.41-52
19 CFR §§ 172.1-43

OTHER LAWS AND REGULATIONS INCLUDE

19 USC §§ 1671-1671f – Countervailing Duty statutes
19 USC §§ 1673-1673i – Antidumping statutes

<u>Intellectual Property</u>

15 USC § 1124

15 USC § 1125
19 USC § 1526(e)
17 USC § 106
35 USC § 271
19 USC § 1337

Australia – US FTA

Pub. L. 108–286, 118 Stat. 919 (August 3, 2004)
19 USC § 1202 HTS General Note 28

NAFTA

19 USC § 1202 - HTS General Note 12
19 USC §§ 3301, 3311-3317, 3331-3335, 3351-3358, 3371-3372
19 CFR §§ 102.0-102.20
19 CFR Part 181

DR- CAFTA

19 USC § 1202 - HTS General Note 29
19 USC §§ 4001-4111
19 CFR § 10.699

Israel Free Trade Agreement

19 USC § 1202 - HTS General Note 8
19 USC § 2112

Andean Trade Preference Act (ATPA)

19 USC § 1202 - HTS General Note 11
19 USC §§ 3201-3206
19 CFR §§ 10.201-210

Andean Trade Promotion and Drug Eradication Act (ATPDEA)

19 USC §§ 3201-3206
19 CFR §§ 10.241-257

Caribbean Basin Trade Partnership Act of 2000 (CBTPA)

19 USC § 1202 - HTS General Note 17
19 USC §§ 2701-2707
19 CFR §§ 10.191-199

African Growth & Opportunity Act (AGOA)

19 USC § 1202 - HTS General Note 16
19 USC §§ 3701-3741

19 CFR §§ 10.211-217

*Please note that the US also has FTAs with Bahrain, Chile, Colombia, South Korea, Morocco, Oman, Panama, Peru and Singapore.

EXPORT LAWS

Department of Treasury, Office of Foreign Assets Control (OFAC)

Import and Export Bans

50 USC § 1701 International Emergency Economic Powers Act (IEEPA)

-Also affects U.S. export controls (15 CFR Part 300 *et seq*.)

22 USC § 2349aa-9 International Security and Development Cooperation Act (ISDCA)

31 CFR §§ 500-599 –Includes embargoes and sanctions on Cuba, Iran, North Korea, Sudan, Syria and the "Crimea" region.

Ukraine Related Sanctions Regulations – 31 CFR Part 589

"CAATSA" – Countering America's Adversaries Through Sanctions Act Public Law No. 115-44

Bureau of Industry and Security, Department of Commerce

IEEPA – 50 USC § 1701

15 CFR Part 730 *et seq*.

Department of State, ITAR

Arms Export Control Act – 22 USC §2778

22 USC § 401

22 CFR Parts 120 - 130

II. Cross-Border M&A
Buying and Selling Companies around the World

NYSBA International Bridging the Gap CLE Program:

Cross Border M&A

Presenters

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Cross-Border Transactions

A. Overview

International capital flows, multinational enterprises and cross-border M&A activity have become ever-larger and more multifaceted parts of the global economy. Globally, cross-border transactions reached $1.3 trillion in 2017, which represented a decrease of 5% in deal volume relative to 2016, driven in part by global geopolitical uncertainty as well as a slowdown in China-outbound M&A due to capital controls and the implementation of new measures to curb "irrational" outbound investments. Nevertheless, of the 10 largest deals in 2017, four of them were cross-border deals worth approximately $126 billion.[i]

There were about 4,220 cross-border transactions involving U.S. companies worth approximately $606 billion in 2017, 52% of which were inbound to the United States. Noteworthy cross-border transactions involving U.S. companies included Johnson & Johnson's $30 billion acquisition of Actelion Pharmaceuticals and Reckitt Benckiser's $17 billion acquisition of Mead Johnson and JAB's $7 billion acquisition of Panera Bread.

With the substantial increase in the number of cross-border deals in recent years, regulatory issues have also risen in importance. In recent years, a number of significant cross-border deals, including several mega-deals, were not consummated or the consummation was delayed for regulatory reasons. For instance, the FTC brought an action to enjoin STERIS Corporation (United States) from acquiring Synergy Health plc (United Kingdom) in a $1.85 billion merger. Although the transaction parties ultimately prevailed at trial and were permitted to proceed with the merger, the transaction had been delayed—the parties had announced the deal on October 13, 2014, the FTC brought the case on June 4, 2015, and the deal did not close until November 2, 2015. Additionally, the DOJ brought an action in April 2017 to enjoin Danone's (France) acquisition of WhiteWave Foods (United States), which had been announced in July 2016 while simultaneously proposing a settlement requiring Danone to divest its Stonyfield Farms business. Examples of significant cross-border deals that were not completed because of antitrust matters include: NYSE Euronext (United States) and Deutsche Börse's (Germany) attempted $10 billion business combination; AT&T's (United States) attempted $39 billion acquisition of T-Mobile USA from Deutsche Telekom (Germany); and AB Electrolux's (Sweden) attempted acquisition of General Electric Company's appliance business (United States). In addition, United Parcel Service's (United States) $6.9 billion bid for TNT Express (the Netherlands) was withdrawn due to concerns from European antitrust regulators (although TNT Express was later acquired by FedEx Corporation), and telecom providers TeliaSonera AB (Sweden) and Telenor Group (Norway) abandoned their attempted combination to create Denmark's largest mobile phone operator, citing as the cause the failure to reach an agreement with the European Commission on acceptable conditions. More recently, 21st Century Fox's (United States) £11.7 billion pending acquisition of the 61% stake of British Sky Broadcasting it does not already own has received significant regulatory interest, including that of the British Competition and Markets Authority, which provisionally found the deal not to be

in the public interest due to concerns that the deal would reduce the diversity of viewpoints in the media.

Continuing a multi-year trend, a significant portion of cross-border activity in 2017 involved hostile or unsolicited bids. Sixty-five hostile or unsolicited cross-border bids, worth approximately $325 billion, were launched during the year.[ii] Major recent unsolicited or hostile proposals for cross-border deals include, among others: Kraft Heinz's (United States) $143 billion bid for Unilever (United Kingdom) (which it withdrew two days after announcement); PPG Industries' (United States) $29.5 billion hostile bid for AkzoNobel N.V. (the Netherlands) (which was called off after a three-month pursuit); Sanofi SA's (France) hostile bid for Medivation, Inc. (United States) (which was ultimately bought by Pfizer, Inc. in a $13.5 billion deal); Bayer AG's (Germany) unsolicited proposal for Monsanto Company (United States) (which led to an agreed-upon deal for about $56 billion); China Resources Microelectronics Limited and Hua Capital Management Ltd.'s (China) $2.5 billion unsolicited overbid for Fairchild Semiconductor International, Inc. (United States) (which ultimately completed its merger with ON Semiconductor Corporation); Anheuser-Busch InBev's (Belgium) unsolicited but eventually agreed-upon $117 billion bid for SABMiller (United Kingdom); and the three-way battle among Perrigo (Ireland), Mylan (the Netherlands) and Teva (Israel) (which ultimately resulted in Teva acquiring Allergan's generics business for $40 billion and Perrigo and Mylan each remaining independent).

"Inversion" transactions (in which a U.S. company combines with a foreign company in a transaction in which the foreign merger party (or a newly formed foreign holding company) becomes the parent of the combined group and the shareholders of the foreign merger party own more than 20% of the resulting foreign parent) were a significant driver of cross-border M&A activity until 2016, when the U.S. Treasury Department issued regulations that, among other things, curbed the ability of inverted groups to introduce significant intercompany leverage into the group's U.S. operations without injecting new capital. As described in Section I.B.6, recently enacted U.S. tax reform includes a number of additional provisions that discourage inversions.

B. Special Considerations in Cross-Border Deals

With advance planning and careful attention to the greater complexity and spectrum of issues that characterize cross-border M&A, such transactions can be accomplished in most circumstances without falling into the pitfalls and misunderstandings that have sometimes characterized cross-cultural business dealings. A number of important issues should be considered in advance of any cross-border acquisition or strategic investment, whether the target is within the United States or elsewhere.

1. Political and Regulatory Considerations

Prospective non-U.S. acquirors of U.S. businesses or assets should undertake a comprehensive analysis of political and regulatory implications well in advance of making an acquisition proposal, particularly if the target company operates in a sensitive industry or if the acquiror is controlled, sponsored or financed by a foreign governmental entity or organized in a jurisdiction where a high level of government involvement is generally understood to exist. Any

weaknesses in the ability to clear regulatory hurdles could be used defensively by reluctant targets or offensively by competing bidders to frustrate or delay the completion of an acquisition.

In the United States, many parties and stakeholders have potential leverage (economic, political, regulatory, public relations, etc.), and consequently it is important to develop a plan to address anticipated concerns that may be voiced by these stakeholders in response to the transaction. Moreover, it is essential that a comprehensive communications plan be in place prior to the announcement of a transaction so that all of the relevant constituencies can be targeted and addressed with the appropriate messages. It is often useful to involve local public relations firms in the planning process at an early stage. Planning for premature leaks is also critical. Similarly, potential regulatory hurdles require sophisticated advance planning. In addition to securities and antitrust regulations, acquisitions may be subject to review by CFIUS, and acquisitions in regulated industries (*e.g.*, energy, public utilities, gaming, insurance, telecommunications and media, financial institutions, transportation and defense contracting) may be subject to additional layers of regulatory approvals. Regulation in these areas is often complex, and political opponents, reluctant targets and competitors may seize on any perceived weaknesses in an acquiror's ability to clear regulatory obstacles. Most obstacles to a cross-border deal are best addressed in partnership with local players (including, in particular, the target company's management, where appropriate) whose interests are aligned with those of the acquiror, as local support reduces the appearance of a foreign threat.

It is in most cases critical that the likely concerns of federal, state and local government agencies, employees, customers, suppliers, communities and other interested parties be thoroughly considered and, if possible, addressed prior to any acquisition or investment proposal becoming public. Flexibility in transaction structures, especially in strategic or politically sensitive situations, may be helpful in particular circumstances, such as: (i) no-governance or low-governance investments, minority positions or joint ventures, possibly with the right to increase to greater ownership or governance over time; (ii) when entering a non-domestic market, making an acquisition in partnership with a local company or management or in collaboration with a local source of financing or co-investor (such as a private equity firm); (iii) or utilizing a controlled or partly controlled U.S. local acquisition vehicle, possibly with a board of directors having a substantial number of U.S. local citizens and a prominent local figure as a non-executive chairman. Use of preferred securities (rather than ordinary common stock) or structured debt securities should also be considered. While an acquisition of outright control of a target by a foreign entity in a sensitive industry may attract significant political attention and regulatory scrutiny, minority and non-controlling investments may be permitted (for example, CNOOC abandoned its attempt to acquire Unocal amid significant political controversy, but CNOOC's $2.2 billion investment and one-third stake in oil and gas assets owned by Chesapeake Energy in 2010 was permitted by regulators).

In addition, local regulators and constituencies may seek to intervene in global transactions. Ostensibly modest social issues, such as the name of the continuing enterprise and its corporate seat, or the choice of the nominal acquiror in a merger, may affect the perspective of government and labor officials. Depending on the industry involved and the geographic distribution of the workforce, labor unions and "works councils" may be active and play a significant role in the current political environment, and as a result, demand concessions. In several recent transactions, the perspective of local constituencies influenced the transaction

structure. For example, in its 2014 acquisition of Tim Hortons, Burger King agreed to list the new company on the Toronto Stock Exchange, reflecting the status of Tim Hortons as an iconic Canadian brand and local regulators' desire to maintain a Canadian listing. Similarly, in its attempted hostile acquisition of Perrigo, Mylan committed to list itself on the Tel Aviv Stock Exchange, regardless of the outcome of its offer, in part to portray a commitment to a long-term presence in Israel and appease Israeli securities regulators and Perrigo's Israeli shareholders. It was also reported that U.S.-based Praxair finally managed to agree to terms with the German company The Linde Group for a $35 billion merger only after the parties agreed to headquarter the combined company in a "neutral" European country (the location of which the parties described as a key "stumbling block" to the initial talks).

In the United States, CFIUS is one of the key authorities to consider when seeking to clear acquisitions by non-U.S. acquirors. CFIUS is a multi-agency committee that reviews transactions for potential national security implications where non-U.S. acquirors could obtain "control" of a U.S. business or the assets or transactions involving investments by non-U.S. governments or investments in U.S. critical infrastructure, technology or energy assets. In recent years, some high-profile deals have failed due to CFIUS hurdles—including MoneyGram and Alibaba affiliate Ant Financial's proposed merger, which the parties terminated in 2018 following failure to gain CFIUS approval over concerns about protection of personal data; Chinese government-backed private equity fund Canyon Bridge Capital Partners' proposed acquisition of Lattice Semiconductor Corporation and a Chinese investment group's acquisition of Aixtron SE, blocked by executive orders from President Trump in September 2017 and then-President Obama in December 2016, respectively; GO Scale Capital's acquisition of an 80.1% interest in Philips Lumileds Holding BV, which was abandoned in January 2016; and India-based Polaris Financial Technology's divestiture of its 85% ownership stake in U.S. company IdenTrust Inc., a provider of digital identification authentication services to banks and U.S. government agencies, after a 2013 CFIUS order. Though data have not yet been released, it is estimated that approximately 20 deals were actively blocked by CFIUS in 2017 (as compared to just 10 blocked deals in all of 2015, the most recent year for which CFIUS data was released), often in pre-announcement stages and many of which were in the technology sector due to increased cybersecurity risk. The scope of CFIUS reviews may expand in the near future—pending U.S. congressional legislation would broaden the range of transactions under CFIUS' jurisdiction, establish mandatory notification for certain transactions, provide for stricter review of "countries of special concern" and extend the CFIUS review period. This legislation, if enacted, would heighten further the potential role of CFIUS and the need to factor into deal analysis and planning the risks and timing of the CFIUS review process.

It is often prudent to make a voluntary filing with CFIUS if control of a U.S. business is to be acquired by a non-U.S. acquiror and the likelihood of an investigation is reasonably high or if competing bidders are likely to take advantage of the uncertainty of a potential investigation. National security implications are not limited to defense sectors; critical infrastructure and industrial base assets and technology transfers can provide a basis for CFIUS interest. Any filing typically should be preceded by discussions with U.S. Treasury officials and other relevant agencies. And companies should consider suggesting methods of mitigation early in the review process in order to help shape any remedial measures and avoid delay or potential disapproval. In some cases, it may even be prudent to make the initial contact prior to the public announcement of the transaction. Given the higher volume of filings that have occurred in the

last few years, such discussions can be instrumental in minimizing the review period. Nonetheless, in today's environment, for any transaction that may be of interest to CFIUS, the pre-filing consultation and review period is taking 75 days on average (although the proposed legislation discussed above, if adopted, would extend this period to up to 120 days).

Additionally, although practice varies, an increasing number of cross-border transactions in recent years have sought to mitigate CFIUS-related non-consummation risk by including reverse break fees specifically tied to the CFIUS review process. In some of these transactions, U.S. sellers have sought to secure the payment of the reverse break fee by requiring the acquiror to deposit the amount of the reverse break fee into a U.S. escrow account in U.S. dollars, either at signing or in installments over a period of time following signing. While still an evolving product, some insurers have also begun offering insurance coverage for CFIUS-related non-consummation risk, covering payment of the reverse break fee in the event a transaction does not close due to CFIUS review, at a cost of approximately 10%–15% of the reverse break fee.

As a CFIUS review is only applicable when the foreign person is acquiring "control" over a "U.S." business (which can include the assets, intellectual property, or operations located in the United States of a non-U.S. business), such review may be avoided by structuring a transaction so that the investor is not acquiring "control." CFIUS regulations issued by the U.S. Department of the Treasury provide an exemption for non-U.S. investments of 10% or less in the voting securities of a U.S. business if made "solely for the purpose of passive investment," although this exclusion does not apply if the non-U.S. person intends to exercise control over the U.S. business or takes other actions inconsistent with passive investment intent. If the foreign acquiror's intent later changes, CFIUS may review the investment retroactively. Control status is fact-specific and subject to a number of guidelines, including with respect to implications of possession of a board seat or the exercise of pro rata voting rights, and whether the investor wields a degree of influence sufficient to determine, direct or decide "important" matters. Certain minority shareholder protections and negative rights may be held by non-U.S. investors without rendering such investors in control of an entity. Further, the proposed legislation discussed above would expand CFIUS's jurisdiction to cover more than transactions that result in "control," extending to any non-passive investment by a foreign person in any U.S. critical technology or infrastructure company. The proposed legislation also defines passive investment narrowly, excluding, for example, investments that confer board or observer rights, access to non-public information or involvement in substantive decision-making pertaining to U.S. business, thus broadening the number of transactions that will be covered.

For acquisitions of control by U.S. or other acquirors of non-U.S. domiciled companies, similar provisions exist under the laws of other jurisdictions, including most notably in Canada, Australia and China, as well as some European nations. For example, in July 2017, the German federal government adopted a new directive increasing its power to scrutinize acquisitions of German companies operating in "critical infrastructure" sectors such as software, telecom and energy. Some countries that have traditionally been hospitable to offshore investors have focused more attention recently on acquisitions by state-owned or state-connected enterprises. For example, Canada's government initially blocked the $5.2 billion bid by Malaysia's Petronas for Progress Energy Resources, on the grounds that it would not create a net benefit for Canada, before approving a revised bid. CNOOC's $15.1 billion acquisition of Canadian oil company Nexen was also subject to significant review by Canadian regulators. On the same day that the

Canadian government approved the acquisitions of Progress Energy and Nexen, it announced changes to Canadian policy in reviewing investments in Canada by state-owned enterprises, which changes would increase the scrutiny applied to acquisitions by foreign-owned or influenced enterprises of control over Canadian enterprises, particularly in the oil-sands business, where such acquisitions would be approved only in exceptional circumstances. In 2013, the Australian Treasurer blocked the $3.1 billion takeover bid of GrainCorp by the American-listed Archer Daniels Midland, after the Australian Foreign Investment Review Board could not reach a consensus on whether to allow the deal to proceed.

Besides the CFIUS filing, foreign investors have to keep in mind that the U.S. Department of Commerce, Bureau of Economic Analysis requires certain U.S. entities (such as investment funds or their portfolio companies) to file annual "BE 13" survey forms with respect to foreign direct investments in the United States. In particular, a report is required by the U.S. entity with respect to (i) a transaction creating a new "foreign direct investment" in the United States or (ii) a transaction whereby an existing U.S. affiliate of a foreign parent establishes a new U.S. legal entity, expands its U.S. operations, or acquires a U.S. business enterprise. Foreign direct investment is defined as "the ownership or control, directly or indirectly, by one foreign person of 10% or more of the voting securities of an incorporated U.S. business enterprise, or an equivalent interest of an unincorporated U.S. business enterprise, including a branch." The completed form must be submitted within 45 days of closing. The failure to report can result in civil or criminal penalties, including fines and imprisonment.

2. Integration Planning and Due Diligence

Integration planning and due diligence also warrant special attention in the cross-border context. Wholesale application of the acquiror's domestic due diligence standards to the target's jurisdiction can cause delay, wasted time and resources, or result in the parties missing key transaction issues. Making due diligence requests that appear to the target as particularly unusual or unreasonable (a common occurrence in cross-border deals, where custom of the type and scope of diligence may vary) can easily cause a bidder to lose credibility. At the same time, missing a significant local issue for lack of local knowledge can be highly problematic and costly. The $10.3 billion acquisition of Autonomy by Hewlett-Packard and subsequent $8.8 billion write-down, and the $653 million acquisition of Zhengzhou Siwei Mechanical & Electrical Engineering by Caterpillar and subsequent $580 million write-down, both attributed to serious accounting improprieties, each underscore the importance of effective due diligence in the cross-border acquisition context.

Due diligence methods must take account of the target jurisdiction's legal regime and local norms, including what steps a publicly traded company can take with respect to disclosing material non-public information to potential bidders and implications for disclosure obligations. Many due diligence requests are best funneled through legal or financial intermediaries as opposed to being made directly to the target company. Due diligence with respect to risks related to the Foreign Corrupt Practices Act ("FCPA")—and understanding the U.S. Department of Justice's guidance for minimizing the risk of inheriting FCPA liability—is critical for U.S. buyers acquiring a company with non-U.S. business activities; even acquisitions of foreign companies that do business in the United States may be scrutinized with respect to FCPA compliance. Diligence relating to compliance with the sanction regulations overseen by the

Treasury Department's Office of Foreign Asset Control can also be important for U.S. entities acquiring non-U.S. businesses. In some cases, a potential acquiror may wish to investigate obtaining R&W insurance in connection with a potential transaction, which has been used with increasing frequency as a tool to offset losses resulting from certain breaches of representations and warranties.

Careful attention must also be paid to foreign operations of domestic companies, including joint ventures with foreign parties. The importance of this issue was dramatically illustrated in the failed attempt by Apollo Tyre, an Indian company, to acquire Cooper Tire & Rubber, a U.S.-based company with a significant joint venture in China. During the pendency of the deal, the Chinese minority partner locked Cooper out of the Chinese factory and made demands about a higher price and the potential clash between Indian and Chinese culture at the plant, which contributed in part to the termination of the merger agreement with Apollo Tyre.

Cross-border deals sometimes fail due to poor post-acquisition integration where multiple cultures, languages, historic business methods and distance may create friction. If possible, the executives and consultants who will be responsible for integration should be involved in the early stages of the deal so that they can help formulate and "own" the plans that they will be expected to execute. Too often, a separation between the deal team and the integration/execution teams invites slippage in execution of a plan that in hindsight is labeled by the new team as unrealistic or overly ambitious. However, integration planning needs to be carefully phased-in, as implementation cannot occur prior to the time most regulatory approvals are obtained and merging parties must exercise care not to engage in conduct that antitrust agencies perceive as a premature transfer of beneficial ownership or conspiracy in restraint of trade. Investigations into potential "gun-jumping" present costly and delaying distractions during substantive merger review.

3. Competition Review and Action

Cross-border M&A activity is subject to careful review by competition authorities, and parties should carefully prepare for multi-jurisdictional review and notifications. Nearly 100 jurisdictions have pre-merger notification regimes, and the list continues to grow; multinational transactions (including minority investments) may require over a dozen notifications. For example, the Dell/EMC transaction required approval from approximately 20 jurisdictions, while the Komatsu/Joy Global transaction required filings in almost a dozen countries. The FTC, the DOJ and the European Commission have not been hesitant to challenge and block cross-border mergers and other cross-border transactions—United Parcel Service's $6.9 billion bid for TNT Express in 2013 was withdrawn due to concerns of European antitrust regulators, and, in 2012, the European Commission blocked the proposed merger of NYSE Euronext and Deutsche Börse.

Competition authorities (particularly those in the United States, Europe and Canada) often, though not always, coordinate their investigations of significant transactions. To the extent that a non-U.S. acquiror directly or indirectly competes or holds an interest in a company that competes in the same industry as the target company, antitrust concerns may arise either at the federal agency- or state attorneys general-level in the United States, as well as in the home country. Although less typical, concerns can also arise if the foreign acquiror of a U.S. target

participates in a market either upstream or downstream of the target. Competition analyses will need to consider variations in market conditions and competition law across relevant jurisdictions. How conglomerate relationships are treated (and views as to required relief) is one area of meaningful variation among competition authorities.

China also has a robust pre-merger notification system and has been active in its review and enforcement activities. In the nine years since the adoption of a pre-merger notification law in China, MOFCOM had previously imposed remedies in 29 cases and rejected only one transaction (Coca-Cola's proposed acquisition of China Huiyuan Juice Group, a leading Chinese juice maker back in 2009). In 2017 alone, MOFCOM imposed remedies in seven transactions, compared with only two in 2016. Transactions upon which MOFCOM granted conditional approval subject to the fulfillment of certain conditions included Dow Chemical's merger with DuPont (conditioned on the divestiture of certain parts of each party's business and supply and distribution commitments in China), SABMiller's acquisition of AB InBev (conditioned on the divestiture of SABMiller's 49% equity stake in a Chinese joint venture) and Google's $12.5 billion acquisition of Motorola Mobility (conditioned on Google's commitment to keep the Android operating system free for five years). MOFCOM also continued its focus on behavioral remedies, including in the Dow/DuPont merger, by requiring Dow and DuPont to supply certain ingredients to Chinese third-party purchasers at reasonable prices, in contrast to the United States, where price controls are relatively rare.

China's antitrust laws require that MOFCOM review any acquisition where aggregate global sales of all parties exceed Rmb10 billion and sales in China for each of at least two parties exceed Rmb400 million. This low threshold for Chinese sales puts many U.S. or European deals squarely within MOFCOM's jurisdiction. China's laws also give MOFCOM broad latitude in selecting remedies and the timing of review. The review clock in China only starts ticking after MOFCOM accepts the filing, which can take weeks or months at MOFCOM's discretion. The review process itself can take a long time (longer than most jurisdictions) as MOFCOM has 90 days after its initial acceptance of the filing to complete its review (which can be extended for a further 60 days). For example, FedEx's acquisition of TNT Express received clearance from U.S., EU and Brazilian regulatory authorities by early February 2016, but did not receive clearance from MOFCOM until the end of April 2016. However, certain transactions with limited horizontal or vertical market overlap, or where the acquisition target (or joint venture, as applicable) does not engage in economic activities in China, may be eligible for MOFCOM's simplified merger review procedure. This typically reduces the formal review period after MOFCOM's initial acceptance of the filing to approximately 30 calendar days on average.

Additionally, India's merger control regime, which came into force in 2011 with the creation of the Competition Commission of India ("CCI"), is now in full swing. An extensive amount of information about the parties and the transaction is required to be included in the notification, and India is one of very few jurisdictions that requires notification to be filed within 30 days of either the board(s) of directors' approval of the combination or the execution of any binding documents related to the combination. The CCI has 30 to 210 days from the date of filing to issue a decision, but the clock stops whenever the CCI issues a request for supplemental information. Parties should expect at least one or two supplemental requests for information to stop the clock. Consequently, the review period will generally be at least two to three months and depending upon the complexity of the matter can be longer.

4. Deal Techniques and Cross-Border Practice

Understanding the custom and practice of M&A in the target's local jurisdiction is essential. Successful execution is more art than science, and will benefit from early involvement by experienced local advisors. For example, understanding when to respect—and when to challenge—a target's sale "process" may be critical. Knowing how and at what price level to enter the discussions will often determine the success or failure of a proposal. In some situations, it is prudent to start with an offer on the low side, while in other situations, offering a full price at the outset may be essential to achieving a negotiated deal and discouraging competitors, including those who might raise political or regulatory issues. In strategically or politically sensitive transactions, hostile maneuvers may be imprudent; in other cases, unsolicited pressure may be the only way to force a transaction. Similarly, understanding in advance the roles of arbitrageurs, hedge funds, institutional investors, private equity funds, proxy voting advisors and other important market players in the target's market—and their likely views of the anticipated acquisition attempt as well as when they appear and disappear from the scene—can be pivotal to the outcome of the contemplated transaction. Some high-profile examples of activist interference in cross-border transactions include Valeant's (Canada) partnership with hedge fund Pershing Square in its failed bid for Allergan (United States), which was ultimately acquired by Actavis, and Elliott Management's attempts to thwart Nokia's (Finland) acquisition of Alcatel-Lucent (United States) and Vodafone's (United Kingdom) public tender for Kabel Deutschland (Germany).

Where the target is a U.S. public company, the customs and formalities surrounding board of director participation in the M&A process, including the participation of legal and financial advisors, the provision of customary fairness opinions, and the inquiry and analysis surrounding the activities of the board and the financial advisors, can be unfamiliar and potentially confusing to non-U.S. transaction participants and can lead to misunderstandings that threaten to upset delicate transaction negotiations. Non-U.S. participants need to be well-advised as to the role of U.S. public company boards and the legal, regulatory and litigation framework and risks that can constrain or prescribe board action. In particular, the litigation framework—which, as discussed in Section I.B.5, has recently been shifting—should be kept in mind as shareholder litigation often accompanies M&A transactions involving U.S. public companies. The acquiror, its directors, shareholders and offshore reporters and regulators should be conditioned in advance (to the extent possible) to expect litigation and not to necessarily view it as a sign of trouble. In addition, it is important to understand that the U.S. discovery process in litigation is different, and in some contexts more intrusive, than the process in other jurisdictions. Additionally, the choice of governing law and the choice of forum to govern any potential dispute between the parties about the terms or enforceability of the agreement may have substantial, or even outcome-determinative, effect on the outcome of any such dispute. Parties entering into cross-border transactions should consider with care whether to specify the remedies available for breach of the transaction documents and the mechanisms for obtaining or resisting such remedies.

The litigation risk and the other factors mentioned above can impact both tactics and timing of M&A processes and the nature of communications with the target company. Additionally, local takeover regulations often differ from those in the acquiror's home jurisdiction. For example, the mandatory offer concept common in Europe, India and other

countries—in which an acquisition of a certain percentage of securities requires the bidder to make an offer for either the balance of the outstanding shares or for an additional percentage—is very different from U.S. practice. Permissible deal-protection structures, pricing requirements and defensive measures available to targets also differ. Sensitivity also must be given to the contours of the target board's fiduciary duties and decision-making obligations in home jurisdictions, particularly with respect to consideration of stakeholder interests other than those of shareholders and nonfinancial criteria.

In addition to these customs and formalities, participants in a cross-border transaction should focus attention on the practical considerations of dealing with a counterparty that is subject to a foreign legal regime. For example, acknowledging the potential practical constraints around enforcing a remedy in a foreign jurisdiction can significantly change negotiating dynamics and result in alternative deal structures. Notably, the use of escrow deposit structures or letters of credit from U.S. banks has become a common way to reduce enforceability risk in transactions with Chinese acquirors. Examples of these structures include CIT Group's sale of its commercial aircraft business to a subsidiary of Chinese conglomerate Bohai Leasing, the sale of Lexmark International, Inc. to a Chinese consortium led by Apex Technology Co., Ltd., and the sale of Ingram Micro Inc. to Chinese shipping company Tianjin Tianhai Investment Co. Ltd.

The multifaceted overlay of foreign takeover laws and the legal and tactical considerations they present can be particularly complex when a bid for a non-U.S. company may be unwelcome. Careful planning and coordination with foreign counsel are critical in hostile and unsolicited transactions, on both the bidder and target sides. For example, Italy's "passivity" rule that limits defensive measures a target can take without shareholder approval is suspended unless the hostile bidder is itself subject to equivalent rules. A French company's organizational documents can provide for a similar rule, and as of March 31, 2016, France's Florange Act made it the default that a French company's long-term shareholders are granted double voting rights, which would reduce the influence of toehold acquisitions or merger arbitrageurs. Dutch law and practice allow for the target's use of an independent "foundation," or *stichting*, to at least temporarily defend against hostile offers. The foundation, which is controlled by independent directors appointed by the target and has a broad defensive mandate, is issued high-vote preferred shares at a nominal cost, which allow it to control the voting outcome of any matter put to target shareholders. The three-way battle among Mylan, Perrigo and Teva illustrates how the applicable takeover regime can have significant impact. Perrigo (which had inverted from Michigan to Ireland) was subject to the "frustrating action" rule and other Irish Takeover Rules, which made it more difficult to defend against Mylan's hostile bid—though Perrigo ultimately succeeded in convincing shareholders not to accept the bid. By contrast, Mylan (which had inverted from Pennsylvania to the Netherlands) used a potent combination of takeover defenses facilitated by Dutch law and its own governance documents, including the use of a foundation, to take a resist-at-all-costs approach to Teva's bid.

Disclosure obligations may also vary across jurisdictions. How and when an acquiror's interest in the target is publicly disclosed should be carefully controlled to the extent possible, keeping in mind the various ownership thresholds or other triggers for mandatory disclosure under the law of the jurisdiction of the company being acquired. Treatment of derivative securities and other pecuniary interests in a target other than equity holdings also vary by jurisdiction and have received heightened regulatory focus in recent periods.

5. Acquisition Financing and Restructuring in Cross-Border Transactions

Important trends that have influenced acquisition financing, such as rising U.S. interest rates, appear positioned to continue in 2018, while the recent enactment of major U.S. tax legislation could substantially alter the calculus for acquirors. Among other things, this legislation vastly reduces the incentives for U.S.-parented multinationals to hold cash off-shore, making that cash available to these companies to fund M&A. Well-prepared acquirors and their advisors will want to work closely in advance of a deal to ensure that the acquiror's financing plan nimbly addresses these trends and developments.

In the context of cross-border transactions, potential acquirors with access to multiple debt markets (*e.g.*, U.S., Euro, and U.K. markets) should consider whether opportunities exist in different geographic credit markets such that financing is cheaper or otherwise available on more favorable terms in one local market as opposed to another; how committed acquisition financing is required to be under local regulation (*e.g.*, the "funds certain" requirement in certain European jurisdictions) and whether a transaction with a financing contingency or other non-certain funds structure might be feasible. Similarly, potential acquirors, particularly less-established or highly-leveraged acquirors, may want to explore alternative, non-traditional financing sources and structures, including seller paper or direct lenders. Under U.S. law, unlike the laws of some other jurisdictions, non-U.S. acquirors are not prohibited from borrowing from U.S. lenders, and they generally may use the assets of U.S. targets as collateral (although there are some important limitations on using stock of U.S. targets as collateral).

As the United States continues to be a popular destination for restructuring of multinational corporations, including those with few assets or operations in the country, firms evaluating a potential acquisition of a distressed U.S. target should consider the full array of tools that may be available. This might include acquisition of the target's fulcrum debt securities that are expected to become the equity through an out-of-court restructuring or plan of reorganization, acting as a plan investor or sponsor in connection with a plan, backstopping a plan-related rights offering, or participating as a bidder in a court-supervised "Section 363" auction process, among others. Transaction certainty is of critical importance to success in a "Section 363" sale process or confirmation of a Chapter 11 plan, and non-U.S. participants accordingly need to plan carefully for transaction structures that will result in a relatively level playing field with U.S. participants. Acquirors also need to consider the differing interests and sometimes conflicting agendas of the various constituencies, including bank lenders, bondholders, distressed-focused hedge funds, and holders of structured debt securities and credit default protection.

6. U.S. Cross-Border Securities Regulation

United States securities regulations apply to acquisitions and other business combination activities involving non-U.S. companies with U.S. security holders unless bidders can avoid a jurisdictional nexus with the United States and exclude U.S. security holders. Where a transaction cannot escape U.S. securities regulations in this manner, exemptive relief may be available. Under the current two-tiered exemptive regime, relief from certain U.S. regulatory obligations is available for tender offers that qualify for one of two exemptions—the "Tier I" exemption, where U.S. security holders comprise less than 10% of a security subject to a tender

offer, and the "Tier II" exemption, where the U.S. shareholder base does not exceed 40%. Tier I transactions are exempt from almost all of the disclosure, filing and procedural requirements of the U.S. federal tender offer rules, and securities issued in Tier I exchange offers, business combination transactions and rights offerings need not be registered under the Securities Act. Tier II provides narrow relief from specified U.S. tender offer rules that often conflict with non-U.S. law and market practice (such as with respect to prompt payment, withdrawal rights, subsequent offering periods, extension of offers, notice of extension and certain equal treatment requirements) but does not exempt the transaction from most of the procedural, disclosure, filing and registration obligations applicable to U.S. transactions or from the registration obligations of the Securities Act. Non-U.S. transactions where U.S. ownership in the target company exceeds 40% are subject to U.S. regulation as if the transaction were entirely domestic. In the absence of Tier I or Tier II relief, the SEC will consider granting no-action relief with respect to certain matters when the federal securities laws conflict with the securities laws of a foreign jurisdiction.

Several of the revisions to the U.S. cross-border securities regulatory regime enacted in 2008 have provided U.S. and non-U.S. bidders with somewhat enhanced flexibility and certainty in structuring deals for non-U.S. targets, even if the amendments did not fundamentally alter the nature or scope of the existing regulations, nor, in some respects, go far enough in enacting reforms.[iii] The 2008 revisions also codified relief in several areas of frequent conflict and inconsistency between U.S. and non-U.S. regulations and market practice.

Significantly, neither Tier I nor Tier II exemptive relief limits the potential exposure of non-U.S. issuers—in nearly all cases already subject to regulation in their home jurisdiction—to liability under the antifraud, anti-manipulation and civil liability provisions of the U.S. federal securities laws in connection with transactions with U.S. entanglements. Both this risk and a desire to avoid the demands of U.S. regulation have persuaded many international issuers and bidders to avoid U.S. markets and exclude U.S. investors from significant corporate transactions. Notably, the exclusionary techniques that have developed for avoiding applicability of U.S. securities regulation are often simply not available to non-U.S. purchasers who buy shares through, for example, open market purchases. It may be impossible when transacting on non-U.S. exchanges to exclude U.S. sellers, and, hence, this inability to exclude U.S. sellers may render problematic any attempts to structure around U.S. laws. As was seen in the Endesa/E.ON/Acciona matter, such uncertainty—and the potential for ensuing litigation—can be exploited to gain tactical advantage in a takeover battle.

Also notable is the U.S. Supreme Court's landmark decision in *Morrison* v. *National Australia Bank Ltd.*, in which the Court sharply limited the extraterritorial reach of U.S. securities laws, particularly Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5.[iv] The decision overturned 40 years of lower-court precedent. The decision and its progeny have eradicated billions of dollars in potential liability for foreign securities issuers and have curtailed, if not altogether eliminated, a burgeoning species of securities litigation that had been known as "foreign-squared" and "foreign-cubed" class actions.

C. Deal Consideration and Transaction Structures

While cash remains the predominant (although not exclusive) form of consideration in cross-border deals, increasing from approximately one-half of cross-border deals into the United

States in 2015 and 2016 to two-thirds of such deals in 2017, non-cash structures are not uncommon, offering target shareholders the opportunity to participate in the resulting global enterprise. Where target shareholders will obtain a continuing interest in the acquiring corporation, expect heightened focus on the corporate governance and other ownership and structural arrangements of the acquiror in addition to business prospects. Pricing structures must be sensitive to exchange rate and currency risk as well as volatility in international markets. Alternatives to all-cash structures include non-cash currencies, such as depositary receipts, "global shares" and straight common equity, as well as preferred securities and structured debt.

Transaction structure may affect the ability to achieve synergies, influence actual or perceived deal certainty and influence market perception. Structures should facilitate, rather than hinder, efforts to combine the operations of the two companies so as to achieve greater synergies, promote unified management and realize economies of scale. The importance of simplicity in a deal structure should not be underestimated—simple deal structures are more easily understood by market players and can facilitate the ultimate success of a transaction.

One of the core challenges of cross-border deals using acquiror stock is the potential "flowback" of liquidity in the acquiror's stock to the acquiror's home market. This exodus of shares, prompted by factors ranging from shareholder taxation (*e.g.*, withholding taxes or loss of imputation credits), index inclusion of the issuer or target equity, available liquidity in the newly issued shares and shareholder discomfort with non-local securities, to legal or contractual requirements that certain institutional investors not hold shares issued by a non-local entity or listed on a non-local exchange, can put pressure on the acquiror's stock price. It may also threaten exemptions from registration requirements that apply to offerings outside the home country of the acquiror.

United States and foreign tax issues will, of course, also influence deal structure. In structuring a cross-border deal, the parties will attempt to maximize tax efficiency from a transactional and ongoing perspective, both at the entity and at the shareholder level. In transactions involving a significant equity component, careful consideration may need to be given to whether the combined group should be U.S. or foreign parented. Although recently enacted U.S. tax reform legislation has adopted certain features of a "territorial" tax regime, it will be critical to carefully analyze and quantify the costs of subjecting the combined group to U.S. tax rules by virtue of being U.S. parented. Transactions involving an exchange of shares in a U.S. target corporation for shares of a foreign corporation generally will be tax free to the U.S. target shareholders only if, in addition to satisfying the generally applicable rules regarding reorganizations or Section 351 exchanges, they satisfy additional requirements under Section 367(a) of the Internal Revenue Code and related Treasury Regulations (which require, among other things, that the value of the foreign merger party be at least equal to the value of the domestic merger party). Further, cross-border transactions in which shareholders of the U.S. merger party receive equity in a foreign parent need to be analyzed under Section 7874 of the Internal Revenue Code and related rules applicable to "inversions."

1. All-Cash

All-cash transactions are easy for all constituencies to understand and do not present flowback concerns. The cash used in the transaction frequently must be financed through equity

or debt issuances that will require careful coordination with the M&A transaction. Where cash constitutes all or part of the acquisition currency, appropriate currency hedging should be considered, given the time necessary to complete a cross-border transaction. Careful planning and consideration should be given to any hedging requirements, which can be expensive and, if they need to be implemented before the announcement of a deal, may create a leak. In addition, parties should be cognizant of financial assistance rules in certain non-U.S. jurisdictions that may limit the ability to use debt financing for an acquisition, as well as tax rules limiting the deductibility of interest expense.

2. Equity Consideration

United States securities and corporate governance rules can be problematic for non-U.S. acquirors who will be issuing securities that will become publicly traded in the U.S. as a result of an acquisition. SEC rules, the Sarbanes-Oxley and Dodd-Frank Acts and stock exchange requirements should be evaluated to ensure compatibility with home country rules and to be certain that the non-U.S. acquiror will be able to comply. Rules relating to director independence, internal control reports, and loans to officers and directors, among others, can frequently raise issues for non-U.S. companies listing in the United States. Similar considerations must be addressed for U.S. acquirors seeking to acquire non-U.S. targets. Structures involving the issuance of non-voting stock or other special securities of a non-U.S. acquiror may serve to mitigate some of the issues raised by U.S. corporate governance concerns. Governance practices can be particularly relevant when equity consideration is used in a hostile acquisition. For example, in Mylan's hostile cash and stock offer for Perrigo, Mylan's shareholder-unfriendly governance regime, which was permissible in the Netherlands, was a sticking point for many Perrigo investors, and was a significant driver in Mylan's inability to generate sufficient support for its offer among Perrigo shareholders.

3. Stock and Depositary Receipts

All-stock transactions provide a straightforward structure for a cross-border transaction but may be susceptible to flowback. A depositary receipt approach carries many of the same advantages as an all-stock transaction but may mitigate flowback, as local institutional investors may be willing to hold the depositary receipts instead of the underlying non-local shares, easing the rate at which shares are sold back into the acquiror's home country market. However, in the typical depositary receipt program, the depositary receipt holders are free to surrender their receipts to the depositary in exchange for the underlying shares. Once the underlying shares are received, the non-U.S. shareholder is free to trade them back into the acquiror's home market.

4. "Dual Pillar" Structures

A more complex structure for a cross-border combination is known as the dual-listed company ("DLC") structure. In a DLC structure, each of the publicly traded parent corporations retains its separate corporate existence and stock exchange listing. Management integration typically is achieved through overlapping boards of directors. Broadly speaking, DLC structures can be divided into two categories: "downstream" DLCs and "synthetic" DLCs. In a downstream DLC, the merged businesses are combined under one or more holding companies that are jointly owned by the two publicly traded parent companies. In a synthetic DLC, the

merged businesses typically are not jointly owned, and economic integration is achieved solely through contractual "equalization" arrangements.

Examples of downstream DLC structures include ABB Asea Brown Boveri and Reed-Elsevier. Royal Dutch/Shell, which had utilized such a structure for several decades, restructured into a single holding company a number of years ago. Examples of synthetic DLCs include RTZ-CRA and BHP-Billiton.

Because DLC structures raise novel and complex tax, accounting, governance and other issues as applied to the U.S., to date, these structures have not been successfully employed in cross-border combinations involving a U.S. parent corporation.

Endnotes

[i] MERGERS & ACQUISITIONS REVIEW, FULL YEAR 2017, THOMSON REUTERS 2-3 https://www.thomsonreuters.co.jp/content/dam/openweb/documents/pdf/japan/market-review/2017/ma-4q-2017-e.pdf.

[ii] *Id.*

[iii] *See* Wachtell, Lipton, Rosen & Katz, Comment Letter to SEC (July 24, 2008), http://www.sec.gov/comments/s7-10-08/s71008-28.pdf (commenting that the SEC's proposed revisions, which ultimately were adopted substantially as proposed with a few notable exceptions, should be revised to enact comprehensive reform, such as using U.S. trading volume—and not beneficial ownership—as the relevant criterion for determining the level of exemption; providing Tier I-style exemptive relief to Section 13(d) regulation under the Williams Act; and eliminating the use of "unconventional tender offer" analysis in foreign transactions).

[iv] *Morrison* v. *Nat'l Australia Bank Ltd.*, 561 U.S. 247 (2010).

III. International IP
Copyrights, Trademarks and Patents

INTERNATIONAL BRIDGE THE GAP

INTELLECTUAL PROPERTY PROTECTION:

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INTERNATIONAL BRIDGE THE GAP
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I. Overview of Trademarks and Patents.

Lawyers embarking on the practice of law—in virtually any area—need a basic understanding of intellectual property law. Intellectual property, or "IP," encompasses and refers to creations of the mind, such as useful inventions, literary and artistic works, designs, symbols, names and images used in commerce, and confidential knowledge or information that gives the possessor a competitive advantage in some field. Laws that protect intellectual property enable people to earn recognition or financial benefit from what they invent or create, or what others have invented or created and transferred to them. In general, intellectual property law tries to strike a balance between the interests of innovators and the public that fosters an environment in which creativity and

innovation can flourish in a way that allows creators and innovators to reap rewards while also allowing others a reasonable opportunity to build on past innovation and creation.

Newly minted lawyers whose clients deal with customers, suppliers, competitors or others in jurisdictions outside the United States also need a basic understanding of how intellectual property is protected internationally. Because the world is made up of discrete jurisdictions, an item of protected intellectual property is technically a separate "piece" of IP in each jurisdiction and each "piece" is subject to the laws of that jurisdiction. To try to facilitate and rationalize intellectual property protection across a plurality of jurisdictions, over the years a network of multilateral treaties has developed. These treaties establish some common rules and norms. However, the network is still a work in progress. These materials are designed to give new lawyers an overview of the major international treaties that govern the protection of trademarks and patents.

Before we embark on that overview, it will be helpful to recap what a trademark is and what a patent is, what each protects, and how those protections differ.

A. Trademarks

A trademark is a word, name, symbol or device, or combination thereof, used to distinguish one person's goods or services from those manufactured or sold by others and to indicate the source of goods or services, even if that source is unknown. *E.g.*, 15 U.S.C. § 1127. It is often a brand name (*e.g.*, TIDE for detergent), but it can also be a lot of other things: a logo, a pure design with no literal element (*e.g.*, the Nike swooch), a slogan (*e.g.*, IT'S FINGER LICKIN GOOD for KFC fried chicken), a sound (*e.g.*, YOU'VE GOT MAIL in the distinctive AOL voice), in certain circumstances a color, a

motion sequence and sometimes even a smell or fragrance. However, not all countries protect these more esoteric types of trademarks.

A service mark is the same as a trademark, but it is used to identify services instead of goods. The term "trademark" is sometimes used specifically for a mark for products, but is also used as an overall term for trademarks (in the narrower sense just mentioned) and service marks.

Trademarks are typically legally protectable indefinitely, so long as the mark continues to be used to identify a person's goods or services.

In the United States and a few other jurisdictions, the right to protect a trademark from use by others that would confuse the consuming public can arise from use alone, without registration. This is referred to as "common law rights" or a "common law trademark." Registration still offers many benefits, but is not essential to protection.

In most other jurisdictions, trademark rights arise from registration, not use alone. Accordingly, as a business expands and begins to contemplate sale of its goods or services in foreign countries, it is important to explore international trademark protection before sales commence. A business', or its lawyer's, failure to do that can have expensive, disruptive consequences. It is not uncommon for others to register trademarks for "trending" goods or services in foreign jurisdictions ahead of the "rightful" owners and then extract payment when the "rightful" owner seeks to expand there.

B. Patents

A patent is a limited monopoly granted by a government to an inventor that typically gives the inventor the right to exclude others from making, using or selling a claimed invention within the territory administered by that government. In return, the

inventor typically must disclose the complete invention to the public so that the progress of science and technology is promoted.

Typically, patents are available for inventions that are useful, novel and non-obvious. Also, patents typically grant their limited monopoly for relatively short periods, such as twenty years from filing for a United States patent.

Timely action is necessary to secure the benefits of patent protection. In the United States an inventor has only one year from the first sale or public disclosure of the invention in which to file a patent application (or a "provisional" patent application, which is simpler and less expensive). Failure to file within that period bars patent protection. This is know as the "on sale bar." In most of the rest of the world, however, a patent application must precede any sale or public disclosure of the invention. Otherwise patent protection is forfeited.

C. Other Forms of Intellectual Property

There are some other less-encountered forms of intellectual property that can be important in the international context. These include industrial designs, maskworks, phonorecords or phonograms, geographical indications and some others. Details of these are outside the scope of this program.

D. International Implications of IP Protection

A lawyer needs a basic understanding of how IP is protected internationally for broader reasons than simply securing international protection and registrations. Intellectual property derives its value from protection in particular countries and jurisdictions. If the owner or licensee cannot control use of the intellectual property by others in a particular country it has limited value there. Accordingly, drafting and

evaluating international transactions that deal with intellectual property, even if only to a minor degree, requires lawyers to understand how each type of intellectual property is protected internationally. For example, license agreements, asset purchase agreements for business assets or stock purchase agreements involving international transactions typically identify intellectual property in schedules and contain representations and warranties, often complex, concerning the intellectual property in the agreement, including warranties that it is valid and subsisting, duly registered, valid and enforceable, etc. in the jurisdictions where the agreement contemplates it will or may be exploited. Licensors are also often asked to warrant that use of the intellectual property in accordance with the license agreement will not infringe the rights of third parties.

To evaluate whether your client can or should give, or reasonably rely upon, such warranties and representations, the practitioner needs at least a general understanding of how international protection of intellectual property works. Even with that understanding it may still be necessary to perform some searches or consult counsel in various other jurisdictions. However, the basic understanding will assist in helping the lawyer identify what he or she needs to know.

II. Theories of International Protection of Intellectual Property

Since the world is made up of individual jurisdictions, each with sovereignty over its own territory, all efforts at harmonizing or setting standards or norms for international intellectual property have to be pursuant to treaties, typically multilateral treaties among groups of nations that can agree on standards of protection. Several of these are discussed in these materials. There are, however, two competing general theories under

which international protection of intellectual property operates – "territoriality" and "universality."

A. Territoriality

The "territoriality" theory postulates that intellectual property rights exist separately under each country's law and run only to the borders of that country. Under the territoriality principle, use or protection of intellectual property outside a country does not give the user any rights to use that intellectual property, or to stop others from using it, in that country. Under territoriality, intellectual property has a separate legal existence under each country's laws. As further discussed below, international intellectual property protection for patents and trademarks generally proceeds under a territoriality theory. As a consequence the applicable international agreements generally provide that some action in, or with respect to, each jurisdiction where protection is desired is required. There are some exceptions – for example there is a Community Trademark Registration and a European Patent available that covers the entire European Union, and some other country group trademark registrations.

B. Universality

A countervailing theory to the territoriality principle is called "universality." Under that theory, intellectual property protected in accordance with one country's law should be afforded protection in all countries, or at least all countries that have agreed to give it that protection. The universality principle has not found much favor in connection with international protection of trademarks and patents. However, version of it is the animating force behind international protection of copyrights under the Berne Convention, which other materials will discuss.

III. International Protection of Trademarks and Patents

Because of the dichotomy between the two principles discussed above, it is most useful to discuss international protection of trademarks and patents separately from protection of copyrights, which will be treated in other materials. The former are generally protected under a territoriality theory, while the latter is protected under a version of the universality theory.

The discussion must begin with the Paris Convention for the Protection of Industrial Property, dating from the late 19th Century. We then consider the Madrid Agreement and the Madrid Protocol, which concern international protection of trademarks, the Pan American Agreement, and finally the Patent Cooperation Treaty, which concerns patents. These are not the only international agreements covering these types of intellectual property. However, they are the major ones. Some reference to others will be made, but, in general, they are outside the scope of these materials.

A. The Paris Convention for the Protection of Industrial Property.

The first broad based international agreement concerning recognition of the intellectual property rights of foreigners in signatory countries was the Paris Convention of 1883. It has been revisited and reconsidered six times since then, most recently in 1967, and it was amended most recently in 1979. 195 countries, including virtually all those of commercial significance, are contracting states under the Paris Convention, or members of the "Union." The text of the treaty, as well as a list of the member countries of the Union is available at http://www.wipo.int/treaties/en/ip/paris/ The basic tenets of the Paris Convention have continued to this day as the fundamental principles of all industrial property recognition and protection. The term "industrial property" as used in

the Paris Convention, includes patents, trademarks, industrial designs, utility models (a kind of "small patent" provided for by the laws of some countries), trade names, geographical indications and unfair competition protection. We will discuss primarily trademarks and patents. The basic principles of the Paris Convention are:

NATIONAL TREATMENT—The principle of "national treatment" is basically that each member country will afford the same intellectual property rights to foreigners that it affords to its citizens. Article 2(1) of the Convention provides that:

> Nationals of any country of the Union shall, as regards the protection of industrial property, enjoy in all the other countries of the Union the advantages that their respective laws now grant, or may hereafter grant, to nationals, all without prejudice to the rights specially provided for by this Convention. Consequently, they shall have the same protection as the latter, and the same legal remedy against any infringement of their rights, provided that the conditions and formalities imposed upon nationals are complied with.

Note that "national treatment" does not require reciprocal treatment. A country need not provide foreigners any trademark or patent protection if it provides its own citizens none. It merely is not permitted to discriminate against foreigners. This has been considered a significant weakness in the Paris Convention.

NO DOMICILE REQUIREMENT—The Paris Convention prohibits any contracting country from requiring that a foreign entity establish a domicile or permanent presence in a country as a condition to enjoying the protection of its patent and trademark laws.

RIGHT OF PRIORITY—The Paris Convention created the very important right of priority for foreign trademarks and patents. Under the Convention, the filing date of a duly filed application in one of the countries of the Union can be claimed as a right of priority in another country any time within a specified time from the original filing date. The priority period for trademarks is six months and for patents it is one year. Under this right, a United States trademark or patent applicant who files an application in another signatory country within the priority period of the US filing has priority in that country over anyone else who filed for the same mark or invention after the US filing date.

COMMON RULES – The Paris Convention also establishes a few common rules for intellectual property protection that all members must follow. For patents, these include:

1. Patents granted in different member countries for the same invention are independent of each other. This means that one country's grant of a patent does not obligate other countries to grant a patent. Conversely, a patent cannot be refused, annulled or terminated in any member country because it has been refused, annulled or has terminated in any other country;

2. The inventor has the right to be named as such in a patent;

3. Certain restrictions on compulsory licenses under patents.

For trademarks, these common rules include:

1. Each country has the right to regulate the conditions for filing and registration of marks by domestic law. Consequently, one country's registration or refusal of registration is not binding on any other country;

2. Under the Paris Convention, each country may determine by its own laws the conditions for filing and registration of trademarks. There is no centralized filing under the Convention. Thus, in the absence of some other agreement, a trademark owner must file and register in each country where protection is needed. (Thankfully, there are some other agreements that provide for international filings to some extent.)

PROTECTION OF "WELL-KNOWN" MARKS--One other important provision of the Paris Convention (Article 6*bis*) requires the protection of "well-known" trademarks, even if they are not registered in a particular country. Countries are required "to refuse or to cancel the registration, and to prohibit the use, of a trademark which constitutes a reproduction, an imitation, or a translation, liable to create confusion, of a mark considered by the competent authority of the country of registration or use to be well known in that country as being already the mark of a person entitled to the benefits of this Convention and used for identical or similar goods." Owners of well-known marks must be afforded at least five years from the registration of the offending mark in which to request cancellation, but the time in which prohibition of use of the offending mark must be requested is in each country's discretion.

Interestingly, even though the United States is a signatory to the Paris Convention and Congress has ratified the treaty, the United States Court of Appeals for the Second Circuit has held that Article 6*bis* does not apply in the United States because the Paris

Convention is not a "self-executing" treaty, *i.e.*, does not become U.S. law without some internal implementing legislation, and Congress has never passed any internal trademark legislation implementing Article 6*bis*. *ITC Limited v. Punchgini, Inc.*, 482 F.3d 135 (2d Cir.), *cert. denied*, 128 S. Ct. 288, *certified questions answered*, 9 N.Y.3d 467, 850 N.Y.S.2d 366 (2007), *certified questions conformed to*, 518 F.3d 159 (2d Cir. 2008). Accordingly, Congress needs to take some action to bring the United States into compliance with its treaty obligation.

B. The Madrid Agreement Concerning the International Registration of Marks

As noted, the Paris Convention did nothing to establish a centralized or uniform system for international filing and registration of trademarks. In 1891, some of the Paris Union countries made an effort to do that in the Madrid Agreement, but still retained the principle of trademark territoriality—that trademarks and trademark protection only exist in individual countries. The text and member countries of the Madrid Agreement can be found at http://www.wipo.int/treaties/en/registration/madrid/. The Madrid Agreement allows trademark registrants in member countries to secure registration in any other member countries they wish by filing an international application through the home country trademark office, with the International Bureau, today the World Intellectual Property Organization ("WIPO") located in Berne. Individual countries must, however, approve each country registration based on their own national laws, and oppositions can be filed in each individual country. However, successful opposition in any one country does not vitiate registrations in other countries resulting from the application. Thus, the Madrid Agreement provides a single place to file for multiple national registrations, but

the filing alone does not confer any substantive rights. Thus, the mere existence of an "international" registration does not mean that it provides protection anywhere. That must be determined through further inquiry.

Today, 55 countries participate in the Madrid Agreement, but the United States has never been one of them. The United States has, however, acceded to the Madrid Protocol, discussed below.

There are several reasons why the United States and several other key countries refused to join the Madrid Agreement, and they are important points for international lawyers to understand:

- It requires that a home country **registration** have issued before the international application can be filed. This disadvantages US trademark applicants because the registration process in the US is more rigorous, and takes longer, than in most countries.
- Under the Madrid Agreement, individual countries have only 12 months in which to reject a registration requested in the international application. The process simply takes longer in the US. If the US undertook to examine Madrid Union applications in twelve months, it would have to give them priority over applications from its own citizens.
- The Madrid Agreement requires that "central attack" be allowed. This means that if the home-country registration (on which the international registrations are based) is successfully attacked, in whole or in part, within five years of registration, all the protection resulting from the international application ceases completely. This is unfair to United States trademark owners because

there are many more grounds to attack a registration available in the US than in most other countries.

- The Madrid Agreement does not require any use of, or intent to use, a trademark before filing for registration. Use based protection of trademarks is a fundamental tenet of United States trademark law.

C. The Madrid Protocol

The Madrid Agreement could never establish a truly international trademark system because it was not acceptable to the United States and a handful of other important countries including the United Kingdom, Ireland, Denmark and Greece. The WIPO continued to look for a solution that would bring these countries into the fold. A promising 1973 attempt called the Vienna Trademark Registration Treaty was acceptable to the United States, but failed to gain enough support to be viable.

Finally, in 1989, a "Protocol Relating to the Madrid Agreement Concerning the International Regulation of Marks", known as the "Madrid Protocol" was agreed upon. The Madrid Protocol was thought to be acceptable to virtually all the major players and the international trademark community thought that a true international trademark system was finally at hand. The text of the Madrid Protocol and the countries adhering to it are available at http://www.wipo.int/treaties/en/registration/madrid_protocol/.

The Madrid Protocol treated a number of the problems that the United States had with the Madrid Agreement. The principal differences between the Madrid Agreement and the Madrid Protocol are:

- **APPLICATION BASED ON FILING—**The Madrid Protocol allows an international application to be based on the *filing* of a national trademark

application, rather than the perfected national *registration* that the Madrid Agreement requires. This helps ameliorate the disadvantage at which the Madrid Agreement placed United States trademark owners.

- **MORE TIME TO REFUSE REGISTRATION—**The Madrid Protocol gives each country named in an international application eighteen months in which to review and refuse registration, rather than the twelve months the Madrid Agreement affords. This more fairly allocates the resources of the Unites States Patent and Trademark office.
- **"CENTRAL ATTACK" LESS DRASTIC—**Under the Madrid Protocol, if the basic national registration (or application) supporting the international application is successfully attacked, then the international registrations that stemmed from it may be converted into separate national registrations with an effective filing date as of the original international application's filing date. Under the Madrid Agreement, these international registrations are simply wiped out. This diminishes the draconian effect of "central attack."
- **FEES IN EACH COUNTRY—**The Madrid Protocol allows each national trademark office to charge its national filing fee for examining applications made via an international application.

The Madrid Protocol gained significant acceptance and today has 101 contracting countries. The number grows virtually every year. The member countries include the United States. The U.S. was quite late in joining, however. Efforts throughout the '90s to have Congress ratify the Madrid Protocol repeatedly failed. This was not due to any substantive problem the United States had with the trademark provisions of the treaty.

Until 2000, the failure to ratify was based on the State Department's opposition to a treaty provision that gave the European Union, as an entity, a vote in future debates over the treaty in addition to the votes of the constituent EU countries. The United States objects on principle to this "extra" vote for a non-country. Compromise on this issue was reached when the EU agreed that it would never vote against the United States on any matter. Two years later, in 2003, the United States finally ratified the Madrid Protocol.

Although the Madrid Protocol is now available to U.S. trademark owners it has not become as widely used as expected. The reasons are not clear. Perhaps it has just not caught on yet. One drawback to use of the Madrid Protocol for U.S. trademark owners is the requirement that the U.S. description of goods and services be used in the international application. The U.S. Patent & Trademark Office typically requires a more specific description that many other countries. This means that international protection based on a U.S. application or registration may give narrower international protection than could be obtained by filing individual country applications or a European Community trademark application covering the entire European Union. However, this is not relevant in every case and is not sufficient to explain why the Madrid Protocol is less used than expected.

It must be noted that the Madrid System (as the Madrid Agreement and the Madrid Protocol, together, are known) is not the only way to protect trademarks internationally. Marks may also be protected through individual country registrations and multi-country registrations such as the Community Trademark covering the entire European Union. Sometimes the Madrid System is simply not available. For example, few American countries other than the United States, and few Asian countries, participate

in the Madrid System. This is changing. Latin America is becoming increasingly receptive to the Madrid System. Colombia and Mexico have joined. Brazil has taken steps to join. Canada is also supposedly joining, but the timing keeps getting pushed back. In January 2014 Canada tabled further consideration of joining the Madrid System so that it could overhaul its trademark laws, by, among other things, adopting the system of International classification of marks that almost all other countries use, known as the Nice Agreement.

Where more than one method of international registration is available, the proper choice requires an evaluation of many factors by an experienced trademark practitioner. These factors are beyond the scope of these materials.

D. The Pan American Convention

Although it applies to only a handful of Latin American countries, the Pan American Convention of 1929 contains some important special trademark rights applicable to member countries that international lawyers should know about. The Pan American Convention consists of two separate agreements, the "Convention for Trade Mark and Commercial Protection," and a Protocol on Inter-American Registration of Trade Marks. Fourteen Western Hemisphere countries, including the United States, but notably not Canada, participated in this convention. The United States renounced the Protocol portion of the Convention in the mid-1940s.

The "Convention for Trade Mark and Commercial Protection" agreement remains in force and has gained new significance for trademarks as a result of the *ITC* decision referred to above, which held that the well-known mark protection of Article 6*bis* of the Paris Convention does not apply in the United States because Congress never passed any

implementing legislation. Articles 7 and 8 of the Pan American Convention provide some potentially very important protection not only for "well known" marks, but also for other marks used in a signatory country, but not yet in actual use, or otherwise protected, in the United States.

If the *ITC* decision is followed by other Circuit Courts of Appeals, and Article 6*bis* of the Paris Convention does not apply in the United States, then the little-known provisions of Articles 7 and 8 of the Pan American Convention will assume far greater importance for trademark owners in the United States and the Latin American countries that are parties to the treaty. The parties are Columbia, Cuba, Guatemala, Haiti, Honduras, Nicaragua, Panama, Paraguay and Peru. The protections of the treaty are available not only to nationals of these countries, but also to "domiciled foreigners who own a manufacturing or commercial establishment or an agricultural development in any of the contracting states." In addition, the benefits of Article 7 are available to "[a]ny owner of a mark protected in one of the contracting states." Thus many trademark owners that are not nationals of a party to the treaty, but have protected their mark in a country that is a party, will be able to invoke the treaty provisions in another country that is a party.

Article 7 of the Pan American Convention provides:

> Any owner of a mark protected in one of the contracting states in accordance with its domestic law, who may know that some other person is using or applying to register or deposit an interfering mark in any other of the contracting states, shall have the right to oppose such use, registration or deposit and shall have the right to employ all legal means,

procedure or recourse provided in the country in which such interfering mark is being used or sought, and upon proof that the person who is using such mark or applying to register or deposit it, had knowledge of the existence and continuous use in any of the Contracting States of the mark on which opposition is based upon goods at the same class, the opposer may claim for himself the preferential right to use such mark in the country where the opposition is made or priority to register or deposit in such country, upon compliance with the requirements established by the domestic legislation in such country and by this Convention.

Article 8 states:

When the owner of a mark seeks the registration or deposit of the mark in a Contracting State other than that of origin of the mark and such registration or deposit is refused because of the previous registration or deposit of an interfering mark, he shall have the right to apply for and obtain the cancellation or annulment of the interfering mark upon proving, in accordance with the legal procedure of the country in which cancellation is sought, the stipulations in Paragraph (a) and those of either Paragraph (b) or (c) below:

(a) That he enjoyed legal protection for his mark in another of the Contracting States prior to the date of the application for the registration or deposit which he seeks to cancel; and

(b) That the claimant of the interfering mark, the cancellation of which is sought, had knowledge of the use, employment, registration or

> deposit in any of the Contracting States of the mark for the specific goods to which said interfering mark is applied, prior to the adoption and use thereof or prior to the filing of the application or deposit of the mark which is sought to be cancelled; or
>
> (c) That the owner of the mark who seeks cancellation based on a prior right to the ownership an use of such mark, has traded or trades with or in the country in which cancellation is sought; and that goods designated by his mark have circulated and circulate in said country from a date prior to the filing of the application for registration or deposit for the mark, the cancellation of which is claimed, or prior to the adoption and use of the same.

The protections these Articles grant are, in fact, somewhat broader than, or at least different from, the well-known marks protection of Article 6*bis*. The availability of protection is based not on the fame of the foreign mark, but on the usurper's knowledge of that mark. Thus, even if the foreign mark is not well known to the public, the foreign owner would be entitled to protection if the usurper knew of the mark. It is arguable that Articles 7 and 8 leave a gap in famous mark protection because, in theory, they would not apply to a famous mark that the usurper did not happen to know about before he or she adopted it. In practice, however, any such gap is doubtful. Decisions applying these articles typically rely, at least in part, on a mark's fame within the jurisdiction as circumstantial evidence that the usurper knew of the mark's use outside the jurisdiction.

Further, Articles 7 and 8 are not vulnerable to the reasoning the Second Circuit used to preclude application of Article 6*bis* of the Paris Convention in the *ITC* case – that the treaty is not self-executing and Congress has never enacted implementing legislation. The U.S. Supreme Court has expressly held that the Pan American Convention is self- executing and became U.S. law upon ratification without the need for implementing legislation.

E. The Patent Cooperation Treaty

The Patent Cooperation Treaty, or PCT, established in 1970, amended in 1979 and modified in 1984 and in 2001, does not grant any international protection for patents. Rather, it facilitates filing for patent protection for an invention simultaneously, or during a specified period, in a number of countries by filing an "international" patent application. Anyone who is a national or resident of a PCT member country may file an international application under the PCT. The application can be filed with the individual national patent offices where protection is sought, or with the International Bureau of the WIPO in Geneva, which will transfer it to each national office. The text of the PCT and a list of its member countries is available at http://www.wipo.int/treaties/en/registration/pct/. Today 152 countries are PCT signatories.

If the applicant is a national or resident of a country which is a party to the European Patent Convention, the international application may also be filed with the European Patent Office (the "EPO"). The same is true for certain African and other multi-country patent agreements, which have their own centralized patent offices.

After a PCT application is filed, it undergoes a so called "international search" by one of the member country patent offices. The results are provided to the applicant, along with a preliminary opinion on patentability. The applicant may then revise his or her application accordingly or withdraw it. If it is revised, the applicant can obtain further review of the application as amended through an international preliminary examination.

If the PCT application is not withdrawn, it is then published by the International Bureau. The applicant has a period of thirty months (with some exceptions) in which to decide which particular countries from which he or she wants to seek a patent. The patent is then prosecuted in each such country by local counsel or patent agents.

The advantages of using the PCT include:

- An extra period of time up to 18 months over what the Paris Convention provides for to decide whether to seek protection in particular countries;
- A uniform format for applications that will not be rejected for failure to comply with a particular local requirement;
- The benefits of the international search report and opinion to evaluate the chances for success generally;
- The opportunity to amend and reevaluate the application at the International Bureau level before it goes to national patent offices;
- World-wide notice of the claimed patent through international publication.

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International Intellectual Property Protection:

Trademarks
Patents

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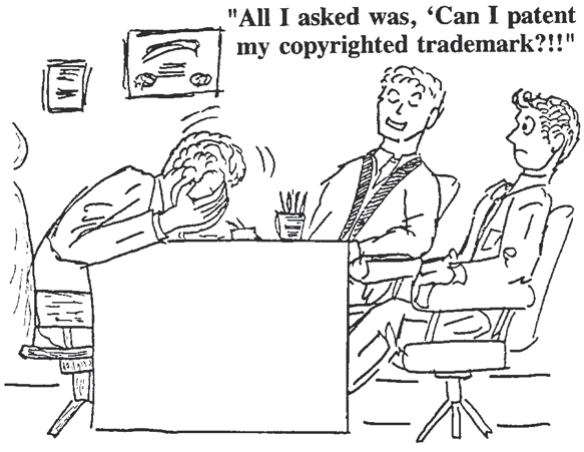
INTELLECTUAL PROPERTY

- International Agreements Often Relate to Intellectual Property or Contain Provisions Concerning Intellectual Property.
- Primarily:
  - Trademarks
  - Patents
  - Copyrights

TRADEMARKS

- A Word, Name, Symbol or Device used to distinguish one person's goods or services from others.
- Indication of Origin—even if unknown
  - Brand Name
  - Slogan
  - Logo
- Protectable Indefinitely as Long as Used

Trademarks, Copyrights and Patents



PATENTS

- Limited Monopoly to an Inventor
- Gives the right to exclude others from making, using or selling
- Requires full disclosure of invention
- Granted for relatively short periods—20 years in U.S.

COPYRIGHTS

- Protects original work of authorship fixed in a tangible medium
  - Textual
  - Graphic
  - Musical
  - Audiovisual
  - Computer Code
- Grants a bundle of exclusive rights, typically
  - Copying
  - Distribution
  - Display
  - Performance
- Relatively long period of protection—Author's life plus 50 to 70 years.

INTERNATIONAL PROTECTION OF TRADEMARKS AND PATENTS

- Intellectual property derives value from protection—not valuable in a given jurisdiction if not protected there
- Lawyers need to know how IP is protected internationally even if not practicing IP law specifically.
  - E.g., warranties that given IP is valid and enforceable in the jurisdictions of importance
- Theories of International Protection
- Overview of Principal International Agreements on IP Protection of Trademarks and Patents
- Still necessary to perform searches and consult foreign counsel

THEORIES OF INTERNATIONAL PROTECTION

- Each jurisdiction has sovereignty over its territory
- Efforts to harmonize or set standards for IP protection must be by treaty—typically multilateral treaties
- Two competing general theories

TERRITORIALITY

- IP rights exist separately under each country's laws and run only to borders of each country.
- IP has separate legal existence in each country.
- Where Territoriality is the governing principle, some action in each jurisdiction is generally required for protection there.

UNIVERSALITY

- Countervailing theory
- IP protected in one country should be afforded protection in all—at least all that agree to provide it.

APPLICATION OF THEORIES

- Territoriality—Trademarks and Patents
- Universality—Copyrights

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INTERNATIONAL AGREEMENTS

Efforts to negotiate broad international agreements relating to IP began in the late 19th Century and are still ongoing.

Paris Convention for the Protection of Industrial Property

- First broad based agreement concerning trademark and patent rights of foreigners
- Established fundamental principles
- Signed at Paris in 1883
- Six revisions, most recently Stockholm in 1967. Amended in 1979
- 195 countries have joined the Paris “union”

Paris Convention—Fundamental Principles

- NATIONAL TREATMENT — Each member country will afford the same IP rights to foreigners that it affords to its own citizens. Article 2(1).
  - Does not require reciprocal treatment
  - A country need not provide foreigners any TM or patent rights if it provides its own citizens none.
  - Considered a weakness

Paris Convention—Fundamental Principles for Trademarks

- NO DOMICILE REQUIREMENT—
  - Prohibits any country from requiring that a foreigner have a domicile or permanent presence in a country as a condition to enjoying the protection of its trademark laws
- RIGHT OF PRIORITY—
  - The filing date of an application in one country of the Union can be claimed in another country of the Union within
    - Six months of the original filing date for trademarks
    - One year of the original filing date for patents

Paris Convention—Right of Priority

- Priority right can “bite” US Trademark owners because it is possible for a later filed application based on a foreign mark to be accorded priority over your earlier filing.
- Priority can also “bite” patent owners because the U.S. has switched from a “first to invent” rule to a “first to file” rule.

Paris Convention—Fundamental Principles

- INDIVIDUAL NATIONAL FILINGS—
  - The Paris Convention provides for no centralized filing or reciprocal recognition. Each country sets its own laws (subject to “National Treatment”)
  - IP owner must file and register in each country where protection is desired
  - Setting common standards is the function of some later agreements
- “WELL-KNOWN” MARKS— Article 6bis requires that member states protect “well-known” trademarks even if not registered.
- Surprising 2007 decision in ITC v. Punchgini holds that Article 6bis does not apply in the US.

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THE MADRID AGREEMENT

CONCERNING THE INTERNATIONAL REGISTRATION OF MARKS

THE MADRID AGREEMENT

- An 1891 effort by some Paris Union countries to establish a centralized, uniform system for trademark registrations.
- Retained trademark territoriality--concept that trademarks exist only in individual countries.
- International, not Supranational.
- Allows registrants in member countries to secure registration in other member countries by filing an international application, through the home country office, with the International Bureau (today WIPO) in Berne.

THE MADRID AGREEMENT

- Filing alone does not confer any substantive rights.
- Individual countries approve each international registration based on own national laws.
- Oppositions can be filed in any country.
- But a successful opposition only affects registration in that country (other than the home registration).
- 55 Countries participate in the Madrid Agreement.
- But ***NOT*** the United States, although the US has acceded to the Madrid Protocol, to be discussed later.
  - Currently, the only way a US company can take advantage of the Madrid Agreement is to base an international registration on a registration by a foreign subsidiary located in a member country.

US OBJECTIONS TO THE MADRID AGREEMENT

- Requires a home country ***registration*** before an international application can be filed.
  - Disadvantages US trademark owners because US registration process is more rigorous and lengthy.
- Only 12 months to reject registrations—
  - Not long enough for US process to work.
  - US would have to give priority to International Applications, at the expense of its own citizens, or issue registrations without adequate examination.

US OBJECTIONS TO THE MADRID AGREEMENT

- CENTRAL ATTACK—Madrid Agreement requires that if the home country registration (on which the others is based) is successfully attacked, in whole or part, within 5 years of registration, all protection in all countries ceases.
  - Unfair to US trademark owners because there are many more grounds of attack on a registration under US law
- Rights based on mere registration.
  - No requirement of use, or even intent to use before registration
  - Inconsistent with a fundamental tenet of US trademark law

THE MADRID PROTOCOL

- The Madrid Agreement was unacceptable to a handful of other key countries in addition to the US
  - United Kingdom
  - Ireland
  - Denmark
  - Greece
- WIPO worked hard for years to find a solution that would bring these countries into the fold

THE MADRID PROTOCOL

- In 1989, a new agreement called the Madrid Protocol was reached.
- Designed to treat the problems the US and other countries had with the Madrid Agreement.
- Thought the solution was finally at hand

MADRID AGREEMENT v. MADRID PROTOCOL

- APPLICATION BASED ON FILING—The Madrid Protocol allows an international application to be based on the filing of a national trademark application, rather than the perfected national registration that the Madrid Agreement requires. This helps ameliorate the disadvantage at which the Madrid Agreement placed United States trademark owners.
- MORE TIME TO REFUSE REGISTRATION—18 months instead of 12
- "CENTRAL ATTACK" LESS DRASTIC—Conversion to national applications
- Not wiped out as under the Madrid Agreement

US ACCESSION TO THE MADRID PROTOCOL

- The Madrid Protocol has been widely accepted with 101 contracting countries today.
- The US acceded in 2003.
- Up and running at the PTO, but is not used as widely as expected.
- Possible reason—US requires more specific descriptions of goods and services than other countries.
- Other drawbacks to Madrid Protocol—
  - Little coverage in Latin America, but improving;
  - Spotty coverage in Asia.
- Not at all clear that a Madrid Protocol International Application will always be the best strategy.

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THE TRIPS AGREEMENT

- All members of the WTO are bound by TRIPS.
- TRIPS does not harmonize trademark law. It merely sets minimum standards.

THE PAN AMERICAN CONVENTION

- 1929 Agreement among 14 Western Hemisphere countries.
- Has significance today in view of ITC decision questioning availability of Paris Convention famous mark protection in US.
- Articles 7 & 8 provide potentially very important protection for marks used in other countries but not yet in the US.
- Parties are Colombia, Cuba, Guatemala, Haiti, Honduras, Nicaragua, Panama, Paraguay, Peru & US.

Patent Cooperation Treaty

- Established in 1970
- No true “International” Protection; although an “international” application is filed
- Can be filed in the member’s national patent office, EPO for member nationals, or with WIPO in Geneva.
- Central processing, search and opinion on patentability
- International publication
- Usually 30 months to decide which countries.
- Primary benefits
  - Extra 18 months over Paris Convention to decide where to prosecute.
  - Uniform format for national applications
  - Useful preliminary evaluation for chances of success.

On Sale Bar

- The United States bars patent protection if the invention has been “on sale” for more than a year—Includes:
  - Advertising
  - Public Disclosures

Most other countries have an immediate “on sale” bar

No patent protection if any disclosure of the invention before filing

THANK YOU!

QUESTIONS???

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IV. International Employment Law

New York Law Journal

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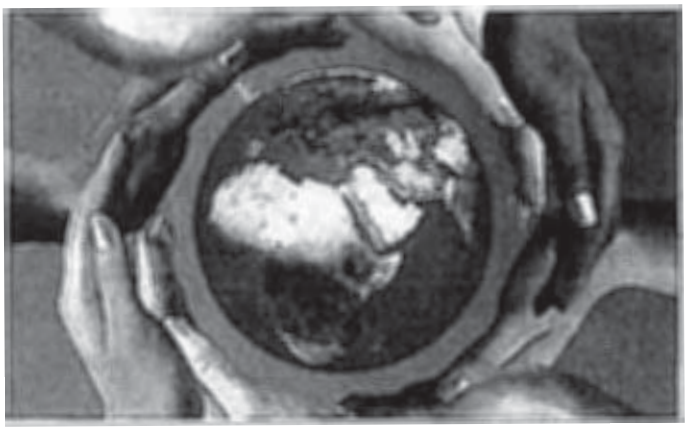
Different Cultures, Different Legal Approaches

In this Employment Issues column, Philip Berkowitz and Hironobu Tsukamoto write: Effective communication is key to being a good lawyer. But one cannot communicate effectively if one does not have a sense of the listener's values. And this may be particularly true when implementing codes of conduct across borders.

By **Philip Berkowitz and Hironobu Tsukamoto** | May 09, 2018



Effective communication is key to being a good lawyer. Whether addressing a client or a court, an adversary or a witness, or drafting an employment or business agreement, an email or a brief, the communication and its meaning must be clear.

But one cannot communicate effectively if one does not have a sense of the listener's values. And this may be particularly true when implementing codes of conduct across borders.

Culture and Communication

Culture is a key part of effective communication. Whether in a personal meeting or drafting a document, the lawyer needs to consider how the message will be received; and the cultural orientation of the message's recipient may be key.

Imagine, for example, that you are meeting with executives of a corporate client. You have spent an entire day hashing out a strategy for an ongoing or anticipated transaction. Indeed, this is not the first meeting on the topic; there have been a number of calls and meetings over a period of days, but this was the one that would finally bring it all together.

At the end of the day, all attendees feel that they have a settled on a reasonable way forward, including a legal strategy. The strategy is communicated to senior executives at headquarters, who indicate that they approve and will move forward on that basis.

You and your key contact, another senior executive at the client, then go out for dinner. At the dinner, you say, "I've been thinking about what we decided today, and I'm not sure that it gives sufficient consideration to a few important issues. I think I have another approach we should consider."

What is your client's likely response? Will she welcome your further insights? If she finds your new proposal and thoughts reasonable, is she likely to suggest that the team reconvene and discuss them? Would you expect your client to be grateful for these late-night ruminations, even if they indeed reflect a better approach?

Would your answer be different if you knew what country the client and its executives are from? For example, what if your client is an American company—or a Japanese company? Should this make a difference? Or would you expect it to make a difference?

Of course, your client may well wish that it had the benefit of your revelations earlier in the day, particularly before she transmitted the earlier strategy to headquarters. However, ideas do not always arrive in a linear fashion. Experience dictates that Americans and Westerners in general may welcome new and different points of view, and may be prepared to change direction and act on them quickly.

What if the client is Japanese? Experience in this case dictates that a Japanese company may be reluctant to consider a different approach once the matter has been run by and seemingly approved by senior executives. Generally speaking, Japanese companies' decision-making occurs in stages, with meetings and documentation aimed at reaching a consensus, from bottom to top; and once the top level approves, the decision is likely to be final. Moreover, the decision-making process is likely to take much longer than in the United States—if the U.S. key players have met for a period of days, the Japanese players have probably met over a period of weeks.

That does not mean the Japanese players do not work diligently, but their style is different from our style.

What Is Culture?

Many organizations now employ a head of culture. This position may be in the area of human resources—but it is not necessarily designed to consider issues such as diversity, or gender equality, or discrimination. Responsibilities would normally include driving successful culture transformations, such as growth or integration of different companies across different regions or countries, communication and branding.

Should "cultural fit" be a legitimate criterion for hire or advancement in an organization? This term could be charged indeed. Presumably, one does not want to screen candidates based on race or ethnicity, or on their acceptance of a culture built on questionable values. On the other hand, an organization may properly look for employees who work well independently, or cross-functionally, and are agile in an organization used to frequent change.

The Dutch social scientist and former IBM executive Geert Hofstede has famously articulated what he describes as four dimensions of societal behavior that dictate or predict differences in business culture. He points to "power distance," or a society's acceptance of power differentials among individuals; "uncertainty avoidance," or a society's aversion or propensity to risk; individualism versus collectivism," i.e., its

propensity to remain in groups; and finally, what he terms a culture's masculine or feminine traits—whether a culture may be considered to be principally aggressive or competitive, as opposed to cooperative, modest or passive.

One may quarrel with these constructs, but they are an example of studies given to the idea that people communicate differently, hear differently, and behave differently, in part depending on the society in which they reside.

There are other, perhaps less obvious behaviors, that may affect the way a client perceives colleagues, receives information, and makes a decision. What impression is sent if one is late to a business meeting? Whether one shakes hands firmly or weakly? The answer often depends on one's country of origin.

What about bowing? Should a non-Japanese attempt to bow to a Japanese host? Should the answer to this question differ depending on whether the meeting is taking place in the United States or Japan? (The answer probably is that if the non-Japanese person is comfortable with bowing, and knows how to do it properly, and is not mocking the Japanese individual, that is fine; but there should be no pressure to do this, and the Japanese individual probably does not expect this gesture.)

In France, colleagues at work often greet each other with a couple of kisses on the cheeks. This is far less likely to be acceptable behavior in Japan, or in China, or indeed in the United States, particularly in the wake or midst of the #MeToo era.

Culture and Codes of Conduct

Issues of culture must be considered when implementing codes of conduct. Societies have differing views of behaviors that Americans view as settled. The problem may not be so much the content, but the way the code is structured and implemented.

Communication, again, is key. Without effective communication and consideration of other cultures, the effort to create a stronger commitment to shared core values and behaviors throughout the group may inadvertently have the opposite effect.

Implementing a code across borders without attention to these considerations may strengthen the divide between "us" and "them."

For example, the simple requirement that a code be signed may be viewed as reflecting a lack of trust in the recipients.

Even more fundamentally, the code may be perceived as reflecting an assumption that people do not take responsibility for their actions or that they lack common sense. Employees may perceive the rules to be self-evident, calling into question the need to write them down.

Dozens of pages of ethical rules, expressed in the lecturing style, may be resented in certain cultures. They may be read like instructions for assembling furniture rather than as guidance for appropriate behavior, and local supervisors may be concerned that they will lose their credibility with local employees if they impose them on their subordinates.

There may also, of course, be substantive divides. For example, policies encouraging employees to blow the whistle on colleagues who are behaving badly may not go over well in countries where whistleblowing is perceived as a deplorable denunciation of colleagues. However, in recent years, thanks to the progressive introduction of U.S. codes of ethics and increasing legislation, this notion is more familiar and accepted as a notion.

And while it is true that most multi-national companies now implement strict rules prohibiting sexual harassment, nevertheless, local laws may remain quite restrictive when it comes to condemning employees for this conduct.

In many countries, the uniquely American system of employment-at-will is not the norm. While the Code may reflect the company's values, an assessment of whether a breach is sufficient reason for a fair dismissal is left to the courts. So the company's attempt to standardize certain incorrect conducts can be frustrated, given that the labor courts will have the last word.

Conclusion

Effectively implementing a code of conduct requires effective communication skills, which in turn requires an appreciation of different cultures. While a Code of Conduct should reflect the values of the company, there must also be room for the receiving culture's values.

Philip M. Berkowitz is a shareholder of Littler Mendelson and co-chair of the firm's U.S. international employment law and financial services practices. Hironobu Tsukamoto is a co-head of Nagashima Ohno & Tsunematsu NY.

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IN-DEPTH DISCUSSION

DOL Flip-Flop: SOX's Anti-Retaliation Provisions Apply to Overseas Conduct After All

BY PHILIP M. BERKOWITZ ON SEPTEMBER 15, 2017

In a late-August decision with potentially far-reaching implications for foreign and multinational employers, the United States Department of Labor Administrative Review Board (ARB) held that the Sarbanes-Oxley Act's (SOX) whistleblower provisions have extraterritorial application—in apparent contradiction of appellate court and indeed prior ARB case law.

In *Blanchard v. Exelis Systems Corp.*,[1] the complainant security supervisor had a contract with the U.S. Department of Defense (DOD) at Bagram Air Force Base ("Bagram") in Afghanistan. His duties included assessment of Afghanis and "other country nationals" (OCNs) who sought access into Bagram. The complainant claimed that his supervisors violated DOD security policy by attempting to cover up the fact that another employee had allowed an OCN to enter Bagram without proper credentials, because they were concerned that the security breach would reflect badly upon the contractors. He also claimed that a supervisor had falsified the number of hours he worked, amounting to alleged mail and wire fraud.

The complainant reported these alleged violations to one of his supervisors and to Human Resources. He also filed a whistleblower complaint with the DOL's Occupational Safety and Health Administration (OSHA), claiming that he suffered unlawful retaliation—he was interrogated, threatened, demoted and held against his will.

OSHA investigated the complaint but concluded that SOX § 806 did not cover adverse actions occurring outside the United States because of the presumption against extraterritorial application of the law. An Administrative Law Judge affirmed this ruling—but on appeal, the ARB reversed and remanded the matter to the ALJ for further proceedings.

The ARB held:

> it is unlikely that Congress intended to limit enforcement of § 806 to U.S. companies and exempt the misconduct of foreign issuers of securities in the U.S. financial market. Such a result would not only give unfair advantage to foreign issuers, it would significantly undermine the twin goals of SOX to protect both shareholders of publically-traded companies as well as the integrity of our increasingly global and interconnected U.S. financial system.

The Sarbanes-Oxley Act of 2002 and the Dodd-Frank Wall Street Report and Consumer Protection Act of 2010 provide private causes of action for whistleblowers who suffer retaliation. Both statutes require a plaintiff asserting a whistleblower claim to show that he engaged in protected activity, that he suffered an adverse employment action, and that the adverse action was causally connected to the protected activity.

To have a claim, a whistleblower plaintiff must show that he reasonably believed that the defendant's conduct constitutes mail fraud, wire fraud, bank fraud, securities fraud, any rule or regulation of the SEC, or any provision of federal law relating to fraud against shareholders.

Dodd-Frank's amendments to the Securities Exchange Act provide a "bounty" to some whistleblowers—if an individual voluntarily provides original information to the SEC, which leads to an SEC enforcement action and recovery of more than $1 million, the whistleblower can collect a monetary award ranging between 10 and 30 percent of the monetary sanctions collected.

In September 2014, the SEC awarded $30 million to a foreign national who submitted to the SEC from overseas evidence of his employer's alleged unlawful conduct, which occurred entirely overseas. The SEC stated its view that there exists "a sufficient U.S. territorial nexus [to justify a bounty award under Dodd-Frank] whenever a claimant's information leads to the successful enforcement of a covered action brought in the United States, concerning violations of the U.S. securities laws, by the [SEC]."

Villanueva

The ARB held in 2011 that § 806 did not have extraterritorial effect. In *Villanueva v. Core Labs. NV, Saybolt de Colombia Limitada,*[2] the ARB affirmed a decision dismissing a whistleblower complaint, even though the alleged retaliatory decision occurred in the United States, because the complaint involved a foreign citizen who alleged violations of foreign law by his foreign employer. In dismissing the complaint, the ALJ relied in part on the Supreme Court's then-recent decision in *Morrison v. National Australian Bank, Ltd.,*[3] where the U.S. Supreme Court engaged in a two-step process to resolve any extraterritoriality issue.

In one step, the adjudicative body determines the extraterritorial reach of the relevant statute. The other step is deciding whether the essential events occurred extraterritorially and, thus, outside of the statute's domestic reach.

Applying *Morrison*'s first step in *Villanueva*, the ARB held that SOX's whistleblower provision, § 806(a)(1), has no extraterritorial application. The ARB reasoned that Congress's silence as to § 806's extraterritorial application conclusively establishes Congress's intent to withhold its application outside the borders of the United States.

As for *Morrison*'s second step, the ARB considered whether the essential parts of the alleged fraud occurred domestically or whether they triggered extraterritorial application. Here, the ARB focused on the locus of the fraudulent activity being reported and stressed that the inquiry should consider the "location of the protected activity, the location of the job and the company the complainant is fired from, the location of the retaliatory act, and the nationality of the laws allegedly violated that the complainant has been fired for reporting ...."

The ARB further noted that even if the complainant's allegation that a publicly traded American company controlled all aspects of the overseas company were true, it would "not change the fact that the disclosures involved violation of extraterritorial laws and not U.S. laws or financial documents filed with the SEC." Thus, despite the allegation that the retaliatory decision was made in the United States, the ARB held that, pursuant to *Morrison*, "some domestic contact will not convert an extraterritorial application to a domestic one."

Blanchard

In finding that SOX has extraterritorial effect, the ARB in *Blanchard* relies almost entirely on its view of Congress's intent in addressing whistleblower conduct when it passed SOX, and on the Supreme Court's more recent decision on extraterritoriality, *RGR Nabisco, Inc. v. European Community*.[4] There, the Supreme Court applied the two-step process developed in *Morrison* to hold that the Racketeer Influenced and Corrupt Organizations Act (RICO) applies extraterritorially.

The Court in *RGR Nabisco* found that RICO incorporates a number of criminal offenses (or predicate acts) that apply to foreign conduct. The Court held that such an indication will suffice to overcome the presumption against extraterritoriality, and that an "express statement of extraterritoriality is not essential."[5]

Similarly, in *Blanchard*, the ARB noted that § 806's substantive prohibitions contain clear indications of extraterritorial intent on the part of Congress. The ARB noted the application of § 806 to all companies with a class of securities registered under § 12 of the Securities Exchange Act of 1934, which by definition includes "foreign private issuers" that are subject to U.S. security laws because they elect to trade in the United States.

Perhaps more significantly, the ARB noted that § 806's "context, structure, and legislative history" indicate that it should be applied extraterritorially. The ARB noted that while Congress did not state expressly that the law applies in foreign countries, its target, "publicly traded companies that engage in specified misconduct",... unequivocally includes both domestic and foreign companies (as well as their employees, contractors and agents)."

The ARB noted, "it is unlikely that Congress intended to limit enforcement of § 806 to US companies and exempt the misconduct of foreign issuers of securities in the US financial market."

The ARB emphasized that Congress's focus, in adopting SOX, was "a backdrop of corporate misconduct conducted on a global arena."

The ARB concluded that its prior ruling in *Villanueva* was "suspect in light of the Supreme Court's holding in *RGR Nabisco*." Nevertheless, the ARB stopped short of finding *Villanueva* to be in error. This is because the ARB concluded that *they did not need to determine that § 806 applies extraterritorially to find that the conduct at issue violated SOX.*

Here, then, is the one saving grace of the decision. The ARB held that § 806 does not cover all foreign conduct of publicly traded foreign companies. Instead, "the misconduct of a foreign issuer/employer under the statute must still 'affect in some significant way' the United States." The ARB held that the complaint in *Blanchard* did allege significant domestic connections.

The ARB noted that in *Villanueva*, it found that the alleged fraud and or law violations involved Colombian laws, with no stated violation or impact on U.S. securities or financial disclosure laws. In *Blanchard*, the complainant based his claims "*solely* on violations of US law," despite that the majority of the conduct at issue occurred overseas.

Indeed, the ARB rejected the *Villanueva* tribunal's conclusion that key to whether the conduct should be protected are the locus of the alleged illegal conduct, the discovery of the alleged illegal conduct, the protected activity, the efforts to address the alleged illegal conduct, and of the retaliation. While "these factors may be a relevant to an extraterritorial assessment under § 806, they are neither individually nor cumulatively dispositive."[6]

Conclusion

Most U.S. multinationals with a concern about potential application of whistleblower law, whether of the United States or another country, are not necessarily parsing their preventive activities by determining whether the conduct at issue involves U.S. laws or the laws of any other jurisdiction.

Some foreign companies, though, may have taken a less leery view of such conduct, expecting that U.S. whistleblower laws will not touch them. *Blanchard* undoubtedly will change this. It greatly expands the risk of U.S. whistleblower claims to all multinationals, to the extent that the conduct at issue could be considered to violate U.S. law. If there are additional connections to the United States, the risk is heightened.

Multinationals, then, must consider this potential liability in formulating policies and directing internal enforcement.

[1] ARB Case No. 15-031, ALJ Case No. 2014-SOX-020 (Aug. 29, 2017), reported at https://www.oalj.dol.gov/PUBLIC/ARB/DECISIONS/ARB_DECISIONS/SOX/15_031.SOXP_slip_op.pdf#search=exelis.

[2] ARB Case No. 09-108 (ARB Dec. 22, 2011).

[3] 130 S. Ct. 2869 (2010).

[4] 136 S. Ct. 2090 (2016).

[5] *Id.* at 2012.

[6] However, even if the statute does apply extraterritorially, the ARB noted that "the authority to reach certain foreign conduct might nevertheless be constrained by principles of international comity or avoidance of conflict of laws."

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Investigations Guidance for Multi-Nationals

MAY 10, 2017

Multinational companies should have in place well considered protocols for investigating claims of alleged internal wrongdoing. Claims of misconduct are often multi-faceted. For example, a claim of unlawful retaliation may also require a review of whether the employee has a reasonable basis for believing that the employer is engaging in wrongful or perhaps illegal conduct. This may, in turn, require an investigation into whether the alleged wrongdoing that is the subject of the complaint actually occurred.

Investigation protocols therefore should provide guidelines that assign investigation roles and responsibilities among various key stakeholders, which may include the general counsel, the chief compliance officer, chief risk officer, head of human resources, and others.

Oversight and Principles

Investigation protocols need to be guided by the company's code of conduct, policies, and workplace rules. They should indicate that they are intended to promote the highest ethical standards of the business and proper behavior of employees.

The guidelines should centralize oversight of investigations in a predetermined and identified investigations team, in order to enable investigations that promote consistency and independence, preserve the attorney-client privilege, and properly evaluate and address legal risk. At the same time, guidelines should not be considered as inflexible or mandatory steps for every investigation. Rather, the guidelines should be tailored through professional judgment to the circumstances of each investigation.

Some general principles: Guidelines need to recognize that country-wide and local laws—especially those governing employee rights and data privacy—may impact the proper approach to an investigation. They should recognize as well the employer's commitment to take appropriate steps to maintain the confidentiality of investigation information.

Guidelines should prohibit retaliation against an employee for raising good faith concerns of misconduct, or for participating or assisting in investigations of such matters. They should make clear that the employer does not prohibit anyone from electing to report concerns, make lawful disclosures, or communicate with any governmental authority about conduct believed to violate laws or regulations, nor does it require disclosures interfering with those rights.

Investigation Intake and Triage

The guidelines should designate a lead officer for identifying the proper team to conduct the investigation. As indicated above, in some circumstances, this may be human resources. In others, it may be the compliance department. And in many circumstances, it may be a combination of different resources who will need to work together to carry out the investigation and formulate remedial measures.

This team will first analyze the nature and significance of the concern and develop or modify a response plan based on, among other things, the nature, severity, scope, and complexity of the allegations; whether there were prior or similar allegations; the past history of personnel involved; the level and role of personnel involved; whether there is a need for escalation; and, critically, the potential financial, legal, reputational, business, contractual, customer, and compliance risks.

Concerns should initially be segregated by type and level of anticipated risk into ethics and compliance concerns and human resources concerns. Teams are then formed based upon the assessment of the type of concern. The team may include internal and external counsel, human resources investigators, forensic accountants or technology professionals, an independent third party, and combinations of the above.

However, certain concerns normally should be brought first to the attention of the individual leading the investigation, or escalated appropriately with senior leadership, the audit committee, external auditors and outside legal counsel. This would be the case where, among other things, an individual has hired counsel or mentioned litigation, the matter may attract press attention, there exists potential criminal liability or a regulatory fine or exposure to a consent decree, allegations of bribery, questionable accounting, accounting controls or auditing matters, alleged misconduct of an executive, officer, or a member of the Board of Directors, a complaint reported to an outside government agency or a threat to do so, or a threatened or actual government agency investigation.

Other concerns that should be elevated would include allegations of illegal, corrupt, or fraudulent activity, internal controls deficiencies, physical harm, retaliation, or an expense or other personal fraud or theft that exceeds a fixed amount, e.g., $50,000.

Matters should normally be shared with senior business leadership only where the business leader is outside the scope of the alleged misconduct, and where the business leader has a legitimate and significant business reason to be notified.

External Counsel, Legal Privilege

As a general rule, absent supervision by an attorney, internal legal investigations will not be protected by the attorney-client privilege. Depending on the nature of the matter, counsel may choose to structure the investigation to utilize or disclose the factual results and process steps in subsequent litigation. Further, certain issues may raise legal questions that require the prompt opinion of counsel. These issues may guide the investigation and related communications.

Of course, the privilege is often waived. And significantly, overseas law and culture may not support application of the privilege; to the contrary, doing so may be greeted with hostility by local law enforcement authorities. Outside the United States, the law generally does not recognize application of the privilege to in-house counsel's communications.

Initial Responses, Internal Steps

A prompt initial response to the reporting party should generally acknowledge receipt of the allegation, reinforce the employer's commitment to investigating all concerns in a fair, prompt, thorough and appropriately confidential manner, reinforce the anti-retaliation policy, provide a contact for further communications, encourage the reporting party to provide any further information, and provide some information about timing and resolution, which normally will depend on the circumstances.

The team needs to consider the rights of the reporting party and the subject. This may include reviewing employment policies or agreements relevant to the review of data, employee interviews, or employee-related remedial measures (e.g., works council rights); considering interim employment measures necessary to a proper investigation (e.g., for the subject of the investigation or for the reporting party); and informing supervisors or other management personnel in an appropriate way.

The team needs to take steps to identify key witnesses and data custodians. It must consider data privacy issues (including cross-border transfer of data), particularly where an investigation involves cross-border transfer of data. The team must consider whether a litigation hold is necessary. It must be sure to preserve relevant electronic data and other physical information, determine the need for and availability of third-party interviews and information, and address the logistics of data formats, foreign language documents, and distant witnesses.

Conducting the Investigation

Obviously, every investigation is unique. The facts and circumstances will affect the specific investigation steps taken. In any case, the investigator should develop an investigative plan, which should consider the chronology of events, appropriate data to capture and review, appropriate search terms, an approach to obtaining data, the identities of witnesses and timing with regard to approaching them, the involvement of counsel, applicable standards from the company's code of conduct and policies, potential legal issues, development of interview questions, and appropriate communications to interviewees and counsel.

Documentation

Normally, the company will prepare an appropriate investigation report, unless legal considerations suggest a different approach. The report should focus factually on the alleged conduct, information gathered during the investigation, and whether the conduct runs counter to the company's applicable policies. Reports normally should not make legal conclusions or contain personal opinions or speculation. They should be shared only with appropriate personnel who have a legitimate need to know, and in a manner that preserves the attorney-client privilege where applicable.

Drafts of the report should normally be reviewed with counsel prior to finalizing.

Remediation and Closure

At the close of the investigation, appropriate internal groups should consider steps forward, including the possibility of disciplinary action, communications to subjects, following up with the reporting party, notifying business personnel with a legitimate need to know, informing other parties, determining whether there should be business process, internal control, or ethics and compliance program enhancements.

Disciplinary action should normally be made by independent personnel and implemented consistently based on standard considerations that include past precedent, level of intent, company risk, and compliance with law. These recommendations should be documented in such a manner as to describe the employee's conduct (or failure to act), how it did or did not comply with the Company's policies, and recommended disciplinary action.

Other Key Issues

This article necessarily provides only the barest outline of an investigation protocol. We would normally also provide, among other things, templates of questions for investigators, lists of appropriate contact points and action items, templates for correspondence with complaining parties and other third parties.

Many other questions must be considered. For example, when should the company permit the employee's counsel to be present during a witness interview, and what role, if any, should the employee's counsel play? As noted below, another important question is whether the investigation should be carried out in a manner designed to maintain the attorney-client privilege, how the privilege can be maintained, and whether the company should waive the privilege.

When matters involve criminal law, it is important to coordinate with competent criminal counsel and to consider whether witnesses may decline to cooperate or insist on having counsel present, and whether they require separate representation.

In some countries, local law may require that the investigation be carried out in the local language. The role of counsel in carrying out an investigation is also important to consider, particularly in countries where counsel's role may be limited by bar association or ethics rules.

Timing can also be critically important. In some countries, the employer may be unable to discipline the employee if too much time passes. In that case, the investigation may curtail the employer's right to discipline the employee, but nevertheless it may fulfill other possibly more important functions such as determining whether the employer is in compliance with the law.

It is critically important that human resources, compliance, the general counsel, and external counsel of all stripe cooperate and communicate with regard to all aspects of an investigation.

And finally, investigation protocols must be pushed out to key stakeholders. Advance training in implementing these and carrying out an investigation is essential.

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Philip M. Berkowitz is a shareholder of Littler Mendelson and co-chair of the firm's U.S. international employment law and financial services practices. Reprinted with permission from the May 10, 2017 edition of the New York Law Journal© 2017 ALM Media Properties, LLC. All rights reserved. Further duplication without permission is prohibited. ALMReprints.com – 877-257-3382 - reprints@alm.com.

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EXPERT ANALYSIS

International Employers Beware: Common Compliance Pitfalls in Managing International Workforces

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U.S. employers who have — or who contemplate having — employees in multiple countries face a terrific challenge complying with the different and often conflicting laws related to their workforce. While U.S. employers are typically familiar with the varying employment regulations at the federal, state and even local levels within their own country, the variety of public policies and statutes affecting employment in other nations can come as a surprise.

One country's views on employee privacy, safety, entitlements or protections may be entirely opposite another's policies on the same issues. For example, the U.S. doctrine that allows employers to terminate employees for almost any reason is wholly contrary to Mexico's policy that prohibits termination except for certain just causes defined in the Mexico federal labor law. The policies of Brazil or the Netherlands that mandate various employee entitlements differ significantly from Singapore's more employer-friendly statutory scheme.

Some laws, such as the United Kingdom's bribery laws, even have extraterritorial application. Companies that fail to take into account the employment differences in the multiple jurisdictions in which they operate may find themselves in violation of the law and subject to inadvertent sanctions, including penalties and fines. They may also damage their brand or reputation.

Given the above, compliance with international employment and human resource regulations is — or should be — a primary focus of multinational employers. Limited time and resources force employers to prioritize their audit and compliance efforts to those areas that present the largest or most imminent risks. Moreover, what is a high-risk area for one company may not be the same for another.

Nevertheless, the following represent some of the most common pitfalls every employer should consider and review.

COMPLYING WITH CORRUPTION AND BRIBERY LAWS

Corruption and bribery laws nearly always top the list of a multinational corporation's compliance priorities for several reasons. Countries around the globe prohibit bribery and corruption to one degree or another. Thus, companies are legally bound to ensure that their employees understand the applicable laws and related obligations. In addition, most companies' ethics policies mandate compliance with relevant laws and prohibit unfair or corrupt practices.

A violation of a country's corruption and bribery laws risks damaging the company's brand and tarnishing its reputation as an ethical business. Next, laws like the U.S. Bribery Act and the U.S. Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-2, have extraterritorial application and impose civil or criminal penalties for incidents that occur even outside their borders. Finally, bribery and

corruption issues have garnered significant public interest and increased enforcement in a number of countries, resulting in enormous penalties and fines.

For example, in 2013 alone, the U.S. Department of Justice announced charges against both individuals and companies for violations of the FCPA, including bribes to foreign officials in numerous foreign jurisdictions and false reports of such bribes as legitimate expenses. In fact, the Justice Department has reported settlements with corporations involving millions and even hundreds of millions of dollars for alleged violations of the FCPA in the last few years alone.

A primary difficulty for international employers, of course, is how to address the differing cultural views on what is or is not a "corrupt" practice within their own international workforce.

In some countries, payment to government officials or other individuals as a way to gain business opportunities may be seen as "the way things are done" rather than as corruption. But companies subject to the extraterritorial application of the FCPA or U.K. Bribery Act (which prohibits corruption even more broadly than the FCPA) generally will not be protected simply because local leaders tolerate or expect corrupt payments. Moreover, trying to excuse bribery because "everyone else is doing it" weakens — or obliterates — a company's reputation as an ethical and fair business.

Finally, even countries traditionally viewed as allowing corruption may be changing their practices. For example, China's current president, Xi Jinping, pledged earlier this year to crack down on corrupt government officials and to strengthen China's anti-corruption laws.[3]

Companies that fail to take into account the employment differences in the multiple jurisdictions in which they operate may find themselves in violation of the law and subject to inadvertent sanctions.

Maintaining a clear no-corruption policy and training the workforce, regardless of location, on such policies should be considered an essential part of a multinational employer's compliance effort.

MINIMIZING MISCLASSIFICATION CLAIMS

In an effort to manage costs, explore new markets or obtain specialized skills, multinational corporations regularly hire independent contractors to perform services in foreign countries. In such arrangements, the true independent contractor — not the multinational corporation — typically bears responsibility for the burdens and costs of employment regulations, local taxation and corporate filings.

To be a truly independent contractor, the contractor must control its own work and how the work is done; bear the risks associated with profits and losses; provide its own equipment, office space and personnel; and assist multiple customers or clients, among other things.

However, the fundamental characteristics of independent contractor status are frequently sacrificed for business expediency.

Multinational employers may require individuals treated as independent contractors to work certain hours, use particular forms, perform services according to the company's expected processes or abide by various employment policies. In addition, the multinational employer may provide the independent contractor with business or travel reimbursements, office space, equipment, business cards with the company's logo, or other benefits.

As a result, upon termination of the relationship or because of an independent audit by foreign government authorities, the independent contractor may be deemed a misclassified employee.

Depending on the jurisdiction, the multinational company may be ordered to pay amounts that can exceed $500,000 or even $1 million because of unpaid taxes, wages, benefits, and associated penalties and fees if the contractor worked for the company for several years. In some jurisdictions, the law would require the company to reinstate the contractor as an employee and pay all employment-related obligations, including contributions to the pension or social welfare funds.

Typically, each independent contractor relationship falls somewhere between true employment and true independent contractor status; liability is determined on a case-by-case basis. Nevertheless, compliance programs should, of necessity, consider and review the independent contractor relationships to ensure that the multinational employer has taken appropriate steps

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to minimize inadvertent misclassification liability, including understanding who may or may not be considered an independent contractor from one jurisdiction to another.

ADHERING TO RELEVANT EMPLOYMENT SCHEMES

Companies operating in multiple jurisdictions are generally plagued by competing or conflicting employment regulations. The policies regarding the nature of the employment relationship typically differ from one jurisdiction to another.

Nowhere is this difference more pronounced than as between the U.S. at-will employment scheme and the policies adopted by most of the rest of the world. Specifically, an employer in the United States may generally terminate an employee for any reason, at any time, with or without notice (*i.e.*, "at will") except for reasons that are unlawful, such as for discriminatory or certain retaliatory reasons. On the other hand, the vast majority of countries eschew the at-will doctrine and instead limit an employer's right to terminate its employees.

Countries such as South Korea and Mexico preserve by statute the employment relationship unless there is just cause to terminate the employee. Other countries, such as Canada, allow for terminations without just cause if the employer gives sufficient prior notice. Some countries, such as the United Arab Emirates, require both prior notice and end-of-service gratuities or severance.

Failure to comply with a foreign jurisdiction's termination requirements can result in reinstatement of the employee, back wages, or other penalties and fines.

There is also wide variation regarding mandatory leave, benefits and compensation requirements for employers. Employers in the U.S. are relatively free to provide paid leave, benefits and other compensation as they choose. But outside the U.S., employers may be required to provide paid vacation, sick leave, retirement benefits, annual or semiannual bonuses, housing allowances, profit sharing, or other benefits.

Failure to anticipate the cost of such mandatory programs can affect the profitability of a company's operations and increase the risk of liability that may arise from noncompliance.

APPROPRIATE EMPLOYMENT CONTRACTS

While all countries have regulations related to the paperwork and documentation associated with a person's employment, the specific requirements can vary widely from country to country. An employer must apply the local jurisdiction's requirements in order to be compliant.

The use and contents of a written employment contract may be mandated by statute. In the United States, written employment contracts are relatively rare. But other jurisdictions require a written employment agreement that comports with specific regulatory requirements.

For example, China's employment contract law[2] requires a written employment contract and penalizes an employer if that contract is not signed. Chinese law may also require payment of up to twice the employee's salary for each month the written employment contract is not signed.[3] The law expressly identifies the minimum provisions that must be included in the employment contract. Failing to include such provisions may result in liability for any resulting losses to the employee.[4]

In addition, employers that wish to discipline or terminate an employee for violations of company policy may be surprised to learn their handbook or global codes of conduct are unenforceable in some jurisdictions. For example, unless the employer obtained consent of the employees or employee representatives, or unless the employer submitted a copy of the relevant rules to the local labor authorities, the employer may be prohibited from disciplining or terminating an employee based on those rules.

Simply publishing the rules on a company website or providing the employee with a copy of the handbook may be insufficient.

Maintaining a clear no-corruption policy and training the workforce on such policies should be considered an essential part of a multinational employer's compliance effort.

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DATA PRIVACY AND RECORDKEEPING

There are few laws in the United States that govern the privacy of an employee's personal information. These are typically limited to the privacy of an employee's medical information, Social Security number or financial information. Outside the United States, a number of countries have taken significant steps to protect the confidentiality of employee data.

The most notable data privacy law is the European Union Data Protection Directive,[5] which became effective in October 1998. The directive covers virtually all processing of personal data. Personal data include any individually identifiable information about a natural person or from which a natural person could be identified. The directive regulates the collection, use and transfer of individually identifiable personal information. Employers fall within the directive because they process personal information about their employees for performance, compensation, and health or medical benefits. The directive also requires special care in the processing of "sensitive" data, such as a person's racial or ethnic origin, trade union membership, political or religious beliefs, or health.

A particular challenge for employers relates to the transfer of personal information outside the European Union. For example, the directive restricts the transfer of personal information from the European Union to third countries unless the third country has been found to provide an "adequate" level of protection. EU member states have assessed millions of dollars in fines for violations of their data protection laws. One employer was fined about $900,000 by Spanish authorities.

Given the risks of liability and the potential interruptions to the business operations that could result from noncompliance with data privacy laws, each multinational employer should thoroughly review its data privacy processes. Employers need to ensure compliance with laws regarding the protection, maintenance and destruction of an employee's personal information.

COLLECTIVE BARGAINING

Most countries recognize an employee's right to association. Indeed, collective bargaining is generally considered a fundamental right of employees although its application differs from one jurisdiction to the next.

In the United States, collective bargaining is governed by the National Labor Relations Act, which grants the National Labor Relations Board sole authority to hear and adjudicate its provisions. A majority of employees must consent to representation by a union before the union can become the employees' representative at the company. However, U.S. companies that open operations in other jurisdictions may be surprised to find themselves bound not only to company-level agreements, but also to collective bargaining agreements issued at the national level for entire industries.

In some European countries, an employer must also work with works' councils, which are representatives of employees with rights to be notified of various employment actions or, as in Germany, the right to co-determine certain actions. Multinational corporations that operate in these jurisdictions must ensure they abide by the provisions of all relevant agreements as well as the consultation or co-determination rights of other employee representative bodies.

GLOBAL MOBILITY

The expatriate workforce of international employers poses significant compliance challenges. The most obvious challenge relates to obtaining and maintaining the relevant work and residence visas and permits. But the question of which employment laws apply is a tricky one.

Typically, an expatriate maintains his or her employment relationship with the home entity while on a temporary assignment in a foreign jurisdiction. Such a structure raises the risks of dual employment or the application of both countries' laws to the employment relationship.

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Other common pitfalls in an expatriate program include mandatory withholdings and deductions, local paid-time-off requirements, and managing frequent business travelers who may become inadvertent expatriates. In light of such pitfalls, companies should carefully consider the ramifications of the multiple layers of relevant and multi-jurisdictional laws and comply accordingly.

CONCLUSION

Since employment law is locally governed, employers with employees in multiple jurisdictions face the challenge of complying with differing, and at times conflicting, employment and labor regulations. Failure to devote time and resources to appropriate compliance efforts can result in unanticipated and, in some cases, immense liabilities. Each company should prioritize its compliance risks and methodically address each risk until appropriate protocols and processes are in place to minimize the liabilities for noncompliance as well as the associated — and likely — damage to a company's reputation and brand. WJ

NOTES

[1] Choi Ci-yuk, *Xi Jinping vows to crack down on corrupt officials in China*, S. China Morning Post, Jan. 23, 2013.

[2] China Employment Contract Law, art. 10.

[3] China Employment Contract Law Implementing Regulations, arts. 6-7.

[4] China Employment Contract Law, arts. 17, 81.

[5] European Parliament and Council Directive 95/46/EC of Oct. 24, 1995, on the protection of individuals with regard to the processing of personal data and on the free movement of such data, 1995 O.J. (L 281 of 23.11.1995).

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Insight

IN-DEPTH DISCUSSION

SEPTEMBER 13, 2017

The Next HR Data Protection Challenge: What U.S. Multinational Employers Must Do To Prepare for the European Union's Impending General Data Protection Regulation

BY PHILIP L. GORDON

With summer holidays over and only eight months remaining in the two-year enforcement grace period, U.S. multinational employers and their European Union (EU) subsidiaries have little time to spare before starting to address compliance with the EU's General Data Protection Regulation (GDPR or the "Regulation"), the EU's new data protection framework. By May 25, 2018, the corporate group will need to implement new policies, procedures, and practices to address the GDPR's many new requirements for handling EU employees' personal data.

Because the GDPR was drafted with the primary intention of protecting consumers who participate in the "digital economy," determining how the GDPR's new requirements apply to HR data can be challenging. To assist in that effort, this Insight describes 10 practical steps that U.S. multinationals can take to address the Regulation's provisions with the greatest impact on managing a global workforce.

While the late May 2018 deadline may translate into a "back-burner issue" for many, delay is not a real option. Several of the steps towards compliance will require months to complete. Moreover, developments since the Snowden leaks in June 2013 have left EU employees far more demanding about data protection. Employees' complaints to EU data protection regulators of alleged non-compliance could snowball into a significant administrative enforcement action. The GDPR empowers data protection regulators to levy administrative fines of up to 4% *of a corporate group's worldwide gross annual revenue* for most violations. In addition, because EU regulators are authorized to bar data processing at the EU subsidiary and to suspend data transfers to the parent corporation, noncompliance could ultimately result in severe disruption of EU operations.

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Ten Practical Steps To Implement The GDPR

1. Determine Who Will "Own" The GDPR Implementation Process

Given the large number and wide range of steps required to implement the GDPR, U.S. multinational employers likely will need to build a team to execute a project plan. That team typically will include at least five groups: (a) HR professionals responsible for global workforce management and their in-house legal counsel; (b) information technology (IT) employees, especially those responsible for information systems used to manage HR data; (c) HR professionals with regional or local responsibilities for EU-based employees; (d) payroll personnel; and (e) personnel on the procurement team responsible for vendor contracting. For many U.S. multinationals, the U.S. parent corporation often will need to lead the implementation effort because EU subsidiaries will not have the HR and in-house legal support to undertake the implementation effort. This is particularly likely to be true for those organizations engaged exclusively in business-to-business (B-to-B) commerce.

For many organizations, this team approach likely will be preferable to appointing a data protection officer (DPO), *i.e.*, an executive or third-party contractor specifically designated to oversee GDPR implementation and on-going compliance. Contrary to popular perception, the GDPR does not mandate the appointment of a DPO. Instead, the Regulation requires organizations to appoint a DPO only in limited circumstances. Guidance issued by EU regulators confirms that these limited circumstances do not include the routine handling of HR data.[1] The regulators also take the position that organizations that voluntarily appoint a DPO must comply with all of the Regulation's requirements regarding DPOs.[2] These requirements could be onerous, especially for smaller EU subsidiaries. They include, for example, minimum (and high) levels of knowledge and expertise, on-going training, independent authority, direct reporting to senior management, and substantial protections against adverse employment action.[3] However, the regulators also have clarified that none of these requirements apply to a person to which an employer voluntarily assigns GDPR-related responsibilities, as long as the organization does not refer to that person in any compliance documentation as the "data protection officer."[4]

U.S. multinational employers should be aware that while individual EU countries have no authority to vary most provisions of the GDPR, EU countries are authorized to supplement the circumstances requiring organizations to appoint a DPO. Germany, for example, recently did so in legislation implementing the GDPR.

2. Identify All Systems Used To Process EU Employees' Personal Data

U.S. multinationals increasingly rely on cloud-based human resources information systems (HRIS) to manage their workforce globally. Because of the wide scope and volume of HR data maintained in these databases, employers typically should focus their compliance efforts on the HRIS. Nonetheless, employers should not neglect other systems where they collect and maintain the personal data of EU applicants and employees. Given the GDPR defines "personal data" broadly to include any individually identifiable information about a natural person or from which a natural person could be identified,[5] the relevant systems likely will be numerous and far-reaching. They may include, for example, learning management systems, digital timekeeping systems, and online surveillance systems.

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1 [illegible]

2 [illegible]

3 [illegible]

4 [illegible]

5 [illegible]

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3. Determine The Permissible Purposes For Processing Employee Data

In contrast to U.S. law, which allows employers to use employee data for almost any purpose unless specifically prohibited by law, the Regulation—following prior law—establishes the exact opposite rule, *i.e.*, employers can lawfully "process" employee data only if the Regulation specifically permits the processing. The definition of "process" is broad. The Regulation defines "processing" to cover any operation during the course of the information life cycle, from initial collection to final destruction.[6] If it engaged in any of these activities without a permissible purpose, an EU employer would violate the GDPR.

Only three of the permissible purposes for processing personal data identified in the Regulation are likely to apply in the employment context. First, the Regulation permits processing if "necessary for the performance of a contract" with the data subject, *i.e.*, an employee.[7] Under prior law, EU regulators construed the term "necessary" narrowly, and they likely will continue to do so under the GDPR. Consequently, this ground may be interpreted to cover only processing with a tight nexus to the employment contract, such as the payment of compensation and benefits or processing requests for sick leave or vacation.

Second, the GDPR permits the processing of employee data to comply with "a legal obligation to which the data controller [*i.e.*, the employer] is subject."[8] This ground will justify a wide range of HR data processing required to comply with local employment and labor laws, such as mandatory fitness-for-duty exams, processing trade union membership to deduct union dues from payroll where legally required, and reporting compensation information to tax and social security authorities.[9] Importantly for U.S. multinationals, the "legal obligation" must be imposed on the EU employer by local law. This ground, therefore, would not permit the U.S. parent corporation to process EU employees' personal data to comply with legal obligations emanating from U.S law, such as responding to a subpoena issued in civil litigation in the U.S.[10]

Third, the Regulation permits processing that is necessary to achieve the "legitimate interests" of the employer or a third party, such as the parent corporation. However, an entity cannot rely on this ground unless it (a) balances its legitimate interest against the employee's rights and determines that those rights are not overriding; and (b) notifies the employee, in writing, of the legitimate interest pursued and of the employee's right to object to the processing.[11] Applying this balancing test, an employer likely would be able to justify processing of employee data that is not particularly sensitive where there is a tight nexus to the employment relationship, such as the EU employer's using business contact details to arrange business travel or the parent corporation's reviewing performance appraisals for global succession planning.

While the GDPR recognizes consent as a permissible ground for processing personal data in most circumstances, EU regulators have emphasized that EU employers generally cannot rely on employees' consent because such consent cannot be "freely given" as required by the GDPR.[12] In the words of the regulators: "Employees are almost never in a position to freely give . . . consent given the dependency that results from the employer/employee relationship. . . . [E]mployees can only give free consent . . . when no consequences at all are connected to acceptance or rejection of an offer."[13]

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6 See GDPR Art. 4 (2).

7 GDPR Art. 6(1)(b).

8 GDPR Art. 6(1)(c).

9 For a more detailed discussion of GDPR's impact on payroll and withholding, see Philip L. Gordon and Elizabeth A. Alexander, [illegible] Littler Insight (Sept. 7, 2017).

10 GDPR Art. 6(3).

11 GDPR Art. 6(1)(f).

12 GDPR Art. 6(1)(a).

13 Article 29 Working Party Opinion 2/2017 on Data Processing at Work, 17/EN WP 249 (June 8, 2017) at p. 5.

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4. Apply The Principles Of Privacy By Design And Privacy By Default

The GDPR embraces the principles of privacy by design and privacy by default.[14] These principles mean that privacy should be built into the design of information systems and that default settings should favor more privacy rather than less.[15]

Applying these general principles to an HRIS database and other HR information systems can be challenging, especially because employers often are relying on "software-as-a-service" (SaaS) solutions and have limited or no control over the software's design. However, many of these solutions contain some features that permit employers to implement the principles of privacy by design and by default. For example, data entry fields for an HRIS database or for an online employment application, designed primarily for the broad data collection permitted under U.S. law, could be locked when data is entered about EU employees or job applicants to prevent the entry of data that the EU employer does not have a permissible purpose to collect. As another example, the database may permit the creation of detailed access lists that not only restrict access by employee category but also by data type within a category of employees.

The GDPR implementation team can best implement privacy by design and privacy by default by first obtaining a comprehensive understanding of the functionality of the HR systems that they, or a vendor, will be implementing. They can then look for ways to use the technology to implement the principles. Importantly, the Regulation recognizes that implementation of these principles may take into account "the state of the art, the cost of implementation, and the nature, scope and context of the processing" as well as the likelihood and severity of the risk to individuals' data protection rights.[16] In other words, U.S. multinational employers and their EU subsidiaries should have a reasonable amount of flexibility when applying the principles.

5. Update Data Processing Notices

As with prior law, The GDPR requires that data controllers distribute to individuals, when personal data is first collected from them, a notice of data processing that describes how the personal data will be handled. For EU employers, this means providing a notice to job applicants concerning the processing of their data during the application process as well as a notice to new hires, typically during the onboarding process, explaining how their personal data will be processed during the employment relationship.

The Regulation substantially expands on the basic notice requirements under prior law, such as the categories of data collected, the purposes for the collection, recipients of the data, a description of data protection rights, and whether the data will be transferred outside the EU.[17] For example, EU employers that rely on the "legitimate interests" ground for processing (described in Step 3, above) must now describe those legitimate interests. As another example, data processing notices must now include information about the period for which employee data will be retained. This requirement highlights the importance of developing data retention schedules for each EU subsidiary that align with local employment and labor laws. EU regulators have not yet opined whether employers will be required to issue to current employees updated notices that address all GDPR requirements if the employer previously provided those employees with a notice that complied with prior law.

6. Ensure Employees Can Exercise Their Data Protection Rights

The GDPR confers on individuals the same rights to access, correct, and object to the processing of, their personal data that existed under prior law and adds two new rights: the right of data portability and the

14 See generally, GDPR Art. 25

15 See GDPR Art. 25(1)

16 GDPR Art. 25(1)

17 See generally GDPR Art. 13

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right to be forgotten. The application of these new rights to HR data likely will be narrow. For example, the right of data portability, which provides data subjects with the right to move digital data from one entity to another, applies only to personal data provided by the employee and does not apply to personal data that the employer is required by law to collect.[18] Consequently, the right would not apply, for example, to performance appraisals prepared by supervisors.

Application of the "right to be forgotten" to HR data likely will be similarly narrow. For example, while this right allows employees to request deletion of files that no longer are necessary for the purposes for which they were collected, employers are not required to delete any employee data necessary to establish, pursue or defend legal claims, or that the employer is required by local law to retain. These exceptions likely will provide a valid basis for rejecting erasure requests until the relevant statutes of limitations or legal retention period expires.

Unfortunately, the limited scope of these two new rights will not relieve EU employers of the need to maintain policies and procedures for responding to requests exercising these rights. The procedures will need to address the timing for responses; when the deadline can be extended; the circumstances where requests can be denied; and the amount of the fees, if any, the employer can charge to recover the cost of responding.[19] Developing standardized forms and tracking logs can greatly facilitate implementation of these requirements and tracking of compliance with them.

7. Develop A Written Information Security Program And A Security Incident Response Plan

The GDPR introduces mandatory security breach notification to all EU countries and requires administrative and technical safeguards for personal data to reduce identified risks and to prevent data breaches. The Regulation, however, does not prescribe specific measures that organizations must take; instead, it establishes only general mandates, such as requirements to ensure the confidentiality, integrity and availability of personal data and to implement disaster recovery capabilities.[20]

Many U.S. multinational employers have responded to mandatory breach notification and information security requirements under a variety of state and federal laws by implementing a comprehensive written information security program that applies to all corporate data, including HR data globally. The policies composing this information security program should be extended to the personal data maintained by EU subsidiaries. To adequately modify corporate policies to local conditions, corporate IT staff or external consultants may need to assess risks specific to the EU subsidiaries.

The GDPR establishes a standard for breach notification similar to that of many U.S. breach notification laws, but requires notification far more quickly.[21] An organization that experiences a data breach generally must notify the relevant data protection authority (DPA) *within 72 hours* of discovering the breach unless it "is unlikely to result in a risk" of harm.[22] Notification to individuals is required if and when ordered by the DPA or, "without undue delay," if the breach is "likely to result in a high risk" of harm to affected individuals.

Given the newness of breach notification to most EU countries[23] and the expedited timeline for notification to the DPA, U.S. multinational employers should ensure that their EU subsidiaries have developed a security incident response plan and have trained all employees on the plan's key elements. The incident response plan should designate a security incident response team of local employees, and where necessary, supplemented

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18 *See* GDPR, Art. 20.

19 *See generally* GDPR, Art. 12.

20 *See generally* GDPR, Arts. 32-34.

21 GDPR, Art. 4(12).

22 GDPR, Art. 33(1).

23 A few countries such as Austria, Germany, and the Netherlands have pre-existing security breach notification laws.

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by U.S. resources, with responsibility for HR data. This team should be responsible for investigating, mitigating, and remediating the breach and for communicating about the breach with the DPA, employees, and where necessary, law enforcement.

8. Vet Vendors That Will Receive Employee Data And Negotiate Vendor Agreements That Meet The Regulation's Requirements

U.S. multinational employers and their EU subsidiaries commonly share the personal data of EU employees with a wide range of service providers. For example, even smaller EU subsidiaries often use local payroll companies to administer payroll for local staff. At the same time, U.S. parent corporations increasingly retain a wide range of cloud-based service providers to collect and manage HR data globally. These vendors may include HRIS database providers, online performance appraisal platforms, and expense reimbursement solutions.

The GDPR requires vetting of service providers before they are retained to confirm the provider's ability to comply with the Regulation. The Regulation also specifies a long list of matters that must be addressed in service agreements. The list includes, for example, a detailed description of the data processing to be undertaken by the service provider and requirements the service provider (a) process personal data only subject to the employer's instructions; (b) implement required security measures; and (c) assist the employer in fulfilling its obligations to respond to requests by employees to exercise their data rights.

While the list of mandatory provisions is extensive, it is not complete. For example, if the vendor is located outside the EU, the vendor agreement must ensure that the vendor will provide an "adequate level of protection" for the transferred personal data (see Step 9, below). In addition, because of the significant enforcement and litigation risks associated with data breaches, the vendor agreements should address at least the specifics of breach reporting by the vendor, responsibility for notification to the DPA and affected employees, and indemnification for claims by employees arising from the data breach.

9. Implement A Mechanism For Lawful Cross-Border Transfers Of Employee Data

The Regulation's overall scheme for cross-border data transfers is materially the same as that under prior law. This scheme generally prohibits transfers of HR data outside the EU unless the EU subsidiary-employer ensures that the recipient — typically the parent corporation but sometimes also other non-EU members of the corporate group or a service provider — will ensure an adequate level of protection for the transferred personal data.

The EU employer-subsidiary satisfies this adequacy requirement if the European Commission (the "Commission") has determined that the receiving country ensures an adequate level of protection for the transferred data. The Commission has issued such a determination for the EU-U.S. Privacy Shield Framework, which went into effect on August 1, 2016. Thus, EU subsidiaries can transfer their employees' personal data directly to U.S.-based members of the corporate group and to U.S.-based service providers that have certified to the U.S. Department of Commerce that they will handle transferred personal data in accordance with the Privacy Shield's requirements.[24]

U.S. multinationals and service providers not certified to the Privacy Shield generally will need to rely on one of the other data transfer mechanisms identified in the Regulation. These mechanisms include the standard contractual clauses (SCCs), approved by the Commission, as well as binding corporate rules (BCRs). The SCCs are a form agreement between the data exporter (the EU subsidiary-employer) and the data importer (the U.S. parent corporation, any non-EU affiliate that receives EU personal data and any non-EU service providers). BCRs are legally binding policies applicable to all members of a corporate group, whether located

[24] [illegible] transfers of employees' personal data to the U.S. pursuant to the Privacy Shield see Littler Insight, July [illegible]

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within or outside the EU, and are enforceable by employees as third-party beneficiaries. To date, fewer than 100 U.S. companies have implemented BCRs as compared to almost 2,500 that have certified to the Privacy Shield Framework.

U.S. multinationals should note that both Privacy Shield and SCCs currently are subject to some uncertainty. Both mechanisms are the subject of litigation in the EU, meaning the Commission's adequacy determination for each mechanism could ultimately be reversed by the EU's highest court, the European Court of Justice. In addition, U.S. and EU officials will meet later this month (September 2017) for the first annual review of the Privacy Shield. This review is particularly significant because (a) the Commission's initial adequacy determination was based on prior law, not the GDPR; (b) the Privacy Shield has been subject to heavy criticism by EU regulators, members of the EU Parliament, and EU privacy advocates; and (c) this will be the first review since the change in U.S. administrations.

10. Periodically Review GDPR Implementation And Maintain Required Records Of Data Processing

U.S. multinationals' and their EU subsidiaries' handling of HR data is continuously in flux, so GDPR implementation needs to be just as dynamic. When information systems are modified, or new information systems are brought online, the change likely will trigger a wide variety of compliance tasks. By way of illustration, the modified or new system should be scrutinized with privacy by design and privacy by default in mind. The EU employer should confirm that it has a permissible purpose for all new categories of data that will be collected and for all new uses and disclosure of that data. Data processing notices may need to be revised or drafted. Information security policies may need to be modified. Vendor agreements may need to be amended or entered for the first time.

In light of the evolving nature of HR data processing, the implementation team should oversee the organization's data protection efforts on an on-going basis after initial implementation. The team could conduct annual reviews of the overall implementation program. These periodic reviews could be supplemented by reviews before existing systems are materially modified and before new systems are implemented.

This on-going compliance effort should assist the U.S. multinational in maintaining on-going compliance with the GDPR's mandatory record-keeping requirements. The Regulation requires that employers maintain detailed records of their data processing. The information to be recorded includes: (a) contact information for the employer; (b) the purposes of the processing; (c) the categories of data subjects and of personal data processed; (d) the categories of recipients, including those in third countries; (e) the third countries to which personal data will be transferred and the instrument, e.g., SCCs or BCRs, used to provide an adequate level of protection; (f) where possible, the envisaged retention periods for different categories of employee data; and (g) a general description of the security measures for employee data. These records must be provided to the DPA upon request.

Conclusion

Implementing a GDPR compliance program for HR data, "operationalizing" the program, and maintaining on-going compliance will require a multi-disciplinary team, typically led by corporate headquarters. The program likely will impact all of the organization's policies, procedures, and processes involving the handling of EU employees' personal data. Some of the steps required to achieve compliance, such as amending vendor agreements, could take several months to complete. Given the breadth of the undertaking and the lead time needed to compete it before the May 25, 2018 enforcement deadline, the time to get started is now.

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On September 28, 2017, Littler will conduct a complimentary webinar: Meeting The Next HR Data Protection Challenge: What Multinational Employers Must Do Before The EU's Upcoming General Data Protection Regulation (GDPR) Takes Effect. Click here for more information.

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How to Know Which Jurisdiction's Employment Laws Reach Border-Crossing Staff: *A Comprehensive Guide to International Choice-of-Employment-Law and -Forum*

By Donald C. Dowling, Jr.

Littler

For the vast majority of employment relationships around the world, choice-of-law analysis is a non-issue that we rarely ever think about. Obviously (for example), a Paris-resident baker working locally for a French bakery is protected only by French employment law. A Buenos Aires-resident banker working locally for an Argentine bank is protected only by Argentine employment law. And so on. Choice-of-law (also so-called "conflict of laws") analysis in plain-vanilla domestic employment scenarios is so simple, so intuitive and so uncontroversial that it almost never comes up.

But choice-of-employment-law becomes a hot issue—sometimes fiercely contested in expensive litigation—in *cross-border* employment relationships, for example:

- international business travelers (employed in one country, temporarily working in another)
- expatriates and international "secondees"
- foreign hires (recruited in one country to work in another)
- international commuters (living in one country but working in another)
- foreign correspondents and overseas teleworkers (working in one country for an employer in another)
- employees with international territories (working in several countries at the same time)
- mobile or "peripatetic" employees (with no fixed place of employment—sailors, flight crews, international tour guides and the like)
- international co-/dual-/joint-employees (staff split-payrolled by, or simultaneously employed by, two employer affiliates in different countries)
- former employees accused of having breached a post-term restrictive covenant in a jurisdiction other than the final place of employment

These scenarios implicate employment across borders, and surely the most common question in cross-border employment law is: *Which country's employment laws reach border-crossing staff?* Plus there are the follow-on questions: *Which country's courts can adjudicate disputes between border-crossing staff and their employers?* And: *To what extent is a choice-of-law provision enforceable when it appears in an employment agreement, expatriate assignment letter, employee benefits program or compensation plan?*

These three questions get asked—or, certainly, they *should* get asked—when an employer recruits, hires, employs, rewards and dismisses an employee in any cross-border employment arrangement. These questions get asked when a multinational employer structures a mobile job, an expatriate posting, an overseas "secondment" or even a long international business trip. These questions get asked when a multinational drafts cross-border employment policies and international benefits or equity plans. These questions get asked as to restrictive covenants and employee intellectual-property assignments with cross-border territorial scope. Indeed, these questions even come up when an organization contracts with an overseas independent contractor (because of the risk of misclassification as a *de facto* employee). And these questions become vital when an employer needs to dismiss border-crossing staff, because these questions implicate "forum shopping"—and it has been said that employees who can "forum shop" wield "powerful ammunition in negotiations over compensation."[1]

The full answer to these three questions is, at the same time, both simple and complex. A simple general rule applies most of the time, but that general rule is subject to nuances, refinements, strategies, exceptions and purported exceptions. To lay out the full answer to these questions requires a rather detailed discussion analyzing three topics: (1) the general rule on the territoriality of employment protection laws, (2) nuances and refinements to the territoriality rule, and (3) contractual choice-of-law and choice-of-forum provisions and the territoriality rule. We address all three topics here.

1 P. Frost & A. Harrison, "Company Uniform," *The Lawyer* (London), Dec. 11, 2006 at 21.

Part 1: The General Rule on the Territoriality of Employment Protection Laws

The U.S. Army used to run an English Channel ship repair center in Hampshire, England. Back in 2006, "for strategic reasons" the Army closed the shipyard.[2] But in shutting it down, the Army ignored an English labor law that prohibits layoffs of 20 or more workers within 90 days unless the employer first "consult[s]" or negotiates "about the dismissals" with the employees' representatives—even if they are not unionized.[3] An English accountant called Mrs. Nolan sued the Army for laying her off without first consulting, but the Army fought back in court, arguing English labor law does not reach an overseas U.S. Army post engaged in activities that are *jure imperii* and are not *jure gestionis* (sovereign immunity concepts)—and besides (the Army argued), in the international public-sector context, UK and European Union labor laws are *ultra vires* (lacking authority).[4]

The case adjudicating these rarified legal defenses dragged on for nine years, going all the way up to the UK Supreme Court. In 2015, the Supreme Court issued a 45-page opinion that upheld for Mrs. Nolan the profoundly simple rule that local (here, English) labor law applies locally (here, in England) to protect employees who work locally (here, Mrs. Nolan).[5] The UK Supreme Court's *Nolan* decision is just one of thousands of employment cases around the world reinforcing the basic, obvious, intuitive and uncontroversial general rule that underlies all choice-of-employment-law: *Employment protection laws are territorial to the place of employment.* That is, the employment-protection laws of the place where you work protect you. It took the UK courts nine years to affirm that even Latin-denominated concepts as esoteric as *jure imperii, jure gestionis* and *ultra vires* do not override such a fundamental principle.

The corollary or inverse or outbound prong of this "territoriality" rule is that employment protection laws of all jurisdictions *other than* the current place of employment—even the place of an employee's citizenship, the place of hire or (as in the *Nolan* case) the place of the employer's headquarters—generally do *not* reach into overseas jurisdictions (unless expressly drawn in by an agreement between the parties). That is, if you work in jurisdiction *X*, then not only do jurisdiction *X*'s employment-protection laws protect you, but jurisdiction *Y*'s employment-protection laws do not.

In short, when contemplating which jurisdiction's laws apply in a cross-border employment scenario, always begin with this basic, presumptive "territoriality" rule. Always assume, as a starting point, that employment protection laws are territorial to the place where the employee now works. Not only does the law of the place of employment control, but (per the rule's corollary, inverse or outbound prong), employment laws of other jurisdictions do not also apply. And remember that this rule applies to all employees, vulnerable low-wage laborers as well as high-compensated executives.

This said, the territoriality rule of employment protection law is just a strong general rule or presumption that applies most of the time—there are very rare deviations where a court flatly holds the general rule does not apply.[6] In addition, though, there are lots of nuances, refinements, strategies, partial exceptions and purported exceptions to the general rule, which we discuss in detail here. Because our discussion here grows out of the fundamental rule of the territoriality of employment protection laws, we begin by explicating the core rule itself, addressing: (A) examples of how the territoriality rule works—including United States examples and expatriate examples, (B) public policy behind the rule, and (C) the "employment protection" law concept.

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2 *USA v. Nolan*, [2015] UKSC 63.

3 That British labor law is the UK Trade Union and Labour Relations (Consolidation) Act 1992, as amended in 1995, § 188. (If the employees are not unionized and so do not have any standing team of worker representatives, English law requires they be allowed to designate representatives for purposes of consulting over the lay-off.)

4 *Nolan, supra* note 2 at ¶ 12.

5 *Nolan, supra* note 2.

6 *E.g., Sabd-Krutz v. Quad Electronics*, US DC ED Cal. case no 2.15-cv-0021-MCE-AC, op. of July 7, 2015 (non-compete enforceable under foreign state's law where employee was hired out-of-state, does "99%" of work out-of-state and moved in-state only for personal convenience).

A. Examples of how the territoriality rule works

As an example of how the general rule on territoriality of employment protection laws works, imagine a hypothetical 14-year-old legally employed for a while in her home country, who then moves to a new country with a minimum child labor age of 16. Even if a guardian consents to applying this child's home-country employment law, obviously this girl is too young to work in the new jurisdiction. As another example, imagine an employer with staff in a state that imposes a high minimum wage. This employer obviously cannot legally pay personnel below the state minimum—even if it can lure in workers from another state with a lower minimum wage who agree, contractually, to apply home-state law. Yet another example is health and safety law: No jurisdiction will compromise its workplace health and safety laws, even for an employee inpatriate from another jurisdiction with laxer health/safety laws who is willing to apply home-country rule.

- *United States examples*. When U.S. employers branch out overseas, they often want to export employer-friendly U.S.-style employment-at-will principles (at least to U.S. expats relocating abroad). U.S. organizations often chafe at the general rule on the territoriality of employment protection laws—Americans often see the rule as heavy-handed and they often speak of it as a quirk of hyper-protective foreign regimes hostile to employment-at-will. But a frustrated U.S. employer should at least acknowledge: *We impose this very rule ourselves.*

  The employment protection laws of a *U.S.* place of employment almost always apply in the face of less-protective regulations from some other jurisdiction, even if the parties had contractually selected foreign law. In the words of the U.S. Court of Appeals for the Ninth Circuit, laws that "seek to protect...workers" are "protective legislation" constituting public policy so deeply "fundamental" that employers and employees cannot opt out of or contract around them.[7] Under the framework of the American Restatement (Second) of Conflict of Laws § 187(2)(b), an employee's current place of employment has "a materially greater interest" in applying the "fundamental policy" of its employment protection laws than does a foreign jurisdiction—even a jurisdiction that an employer and employee may have contractually selected.

  Imagine hypothetically a Pakistani technology company transfers an entry-level Karachi programmer (Pakistani citizen with U.S. work visa) to its branch in Palo Alto. Imagine the programmer signs a contract calling for the law of her and her employer's home country—Pakistan. Pakistan obviously has a strong nexus to this particular employment relationship, so under commercial principles, this choice-of-law clause would be presumptively enforceable.[8] But imagine that after the programmer's place of employment shifts to California, she continues to earn a Pakistani wage less than the U.S. minimum, she gets sexually harassed, she suffers an injury because of a workplace safety violation and she gets disciplined for using social media to criticize her boss. The Pakistani programmer might file claims with the U.S. Department of Labor, the EEOC, OSHA, the NLRB and California state agencies, and she might file a California state workers' compensation claim. In defending against these charges, the employer could invoke the affirmative defense of the contractual choice-of-Pakistan-law clause. But few American lawyers would bet on that defense prevailing. America's federal and California's state public policy void most prior waivers of employment protection laws—including waivers in the guise of foreign choice-of-law clauses.[9] Just as an agreement to work for less than minimum wage would be void under the U.S. Fair Labor Standards Act, and just as an advance waiver of workplace safety law would be void under OSHA, a contractual selection of Pakistani wage law will be void if Pakistan's minimum wage is below the FLSA minimum, and a contractual selection of Pakistan's workplace safety law will be void if Pakistani health and safety standards are below U.S. OSHA standards. Any court holding otherwise would push this California-based employee out of the safety net of American and Californian employment protection laws.

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7 *Ruiz v. Affinity Logistics*, 667 F. 3d 1318 (9th Cir. 2012), *later proceeding* 2014 U.S. App. LEXIS 11123 (9th Cir.).
8 Restatement (Second) of Conflict of Laws § 187(2)(a).
9 *Ruiz, supra* note 7.

- *Expatriate examples.* Of course, the general rule on the "territoriality" of employment protection laws often arises in—and usually applies to—the *expatriate* context. A business expatriate is an employee originally hired in (and originally working for) an employer in a *home* country who later moved to, and who now works for that same employer (or an affiliate) in, a new *host* country. The territoriality rule dictates that the employment protection laws of an expatriate's new host country (the new place of employment) protect the expatriate, even where both the expatriate and the employer are from the same foreign home country. For example, the French Supreme Court has held that New York employment law, not French law, covers French citizens who work in New York even for French-owned employers.[10] As another example, the Ontario Superior Court of Justice rejected an employment claim invoking Canadian law of a Canada-hired Canadian who got transferred to New York and then fired.[11]

  The rule in these cases becomes particularly significant when an American employee leaves the United States, because of America's employment-at-will doctrine. As mentioned, the territoriality rule dictates that an American whose place of employment shifts abroad almost always steps out of employment-at-will and into the safety net of host country employment protections—the "indefinite employment" regime of vested rights, caps on hours, mandatory vacation, severance pay and termination protections.

B. Public policy behind the rule

The general rule on the territoriality of employment law emerges from a strong underlying public policy: Employment protection laws tend to be strands in the legal safety net that each jurisdiction erects to protect people who work inside its territorial borders. If some jurisdiction's employment safety net fails to catch certain people who work locally—for example, if the employment protection laws of some country exempted foreign citizens working in-country (say, immigrants, "inpatriates," or those working for foreign-headquartered organizations), then employers might withhold the jurisdiction's minimum labor protections under its "mandatory rules." From a public policy point of view, the issue becomes exploitation: Just because some worker happens to be an immigrant, an inpatriate or an employee of a foreign organization should not give the employer an excuse to pay less than local minimum wage, to flout local health and safety regulations or to violate any other local employment protection law, be it a discrimination law, a restrictive covenant law, a severance pay law or any other employment law.

And the corollary of the general rule on the territoriality of employment law (the inverse or outbound prong) also emerges from a strong underlying public policy: Jurisdictions are poorly positioned to police compliance overseas with their domestic workplace regulations. And under the principle of sovereignty, each jurisdiction has the primary and keenest interest in regulating workplaces on its own soil, protecting workers working on its own soil. A jurisdiction's employee-protection laws generally should not reach outside its territorial boundaries.

C. The "employment protection" law concept

Under this territoriality rule, *employment protection* laws of a jurisdiction are mandatory rules applicable locally by force of public policy. Employment protection laws tend to include most all of a jurisdiction's rules regulating the employment relationship—its laws regulating, for example, pay rate, payroll, overtime, workplace health/safety, child labor, payroll contributions, mandatory benefits, caps on hours, rest periods, vacation/holidays, labor unions/collective representation, discrimination/harassment/bullying/"moral" abuse, employee-versus-contractor classification, and restrictive covenants/non-competes/trade secrets/employee intellectual property. In addition, employment protection laws also include the full suite of laws that regulate *dismissals*—laws on "good cause" for firing, dismissal procedures, pre-dismissal notice periods, mandatory retirement, severance pay and severance releases. In the employment context, mandatory rules also include data protection (privacy) laws, which are not even employment laws.

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10 French Sup.Ct. dec. 10-28.563 of Feb. 2012 (many French choice-of-employment-law cases involve so-called "French employment contracts," which—as we discuss *infra* part 3(B)—generally compel a different result; this case did *not* involve "French employment contract").

11 *Sullivan v. Four Seasons Hotels*, 2013 ONSC 4622 (2013).

And so a given jurisdiction's "employment protection" laws or "mandatory rules" that apply by force of public policy tend to include all its local laws regulating local workplaces, except for (maybe) certain rules on the structure of executive compensation, equity/stock options and non-mandatory benefits. But that said, in some jurisdictions even laws regulating compensation and equity plans are also "mandatory rules." In short, the body of the employee-protection laws of a jurisdiction tends to include most all of its labor and employment (and data protection) laws. Only a tiny subset of a country's labor and employment law does not qualify as employee-protection law.

Part 2: Nuances and Refinements to the Territoriality Rule

The territoriality rule of employment protection laws almost always controls, except for some rare deviations where a court flatly holds against the rule.[12] But while court decisions rejecting the territoriality rule are quite rare, this rule itself is subject to six nuances, refinements, strategies, partial exceptions and purported exceptions. That is (rare exceptional cases aside), courts around the world tend to decide choice-of-employment-law disputes consistent with the territoriality rule *only after the rule has filtered through six layers of nuances or refinements*. These nuances and refinements can get complex and can compel careful legal analysis.

We might characterize the nuances and refinements to the general "territoriality" rule of employment protection laws as: (A) disputed "place of employment," (B) wage/hour and health/safety laws, (C) Communist and Arab deviations, (D) extraterritorial reach, and (E) affirmative defenses arising from the international context. We discuss those five nuances and refinements here, in part 2. Then in part 3 we address the sixth and most significant nuance or refinement: choice-of-law and choice-of-forum provisions in employment agreements.

A. Disputed "place of employment"

While the general rule on the territoriality of employment law almost always applies, *which country* is the territory whose law controls sometimes gets disputed. That is, which country is a given employee's current "place of employment" is sometimes unclear—a disputed fact question that can get complicated.

In assessing which jurisdiction's employment laws reach a given cross-border employment relationship, the first step is identifying that employee's (current) place of employment. *Place of employment* is a legal concept analogous to "residence" and "domicile." Every employee is generally held to have just one place of employment at a time. Assessing a given mobile employee's current place of employment is sometimes hard, and is sometimes disputed.

Fortunately, on a per-employee basis, questions about what is a given employee's place of employment are rare, because the place of employment of the vast majority of the world's workforce is obvious and uncontested. Usually a given worker's place of employment is, simply, the address on his business card, email signature and paycheck stub. It is the place where his office phone rings or where his work computer gets docked. But the place of employment of a small minority—the mobile workforce—gets questioned. What is the place of employment of a "peripatetic employee" like a flight steward, pilot, sailor or salesman with international territory? What about a so-called "international commuter" living in one country but with an office in another? What about an expatriate who mostly works in one country but whose assignment documentation purports to base him elsewhere? What about a so-called "stealth expatriate" who works out of an overseas hotel or at a location unknown to the employer? What about an employee whose boss tolerates working remotely from a home in a jurisdiction away from the office? Where do we draw the line between someone working temporarily abroad on a very long business trip versus an expatriate on a very short term overseas posting? What is the place of employment of a reassigned expat who worked in a home country for decades—but who moved to a new host country only yesterday? Determining "place of employment" in situations like these turns on the facts—and can be complex. According to one article:

> The most contentious issue [in choice-of-employment-law analysis under U.S. law] that

12 *E.g., Sabd-Krutz, supra* note 6

> has arisen...in recent years seems like a final exam question in a philosophy class: Was the plaintiff even employed overseas? Routinely, plaintiffs [invoking U.S. employment law] assert that their overseas assignment was only temporary or that their work should otherwise be viewed as U.S.-based. There is no consensus test for determining where the employee was actually employed. Most courts focus on the "primary work station" test which typically results in finding overseas employment, while others opt for a "center of gravity" test, which can produce some surprising results in holding workers, who are in fact overseas, to be constructively employed stateside. Under either test, courts may look at factors such as the location of the employee's desk or work station, what the employee's business card says, and the duration and amount of any overseas work.[13]

Inevitably in these scenarios, someone always asks: *How long does an employee have to work in a place before it becomes the place of employment?* There is no answer, because time worked in a given workplace is only one factor in assessing place of employment. Italy is the place of employment of a secretary who was hired just yesterday to work a local job at an office in Rome—but Italy is not the place of employment of a Tokyo-based banker who has been working in Milan for the last two months, closing a deal on a long business trip.

Having said "place of employment" is a legal concept analogous to residence and domicile, understand that different jurisdictions apply different iterations of this concept—sometimes using different labels. For example, U.S. immigration law looks to whether a worker is a "U.S. employee." Europe's Rome I Regulation on conflict of laws looks to which jurisdiction is "habitually" a given employee's place of "work"[14] and English case law considers which jurisdiction has the strongest "connection" to an employment relationship.[15] While a U.S. court will analyze the "place of employment" of (for example) a pilot, sailor or expatriate, the EU Court of Justice case might assess that pilot's, sailor's or expat's "habitual place of work" while an English employment tribunal might analyze which jurisdiction has the strongest "connection" to that pilot's, sailor's or expat's job. Speaking comparatively, these legal concepts do not always align perfectly. Our discussion here generally speaks to "place of employment," while recognizing that some jurisdictions impose analogous but subtly different legal concepts.

B. Wage/hour and health/safety laws

In most all jurisdictions of the world, *wage/hour and workplace health/safety* laws tend to be mandatory rules that reach everyone rendering services locally—even an incoming business traveler or guest worker only temporarily working in a host country (an employee with an overseas place of employment and employment relationship otherwise governed by home country law). That is, laws regulating minimum wage, overtime, caps on hours and worker health/safety tend to protect even inbound business travelers and guest workers who otherwise ostensibly retain a different home-country place of employment and who are otherwise subject to home country employment law on other topics—unionization, workplace privacy, employee benefits, vacations, discrimination/harassment, dismissal and the rest. In the European Union this issue falls under the controversial "Posted Workers Directive" which extends wage/hour, health/safety (and for that matter other host-country employment protections) to incoming guest workers.[16] In the United States, wage/hour law kicks in after a visiting employee has been on U.S. soil for just 72 hours, and health/safety laws may apply to everyone working stateside even for just an hour.[17]

The policy here as to *wage/hour* laws is straightforward: If an incoming business visitor were exempt from host-country wage/hour law because of a foreign place of employment, then a temporary short-term guest worker from a jurisdiction with looser wage/hour laws could come in and undercut locals. For example, a St. Louis employer cannot bring in a temporary guest worker from Guatemala (even with a guest-worker visa) and pay Guatemala's minimum wage—undercutting and

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13 K.Connelly & L.Chopra, "Extraterritorial Application of U.S. Discrimination Laws," Law 360 online (Aug. 21, 2012) (paragraph breaks omitted).

14 *Cf.* Europe Rome I Regulation, EU Reg. 593/2008/EC (6/17/08) at arts. 8, 21.

15 *E.g., Lodge v. Dignity & Choice in Dying*, UK EAT/0252/14(2014).

16 EU Posted Workers Directive, 96/71/EC, at art. 1 (focusing on place "where the work is carried out").

17 U.S. Dep't of Labor Wage & Hr. Div. Field Operations Handbook (5/16/02) at §10e01(c) (U.S. Fair Labor Standards Act covers guest workers after 72 hours in U.S.).

presumably displacing a local from St. Louis.[18] The policy here as to *health/safety* laws is different but equally straightforward: It would be seen as cruel if an employer could withhold otherwise-mandatory health/safety protections from a worker who happens to be a business visitor or guest worker. For example, imagine a U.S. OSHA regulation requires that employers provide hand guards on buzz saws, and imagine a Kansas City employer gives a buzz saw missing the hand guard to an engineer visiting for the week from Germany. If the German accidentally cuts off his hand, "victim visitor status" is probably a loser defense to the inevitable OSHA charge.

C. Communist and Arab deviations

A handful of exceptional jurisdictions—mostly the five remaining Communist countries (China, Cuba, Laos, North Korea and Vietnam) but also including Indonesia and a few others—actually impose national employment laws to protect their local citizens at the expense of immigrant foreigners. Or, at least, these jurisdictions let non-citizen "inpatriates" opt out of their national employment regulations. These jurisdictions want their domestic employment protection laws to protect their local citizens, but do not seem to care whether their local employee-protection safety net stretches to protect non-citizen inpatriates (who are likely to be well-compensated and well-protected, anyway). So law in these jurisdictions either does not reach non-citizens or at least is hospitable to employment-context choice-of-foreign-law arrangements with non-citizen staff.[19]

Similarly, some employment laws in some Arab countries reach only local citizens, or at least accommodate choice-of-foreign-law provisions—for example: minimum wage laws in the UAE; social security rules in the UAE and Saudi Arabia; Saudi employment protections for Saudi citizens and end-of-service gratuities in a handful of Arab jurisdictions. These exceptions, though, are rare even in the Arab world.

D. Exceptional extraterritorial reach

We said that under the territoriality rule of employment protection law, a host country's employment protection laws protect even inpatriates and immigrants whose place of employment shifts into the host country, and under the corollary or inverse or outbound prong of this rule the employment laws of a given jurisdiction tend *not* to follow workers who emigrate to go off and work abroad. But this corollary/inverse/outbound prong is merely a presumption or general principle—and is subject to some important exceptions. A handful of jurisdictions actually impose "sticky" employment protection laws that attach to certain local citizens, local residents or local hires, following them after they move away. These sticky employment laws are said to have an "extraterritorial" reach, reaching beyond the home territory.

Someone working in an overseas host country can enforce an extraterritorial home country employment-protection law (usually asserting that claim in a home-country forum) even though he simultaneously enjoys the full protection of host-country employment law. That is, the analysis here is cumulative, not "either/or": Where employment laws reach extraterritorially, a hapless employer has to comply with *two jurisdictions'* sets of workplace laws at the same time, and must always meet the *higher* of the two jurisdictions' employment protections. (We can put aside the scenario of a host-country employment law that *compels an employer to violate* an extraterritorial-reaching home country mandate, because that situation almost never happens in the real world. Where it does, follow host-country law.)

The United States, Canada, England, Australia and some South American countries offer examples of exceptional jurisdictions that presume to extend at least some employment protection laws extraterritorially in at least some situations. And then there are *emigration* laws, which have a similar effect:

- ***U.S. discrimination and whistleblower retaliation laws.*** In 1991, the U.S. Congress swiftly reversed a 1991 Supreme Court decision[20] by passing the Civil Rights Act of 1991.[21] Since then,

18 At least not after the Guatemalan is stateside for over 72 hours. *Supra* note 17.
19 As discussed in part 3, *infra*, this differs from how *other countries* treat choice-of-foreign-employment law provisions.
20 *EEOC v. Aramco* (499 U.S. 244).
21 Pub. L. 102-166.

the major U.S. federal discrimination laws have reached U.S. citizens who work abroad for U.S. "controlled" multinationals[22] —even as host-country discrimination laws usually apply simultaneously as mandatory rules that employers and employees cannot contract around.[23] That said, the Genetic Information Nondiscrimination Act of 2008 does not reach abroad.[24]

As to how the extraterritorial reach of U.S. discrimination laws works in practice, imagine a hypothetical 42-year-old U.S. citizen office manager formerly working in, but now fired from, the Brussels office of a Silicon Valley tech company. This U.S. expatriate could simultaneously bring both a Belgian labor court unfair dismissal or discrimination claim and a U.S. gender, race or age discrimination charge—regardless of any choice-of-law provision in her employment contract and even if her employer's human resources department categorized her as a "local hire" rather than a company expatriate on assignment in Belgium. Damages might (perhaps) get offset, but the Belgian and American claims are independent causes of action. This scenario is not just theoretical: For decades now, American multinationals have been defending the occasional double-barreled, two-country dismissal claim.

This said, just because the major U.S. discrimination laws *can* reach extraterritorially to protect U.S. citizens working overseas for U.S.-controlled multinationals does *not* guarantee a U.S. remedy in U.S. courts. Under recent case law, even a U.S. citizen whose place of employment is overseas and who works for a U.S.-controlled employer might *not* be able to assert a U.S. discrimination law claim in a U.S. forum either if the U.S. is deemed an inconvenient forum (*forum non conveniens*) or if the employee had selected host-country law or a host country forum:

- *Forum non conveniens*. In 2015 the Ninth Circuit Court of Appeals affirmed the dismissal of an American citizen employee's Title VII and ADEA lawsuit alleging a Dutch subsidiary had discriminated against her.[25] The American sued both the Dutch subsidiary and U.S. headquarters in an Oregon federal court, but the Ninth Circuit affirmed a complete dismissal: U.S. courts had no personal jurisdiction over the Dutch subsidiary and exercising U.S. jurisdiction over headquarters was inappropriate on *forum non conveniens* grounds because the Dutch-working employee had an adequate remedy under local Dutch employment discrimination law. Because most countries now prohibit employment discrimination in some respects, expect other lawsuits in U.S. courts invoking the extraterritorial reach of America's discrimination laws to be subject to dismissal on these grounds.

- *Choice of host-country law or forum*. Later we discuss the effect of contractual choice-of-law and choice-of-forum clauses in cross-border employment.[26] One effect of those clauses is that they can waive the extraterritorial reach of U.S. discrimination law. For example, in 2014 a U.S. federal appeals court dismissed a U.S. citizen's London-arising extraterritorial claim under U.S. discrimination law because that expat had, previously, signed a contract selecting English law and English courts to adjudicate any later-arising employment dispute.[27]

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22 The principle here is that the employer is "controlled" from the United States. Generally, any U.S.-headquartered multinational will be held to be U.S.-controlled, and even certain overseas operations of non-U.S.-headquartered multinationals may be held to be U.S. "controlled" if they report up to a U.S. regional center. Several U.S. case opinions, law review articles and provisions of "EEOC Enforcement Guidance" explicate the scope of the so-called "control test" in this context.

23 *Cf.* 29 USC §§623(h) (ADEA abroad); 42 USC §§2000e-1(a), (c), 2000e-5(f) (3) (Title VII abroad); 42 USC §§ 12111(4), 12112(c) (ADA abroad). *See generally* Connelly & Chopra, "Extraterritorial Application of U.S. Discrimination Laws," *supra* note 13.

24 Pub. L. No. 110-233, 122 Stat. 881.

25 *Ranza v. Nike Inc.*, 793 F.3d 1059 (2015).

26 *Infra* part 3.

27 *Martinez v. Bloomberg LP*, 740 F.3d 211 (2014). One factor in the *Martinez* court's decision was that English substantive law also prohibits the alleged discrimination. If a choice-of-law clause were to select a forum that does not prohibit the alleged discriminatory act, the result might be different.

While U.S. discrimination laws tend to reach "extraterritorially," *other* American employment laws including the FMLA, FLSA, OSHA and WARN do not extend overseas.[28] This is because U.S. labor/employment laws (other than discrimination laws) tend to be silent on whether they reach abroad—and no federal statute in the entire U.S. Code reaches abroad unless its statutory text "clearly expresse[s]" that it does.[29] That said, though, sometimes an international employment fact scenario arises in which an American state or federal court applies American domestic state or federal employment law not because that particular law reaches extraterritorially, but because that court decides a domestic American employment law controls that dispute. That is, the court reasons it is adjudicating a domestic American employment matter that happens to involve some incidents overseas. These cases turn on the legal question of whether the particular dispute at issue arises under domestic American law—and, of course, on the relevant employee's place of employment. One complex line of these cases is the evolving body of law on the overseas reach of the Sarbanes-Oxley whistleblower retaliation statute, SOX § 806—which courts have held is not an employment law, and which does not necessarily conform to choice-of-employment-law analysis. Some but not all extraterritorial § 806 cases let overseas plaintiffs invoke rights under § 806. Some but not all of those cases expressly hold that § 806 reaches extraterritorially. But the cases that extend § 806 abroad tend to anchor the specific dispute in acts done or decisions made domestically in the United States.[30]

- *England*. English employment protection statutes tend to follow the general territoriality rule and are confined to employment on English soil. And so an Englishman who works outside England for an English-controlled employer rarely gets to invoke English employment protection laws, such as under the Employment Rights Act 1996. Indeed, even an employment contract that expressly invokes "English law" in a workplace outside England usually fails to export English employment statutes, because that English law clause itself is supposed to be governed by the English common law of contracts and English choice-of-law principles, and these confine English employment protection statutes to employment physically within England.[31]

  English case law, though, carves out increasingly intricate exceptions. For example, English employment law reaches abroad into "enclaves" of Britons who work abroad directly servicing U.K. domestic entities like British foreign correspondents writing for London newspapers and Britons stationed in U.K. embassies, on U.K. military bases or at other foreign outposts—and including telecommuters working abroad from home on English business. Cases construing this exception turn on their facts; the English court decisions closely analyze specific nuances at issue in each particular scenario, significantly narrowing the precedential value of these decisions.[32] The English cases adjudicating the outer limits of the exception keep evolving, although the exception remains narrow, at least in theory.

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28 FMLA does not extend abroad: 29 U.S.C. § 2611(2)(A0; 29 C.F.R. § 825.102, 825.105(b). FLSA does not extend abroad: 29 U.S. C. § 213(f); *see Cruz v. Chesapeake Shipping*, 932 F.2d 218 (3d Cir. 1991) (FLSA does not extend abroad); *Wright v. Adventures Rolling Cross Country*, case no. C-12-0983 EMC., U.S. D.C. N.D. Cal., Order of 5/3/12 (FLSA and California wage/hour law do not reach abroad); U.S. Dept. of Labor Wage & Hr. Div. Field Operations Handbook, *supra*, at §10e02 (FLSA does not reach U.S.-based workers working an entire workweek or more abroad). OSHA does not extend abroad: 29 U.S.C. § 653(a). WARN does not extend abroad: 20 C.F.R. § 639.3(i)(7).

29 *RGR Nabisco v. Euro. Cmt'y*, 136 S.Ct. 2090 (2016) ("clearly expressed" at pgs. 2102-03); *Morrison v. Aust. Nat'l Bank*, 561 U.S. 247 (2010); *EEOC v. Aramco*, *supra* note 20.

30 *See Carnero v. Boston Scientific*, 433 F.3d 1 (1st Cir. 2006), *cert. den.* 548 U.S. 906 (2006) (SOX § 806 does not reach abroad); *O'Mahoney v. Accenture Ltd.*, 537 F. Supp. 2d 506 (S.D.N.Y. 2008) (SOX whistleblower in France states a retaliation claim where alleged retaliation occurred in the U.S.); *Blanchard v. Exelis Syst. Corp.*, U.S. Sec'y of Labor Administrative Review Board [ARB], case no. 15-031 (Aug. 29, 2017) (SOX § 806 extends abroad where the claim is anchored in acts done or decisions made domestically in the United States); *Villanueva v. Core Labs*, ARB, case no. 2009-SOX-006 (Dec. 22, 2011), *aff'd on other grounds* 743 F.3d 103 (5th Cir. 2014) (SOX § 806 does not reach abroad under facts alleged).

31 *Cf. Ravat v. Halliburton*, [2012] UKCS 1 at §§32-33.

32 *E.g., Seahorse Maritime Ltd. v. Nautilus Int'l*, UK EAT/0281/16/LA (2017); *Olsen v Gearbulk Services et al.*, UK EAT/0345/14 (2015); *Lodge v. Dignity & Choice in Dying*, UK EAT/0252/14 (2014); *Dhunna v. Creditrights* [2014] IRLR 953; *Ravat v. Halliburton*, *supra* note 31; *Duncombe v. Sec'y of State for Children, Ministry of Defense v. Wallis & Anr*, [2011] ICR 495; *Blouse v. MBT Transport Ltd*, [2007] UK EAT/0999/07 & EAT /0632/07; *Lawson v. Serco*, [2006] ICR 250; *Saggar v. Ministry of Defence*, [2005] EWCA Civ. 4133. *See* Sarah Ozanne, "Recent Developments in the Territorial Scope of UK Employment Law," 16 IBA BUSINESS LAW INT'L 265 (2015).

- ***Australia.*** Whether Australian employment statutes reach extraterritorially turns on the facts involved and on the employment law invoked. Generally an Australian citizen hired in Australia but now working abroad for an Australian employer entity can invoke protections under Australian employment statutes, but Australian hires who get "localized" on foreign assignments—working abroad for non-Australian-incorporated affiliates—cannot.[33]

- ***South America.*** Some but not all South American countries expressly extend their employment protection laws abroad, at least under certain scenarios in certain circumstances. Colombia, much like the England, extends its employment protection laws extraterritorially only where an overseas-working employee reports directly into management in Colombia, "subordinated" to Colombian control.[34] At the other extreme, Venezuelan extends most Venezuelan employment protection laws outside Venezuela to protect Venezuelan expatriates originally hired in Venezuela but now working abroad.[35]

  Brazil extends Brazilian employment protection laws extraterritorially to protect Brazilians temporarily posted overseas.[36] This doctrine is vital whenever a U.S. company calls up someone from its Brazil facility to come work in the United States. Usually Brazilian employment law attaches only to temporary foreign assignments, not permanent moves. Depending on the judge, though, Brazilian courts may apply this rule only for Brazilian citizens or only to those originally hired in Brazil. Brazilian courts aggressively enforce this rule. In one case, a Brazilian who had worked as a mason in Angola won overtime pay, severance pay and other benefits due under Brazilian law for work performed in Angola.[37] In another case a Brazilian court awarded "moral damages" under Brazilian law to a Brazilian who had worked lots of hours on a job in Angola—even though he had properly been paid for the overtime.[38]

- ***Emigration laws.*** While all countries regulate immigration, some countries that export lots of laborers actually impose restrictions on *emigration*—these jurisdictions regulate employers that recruit locals to go work abroad or that post locals overseas as expatriates. Emigration restrictions act as extraterritorial employment laws that extend certain employment protections overseas. While emigration laws are meant to protect *low-wage* locals lured to work overseas positions in countries where there is a perception of worker abuse (for example, Filipino domestic servants and construction laborers lured to work in the Middle East), emigration-protection laws usually reach cross-border white-collar recruitments and postings. For example:

  - The Philippines regulates employers that recruit Filipinos to work abroad, requiring registrations and permits from two separate Filipino agencies and imposing standard form overseas employment agreements.

  - Guinea requires that employers pay both social security and tax withholdings on behalf of Guinean expatriates working abroad.

  - Liberia requires a license from the Liberian Ministry of Labor to recruit locals.

  - Ghana and Mozambique require paying expatriates' moving and repatriation expenses—including for families. Ghana also requires employers of Ghanaian expatriates dispatched abroad to contribute to the Ghanaian social security system, at least under some circumstances.

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33 Australia Fair Work Act 2009 §§ 13, 14, 34, 35(2)—but Australia Superannuation Guarantee legislation applies different standards.

34 *Méndez Nieto v. Techint Int'l Construction Corp.*, Colombia Sup.Ct. Justice/Labor Div., case no. SL14426-2014. (# 41948, r. 36)(Oct. 2014).

35 Venez. Labor Code art. 78.

36 Brazil Labor Code § 7062/82, art. 3(11).

37 *Elizeu Alves Correa v. Construtopic Construtora Ltda. et al.*, Brazilian Appellate Labor Court case # 02541- 69.2010.503.0091 (5/16/11).

38 *Mauricio da Silva v. Construtopic Construtora Ltda. et al.*, Brazilian Appellate Labor Court, Third Region case # 01006-2011-091-03-00-0 BO (11/17/11).

E. Affirmative defenses arising from the international context

In certain rare scenarios, the cross-border employment context offers an employer an international-context affirmative defense to a worker's employment law claim. For example, in the *Nolan* (U.S. Army England shipyard) case, the Army waived a sovereign immunity defense that might have been available to it by virtue of its status as a branch of a foreign government. Sovereign immunity and diplomatic defenses apparently prevail sometimes, and lose sometimes, when Cuba sends government-employed doctors to work in Brazil (generating revenue for the Cuban government), and the doctors sue in Brazilian courts demanding to be compensated under Brazilian standards.[39] Another example is the "Friendship, Commerce and Navigation" [FCN] treaty affirmative defense to certain employment claims theoretically available to (but only very rarely upheld for) foreign-incorporated employers sued under host country discrimination law.[40]

Conceptually, these substantive affirmative defenses are unrelated to *choice-of-employment law* analysis. For example, if a Japanese employer convinces a U.S. court to dismiss a discrimination lawsuit on FCN treaty grounds, or if Cuba convinces a Brazilian labor court that a Cuba/Brazil bilateral agreement on dispatching doctors compels dismissal of a Cuban doctor's wage claim, those dismissals is are because a treaty or international agreement trumps a statute. They are not choice-of-law determinations under conflict-of-laws analysis.

Part 3: Contractual Choice-of-Law and Choice-of-Forum Provisions and the Territoriality Rule

In discussing the general rule on the territoriality of employment protection laws, until now we mostly assumed the employer and employee had not agreed to select a specified jurisdiction's law to control, or court system to adjudicate, if they later get in a dispute. But choice-of-law and choice-of-forum agreements are common in the cross-border employment context, often found, for example, in employment contracts, offer letters, expatriate assignment packages, restrictive covenants, and employee compensation, bonus, benefits and equity plans.

So we turn now to the final, and biggest, nuance or refinement to the general rule on the territoriality of employment protection law: *the effect of a contractual choice-of-law or choice-of-forum provision*. We first address (A) the general rule on contractual choice-of-employment-law provisions, and then we address a number of nuances, refinements, strategies, exceptions and purported exceptions to that general rule: (B) "national" and "hibernating" employment contracts, (C) Europe's Rome I regulation, (D) non-mandatory rules and "Global Employment Companies," (E) restrictive covenants, and (F) forum selection clauses and the Recast Brussels Regulation.

A. The general rule on contractual choice-of-employment-law provisions

The general rule on contractual choice-of-employment-law provisions is: These provisions successfully pull in the law of a contractually-selected jurisdiction that is not the place of employment, but these provisions are powerless to shut off the mandatory application of the employment protection laws of the host country place of employment. For example, consistent with a line of cases in France, a worker whose place of employment is France who signs a choice-of-law clause calling for the law of Andorra, Austria, Belgium, Italy, Texas or the U.K. simultaneously enjoys both a *contractual* right to invoke protections under Andorran, Austrian, Belgian, Italian, Texas or U.K.

39 *Nolan, supra* note 2 at ¶ 12; "'Slave Labor': Cuban Doctors Rebel in Brazil," New York Times, Sept. 29, 2017, at A1.

40 *E.g., Sumitomo Shoji v. Avagliano*, 457 U.S. 189 (1982); *Papaila v Uniden Am.Corp.*, 51 F.3d 54 (5th Cir. 1995); *Fortino v. Quasar*, 950 F. 2d 389 (7th Cir 1991).

law and a French *statutory* law right to invoke French employment protection laws.[41] The worker is positioned to "mix and match" or "cherry-pick" the more employee-protective rules between the two regimes.

- ***Policy behind the rule.*** We have already discussed the policy behind this rule. As discussed, the employment protection laws of a place of employment generally apply by force of public policy as "mandatory rules." Imagine (for example) if a worker in a jurisdiction that imposes a high minimum wage and tough workplace safety and discrimination laws signs an agreement purporting to agree to work for less than minimum wage and purporting to waive local workplace safety and discrimination laws. Obviously that waiver is almost surely void, because the jurisdiction's employment protection laws—here, its minimum wage, safety and discrimination laws—apply by force of public policy as "mandatory rules." And if that waiver is void, so is a choice-of-law clause *disguised* as a waiver: If this worker signed a choice-of-law provision selecting the law of some jurisdiction with a low minimum wage and with loose workplace safety and discrimination laws, that choice-of-law provision would have the effect of waiving host country minimum wage, safety and discrimination laws. The choice-of-foreign law clause would be a disguised waiver, just as void as an overt waiver.

  That said, we have mentioned some rare exceptions—some Communist and Arab-world jurisdictions enforce choice-of-foreign-employment law clauses in some contexts.[42]

- ***Choice of foreign law versus choice of host-country law.*** A choice-of-employment-law provision that simply selects the law of a host country place of employment does not raise this problem. That law already applies, anyway. A canny employer strategy in cross-border employment is to use a choice-of-law provision that affirmatively selects the law of the host country place of employment (either by naming that jurisdiction or by saying "the law of the place of employment applies"). Some courts—including at least one U.S. federal appeals court[43] —hold that a contractual selection of host country place-of-employment law actually shuts off otherwise-extraterritorial employment laws of foreign jurisdictions.[44] U.S. discrimination law has been held *not* to reach an American citizen working abroad for a U.S.-controlled employer who has contractually selected host-country law.[45]

  The rest of our discussion here on employment-context choice-of-law provisions addresses contractual selections of *foreign* employment laws. Provisions that select the law of a *host country* place of employment do not trigger the issues we discuss here.

The upshot of the general rule on contractual choice-of-law provisions in the international employment context is that a choice-of-foreign-employment-law provision often backfires on the employer that originally drafted it and insisted on it. This provision can force a hapless employer to comply with two employment law regimes simultaneously—all the employment laws of the contractually-selected foreign jurisdiction plus all the employment protection laws of the host country place of employment. Usually this employer would have been better off with no choice-of-law clause at all (at least then, only one set of employment laws would apply).

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41 *Cour de Cassation* (French Civil Supreme Court, Social Section) case no.14-18.566 (Jan. 13, 2016) (French employment law applies notwithstanding UK-law clause); *Cour de Cassation* case no. 14-16269 (Oct. 28, 2015) (French employment law applies notwithstanding Belgium-law clause); *Cour de Cassation* case no. 09-66571 (Feb. 9, 2012) (French employment law applies notwithstanding Texas-law clause); *Cour de Cassation* case no. 01-44654 (Mar. 12, 2008) (French employment law applies notwithstanding Italy-law clause); *Cour de Cassation* case no. 99-45821 (Nov. 12, 2002) (French employment law applies notwithstanding Austria-law clause); Grenoble Court of Appeal case no. 00-3363 (Mar. 24, 2003) (French employment law applies notwithstanding Andorra-law clause); Grenoble Court of Appeal case no. 3799-95 (Feb. 24, 1997) (French employment law o applies notwithstanding Texas-law clause).

42 *Supra* part 2(C).

43 *Martinez, supra* note 27 (2nd Cir. 2014).

44 On extraterritorial-reaching employment laws, see *supra* part 2(D).

45 *Martinez, supra* note 27 (2nd Cir. 2014). *See also generally New Zealand Basing Ltd. v. Brown*, CA12/2015 [2016] NZCA 525 (2016) (New Zealand Court of Appeal enforces a Hong Kong choice-of-law clause to dismiss claims under New Zealand age discrimination law brought by employee airline pilots residing in New Zealand without a New Zealand place of employment—opinion ¶ 21: "the majority of the pilots' work occurs outside of New Zealand airspace").

Not surprisingly, when employers that had inserted choice-of-foreign-law provisions into employment arrangements figure out how their provisions actually work, they sometimes scramble to impeach their own provisions. In one case a California employer argued its provision selecting California "regulations" that apply to a cross-border employment relationship somehow did not extend California law. The provision said: "You are considered to be a California resident, subject to California's tax laws and regulations," but the employer argued that clause somehow did not act as a choice-of-California-law clause.[46] In another case, a California corporation had inserted a provision into an agreement with a Denmark distributor saying the distributorship contract was to "be governed and construed under the laws of the State of California, United States of America." That company later argued—unsuccessfully—that this clause somehow did not export California's dealer-protection laws to protect its Danish dealer.[47]

Occasionally an employer succeeds in impeaching its own choice-of-foreign law provision, for example by showing applicable choice-of-law principles do not extend employment regulations extraterritorially, making the provision illusory. We already mentioned that choice-of-English-law clauses in cross-border employment arrangements do not usually extend English law abroad because English employment statutes tend to be domestic to England.[48] English employers sometimes argue their ill-considered choice-of-English-law clauses do not extend English law to overseas employment relationships, on this ground.

The point, however, is that no employer should stick a provision into its own employment contracts that it will later want to impeach. If employers simply omit choice-of-foreign-law provisions from employment contracts, or else if they contractually select host-country (place of employment) law, they will not later find themselves impeaching their own agreements.

Another drawback to choice-of-foreign-law provisions in cross-border employment agreements is the complication and expense of collateral litigation. These provisions almost always complicate cross-border employment disputes, imposing extra costs either when employers try to impeach them or when the clauses force judges to confront proof-of-foreign-law issues and solicit expert testimony and translations. Ultimately these cases tend to arrive at the predictable conclusion under our general rule, anyway (these cases almost always affirm that a contractual choice-of-law provision pulls in the contractually-selected jurisdiction's law without shutting off place-of-employment protection laws). For example, two landmark UK decisions explored whether a U.S. state choice-of-law clause (one case involved a New York law clause and the other a Maryland law clause) in executive compensation arrangements requires a UK court to defer to U.S. state law in interpreting a restrictive covenant to be enforced in the UK. After collateral proceedings and expert testimony to determine what foreign (U.S.) law required, at the end of the day both UK courts predictably ruled that UK, not U.S. state, public policy and "mandatory rules" control restrictive covenants enforced on UK soil, when the UK rules are more protective than the U.S. rules. If the employers in these cases had simply omitted foreign-law provisions from their employment documentation in the first place, they might have saved significant collateral litigation costs and ended up with essentially the same result.[49]

B. "National" and "hibernating" employment contracts

Having discussed the general rule on contractual choice-of-foreign-employment law provisions, we turn to various nuances, refinements, strategies, partial exceptions and purported exceptions to the rule. First among these is what we might refer to as "national" employment contracts. In some circles outside the United States, lawyers, human resources professionals and even rank-and-file workers talk about employment contracts as if they somehow acquire their own nationality or citizenship or passport. For example, a German employer might hire a German worker under what a German boss would call a "German employment contract" and might later transfer that worker to (say) Mexico, giving him what the boss would call a "Mexican employment contract." At that point

46 *Wright v. Adventures Rolling Cross Country*, case no. C-12-0983 EMC., U.S. D.C. N.D. Cal., order of 5/3/12).
47 *Gravquick A/S Trimble Nav. Int'l*, 323 F.3d 1219, 1223 (9th Cir. 2003) (for our purposes here, the dealer-protection laws in this case are analogous to employment protection laws, and the dealer relationship is analogous to an employment relationship).
48 *Ravat*, *supra* note 31.
49 *Duarte* case, [2007] EWHC 2720 (QB) (UK) (1/07); *Samenga-Turner* case, [2007] EWCA Civ. 723 (UK) (7/07).

the worker might claim to work, simultaneously, under both contracts, with the "German contract" subject to German law (whether it has an express choice-of-law clause in it or not), extending German employment protections into the Mexican workplace.

This scenario seems to arise particularly frequently with so-called "French employment contracts." Even though French statutory employment law does not otherwise reach abroad,[50] French employment law takes a particularly territorial view of employment contracts. So when a French expatriate originally hired under a so-called "French contract" sets off to work outside France—even if he signs a new host country employment agreement and even if his underlying "French contract" gets suspended or "hibernated"—French employment laws likely attach, which comes up, for example, if the employer later fires the expatriate during the assignment. Upon dismissal, the hibernating "French contract" springs to life and imposes French employee-protection laws as if by a choice-of-French-law clause (even if the "French contract" has no explicit choice-of-law clause). Of course, in these situations the territoriality of host-country employment law means that the employment protection laws of the place of employment also apply simultaneously. (The cleanest way to tidy up this situation is to structure overseas expatriate assignments as "localizations" and to cancel any underlying home country employment contract. An expatriate can resign from a preexisting home country employment arrangement and simultaneously sign onto a new one in the host country that extends retroactive service credit. Another solution is to amend the underlying home country contract to add an express choice-of-law clause selecting the law of the new host country place of employment.)

For our purposes here—analyzing the effect of contractual choice-of-law provisions in cross-border employment—the point is that what we might call a "national" employment contract is essentially an employment contract *with an express or implicit selection of the national employment law regime*. That is, what Europeans refer to as a "French employment contract" or a "German employment contract" essentially means an employment contract with an express or implicit choice-of-French-law or choice-of-German-law clause. Even when a home country national employment contract "hibernates" while the employee works abroad under a separate host-country employment arrangement, the national employment contract can impose home-country law because it acts as a contractual selection of home country law. (Again, a strategic employer can tidy up this situation.)

C. Europe's Rome I Regulation

When a conflict-of-employment-law question arises in Europe, European lawyers talk about "Rome." European Union member states are subject to a choice-of-law arrangement called the Rome I Regulation that "replaces" the earlier 1980 Rome Convention.[51] European lawyers are quick to argue that the general rule we have set out on contractual choice-of-foreign-employment law provisions does not apply in Europe, because the Rome regime trumps it. European lawyers talk about Rome I and its predecessor Rome Convention as if they somehow empower a choice-of-foreign law clause to block the mandatory application of host country (place of employment) protection laws.

For example, a March 2005 law firm news alert by German lawyers characterizes the Rome regime as leaving European workers "free to agree upon the law of the country that shall be applicable to the employment contract," and an October 2003 law firm news alert by French lawyers portrays the Rome regime as leaving "the parties to an employment contract...free to choose the governing law." Further, in 2008—when the Rome I Regulation replaced its predecessor 1980 Rome Convention—European lawyers claimed that the then-new Rome I Regulation, more than ever, ratifies and empowers contractual selections of foreign employment law to divest the law of a host country place of employment.

But no, this is not how the Rome regime works. In fact, the Rome regime merely codifies the general rule we have set out on contractual choice-of-foreign-employment law provisions. The texts of both the original 1980 Rome Convention and now the 2008 Rome I Regulation affirm that "overriding mandatory provisions of the law of the forum" (place of employment) trump any choice-

50 *See* French Supreme Court case no. 10-28.537 (Feb. 2012).
51 Rome I Reg. art. 24.

of-foreign-law clause or foreign employment contract.[52] Rome I defines "overriding mandatory provisions" as laws "the respect for which is regarded as crucial by a country for safeguarding its public interests."[53] Rome I requires that a contractual choice-of-employment-law provision not "deprive[e] the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable."[54] And under Rome I, a choice-of-foreign-law clause cannot override the law of any "country" "more closely connected with" the "circumstances [of employment] as a whole."[55]

This means that in Europe, just as in most of the world, an employee lucky enough to get a contractual selection of foreign employment law (or to have what we called a "national" employment contract of a foreign country) usually gets to "mix and match" or "cherry-pick" the more favorable employment protection laws of either the contractually-selected jurisdiction or the host country place of employment "in which the employee habitually carries out his work"[56] —or both. Consistent with this, as mentioned, a worker whose place of employment is France who signs a choice-of-law clause calling for the law of Andorra, Austria, Belgium, Italy, Texas or U.K. simultaneously enjoys both a *contractual* right to invoke protections under Andorran, Austrian, Belgian, Italian, Texas or U.K. law and a French *statutory* law right to invoke French employment protection laws.[57]

In short, in discussing contractual choice-of-foreign-employment law provisions, expect Europeans will claim that because of Rome I, an "individual employment contract" is "governed by the law chosen by the parties." The best response to this argument is: *Yes, this is indeed consistent with the first sentence of Rome I article (8)(1). But that same provision's second sentence then goes to impose the general rule on territoriality of employment protection laws of a host country place of employment even in the face of a contractual selection of foreign law.* To that point, the European may fall back and point out that under the Rome regime, an employer and employee are indeed free to choose an employment law regime other than that of the host country place of employment as long as, when a dispute later arises, both parties reaffirm that their selected jurisdiction's law applies. This certainly is true—but *so what?* When an employment dispute erupts that a worker realizes he can win if he invokes laws of his host country place of employment law, assume he will.

D. Non-mandatory rules and "Global Employment Companies"

We already said that the general rule on the territoriality of employment law applies to *employment protection* laws ("mandatory rules").[58] This principle also applies to our general rule on contractual choice-of-employment-law provisions. That is: Choice-of-law provisions in the international employment context pull in the law of a contractually-selected jurisdiction that is not the place of employment; however, these provisions are powerless to shut off the mandatory application of the *employment protection* laws or "mandatory rules" of a host country place of employment. But that said, a choice-of-foreign-law provision might indeed shut off host country employment laws that do *not* amount to mandatory employment protection laws. This means that parties to a cross-border employment relationship might select home-country laws that govern discretionary human resources topics like, for example: equity plan rules, executive compensation doctrines, and some (but not all) regulation of non-mandatory benefits like rules on voluntary pensions, medical insurance plans, certain tax and social security totalization treaties, and some (but not all) rules applicable to discretionary bonuses. There is U.S. case law authority dismissing a U.S.-based employee's claim contesting terms in a restricted share plan because that plan contained UK choice-of-law and UK choice-of-forum provisions.

Because choice-of-foreign-law clauses can be enforceable as to non-mandatory topics mostly relating to compensation and benefits plans, choice-of-home-country-law clauses are common, and often effective, in international compensation/benefits plans and equity plans, particularly those for

52 Rome I Reg. arts. 34, 37; *compare* Rome Convention articles 3(3), 6, 7.
53 Rome I Reg. at art. 9(2) (1); *cf.* art. 21 (choice-of-law clause cannot override any rule "manifestly incompatible" with "public policy" of "forum" court).
54 Rome I art. 8(1).
55 Rome I arts. 8(1), (4).
56 Rome I Reg. art. 8(2).
57 *Supra* note 41.
58 *Supra* part 1(C).

highly compensated executives. This principle grounds "Global Employment Companies" (GECs), subsidiary entities that a multinational sets up to employ a corps of career expatriates working around the world. This said, in designing a cross-border compensation/benefits plan, equity plan or GEC, remember that the contractual selection of home country law tends to be enforceable only as to topics that do not amount to "mandatory rules." Even a choice-of-law clause in a bonus plan, equity award agreement, compensation arrangement for highly compensated executives or GEC constitutional charter will not divest host-country "mandatory rules" like, for example, laws on vacation, sick leave and dismissals. Neither cross-border compensation plans nor GECs get an exemption from the general rule on the mandatory application of host-country *employment protection* laws.

E. Restrictive covenants

Restrictive covenants—non-compete agreements, customer and employee non-solicitation agreements and confidentiality agreements—as well as employee invention/intellectual property assignments raise special challenges in cross-border employment. Laws that enforce restrictive covenants tend to be "mandatory rules" (employment protection laws) that apply by force of public policy, so the restrictive-covenant interpretation rules of a host country place of employment tend to apply by force of law. For example, never expect a California court to defer to a contractual provision selecting New York or English law to enforce an employment-context non-compete against a worker whose place of employment is California (in California, employment-context non-competes are void).[59] It works the same way in reverse—English courts almost never defer to foreign (say, New York or Maryland) choice-of-law clauses when enforcing restrictive covenants on staff who work in England.[60]

When enforcing a post-term restrictive covenant after an employee has left the job, the practical issue usually comes down to complying with the restrictive covenant rules and public policy of the jurisdiction where the original employer seeks enforcement, which often ends up being *the place where the employee has gone off to breach the covenant*, and may be neither the home nor host country during employment.

- *Example.* Imagine an employee originally hired in Paris had signed a Europe-wide non-compete containing a French choice-of-law clause who then got transferred to work for a while in Florida. Later, this employee quit, moved to London, and started working for an English competitor, flagrantly violating the non-compete. If the original employer now tries to enforce the non-compete, which jurisdiction's law applies? France's? Florida's? Or England's?

  As a strategic matter, to win an enforceable remedy, the original employer here is probably best advised to try to enforce the non-compete in London under English law, ready to show the provision complies with English non-compete public policy. (In this example the original employer might have to convince a London court that the non-compete complies with *both* British and French law, because of the choice-of-French-law clause—which show this employer would have been better off omitting that pesky clause in the first place.)

  Theoretically there might be other litigation approaches possible, and there might be arguments that any of these three jurisdictions' laws apply. But in the real world, if the original employer wants fast specific performance (a quick, binding injunction) or an enforceable money judgment (in a place where the employee has assets), the best strategy very likely will be for the employer to frame a restrictive covenant enforcement action under the law of the place where the employee has gone off to breach—and to sue in that jurisdiction's local courts.[61]

F. Forum selection clauses and the Recast Brussels Regulation

59 *E.g. Ruiz* (9th Cir. 2012), *supra* note 7, *but see Sabd-Krutz* (US DC ED Cal. 2015), *supra* note 7.

60 *Duarte* (UK 2007), *supra* note 49; *Samengo-Turner* (UK 2007), *supra* note 49.

61 *See, e.g., Digicel v. Carty*, [2014] JMCC Comm 14 (Jamaica Sup.Ct. Judicature) at ¶¶ 36, 78 (Jamaican court asked to enforce restrictive covenant against employee who had been employed in the United States—the covenant covered competition across "the Caribbean or Central America" and the plaintiff employer saw the breach occurring in Jamaica).

We have been addressing choice-of-law clauses that invoke a legal regime other than the law of the place of employment. The follow-on issue is the enforceability of an employment-context agreement that calls for private arbitration[62] or for adjudicating disputes in a foreign court—that is, the enforceability of a contractual choice-of-foreign-*forum* provision that purports to require the employer and employee resolve any disputes in their contractually-selected forum and not in the local labor courts of the host country place of employment. (We are not addressing the scenario of a worker subject to a forum selection clause who *voluntarily* brings a claim in a previously-agreed forum, nor are we addressing the scenario of an employer and employee embroiled in a dispute who mutually agree on a forum to hear their claim. And of course we are not dealing with forum-selection provisions that choose the local labor courts of the host country place of employment. None of those scenarios present enforceability problems.[63])

Employment-context forum-selection provisions that call for a forum other than host country (place of employment) labor courts tend to be unenforceable abroad, because outside the United States, special-jurisdiction labor courts tend to assert mandatory jurisdiction over employment disputes with staff who work locally (whose place of employment is in-country). This principle is familiar even in the otherwise-arbitration-friendly United States, because certain U.S. worker-rights agencies (for example, state workers' compensation agencies, unemployment compensation agencies, equal employment agencies, the EEOC, OSHA and the NLRB) can have mandatory jurisdiction over certain employment disputes. When they do, an arbitration or choice-of-foreign-forum provision may be unenforceable.

Outside the United States, a provision in an employment or expatriate agreement (or compensation plan) that purports to select arbitration or to empower some forum other than local host-country labor courts tends not to block the mandatory jurisdiction of labor tribunals in the place of employment. In London today, for example, many U.S. financial services expatriates are working under arbitration and U.S.-court clauses of dubious enforceability. If an American expat working in London has signed an arbitration or U.S.-courts clause but nevertheless sues the employer in an English Employment Tribunal, the employer might not expect to win a dismissal by invoking the forum-selection clause.[64] That said, a few rare jurisdictions are exceptions. Malaysia enforces employment-context arbitration agreements, for example. And in 2017 Brazil amended its labor code and now purports to allow arbitration agreements in employment contracts.[65]

In employment-context choice-of-forum scenarios, Europeans invoke articles 20, 21 and 22 of the so-called "Recast Brussels Regulation" on employment-context choice-of-forum clauses within Europe.[66] These provisions of this EU Regulation merely codify our general rule that employees outside the United States rarely have to litigate employment disputes outside their host country place of employment, even if a choice-of-foreign-forum clause purports to require otherwise. In a 2015 decision, the UK Court of Appeals invoked the Recast Brussels Regulation to block a choice-of-Massachusetts-courts clause in a U.S.-headquartered employer's equity plan.[67]

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62 The references here to *private* arbitration distinguish the *court-mandated* alternate dispute resolution procedures under certain countries' labor courts.

63 Indeed, a provision that selects the labor courts of the host country place of employment can be an excellent employer strategy, because it might divest the jurisdiction of foreign courts that otherwise could adjudicate "extraterritorial" employment claims. *E.g., Martinez, supra* note 27 (2nd Cir. 2014); *New Zealand Basing Ltd, supra* note 45 (New Zealand 2016).

64 *E.g., Petter v. EMC Europe Ltd & Anor*, [2015] EWCA Civ 828 (UK Court of Appeal grants "anti-suit injunction" to block choice-of-Massachusetts-courts clause in U.S.-headquartered employer's "share incentive scheme" equity plan).

65 Brazil CLT (Consolidated Labor Laws) *revised* 2017, at art. 507-A: "For employees [earning at least double minimum wage], employer and employee are free mutually to agree on a binding arbitration clause, as provided under the Law 9.307/96 [Brazil arbitration law]."

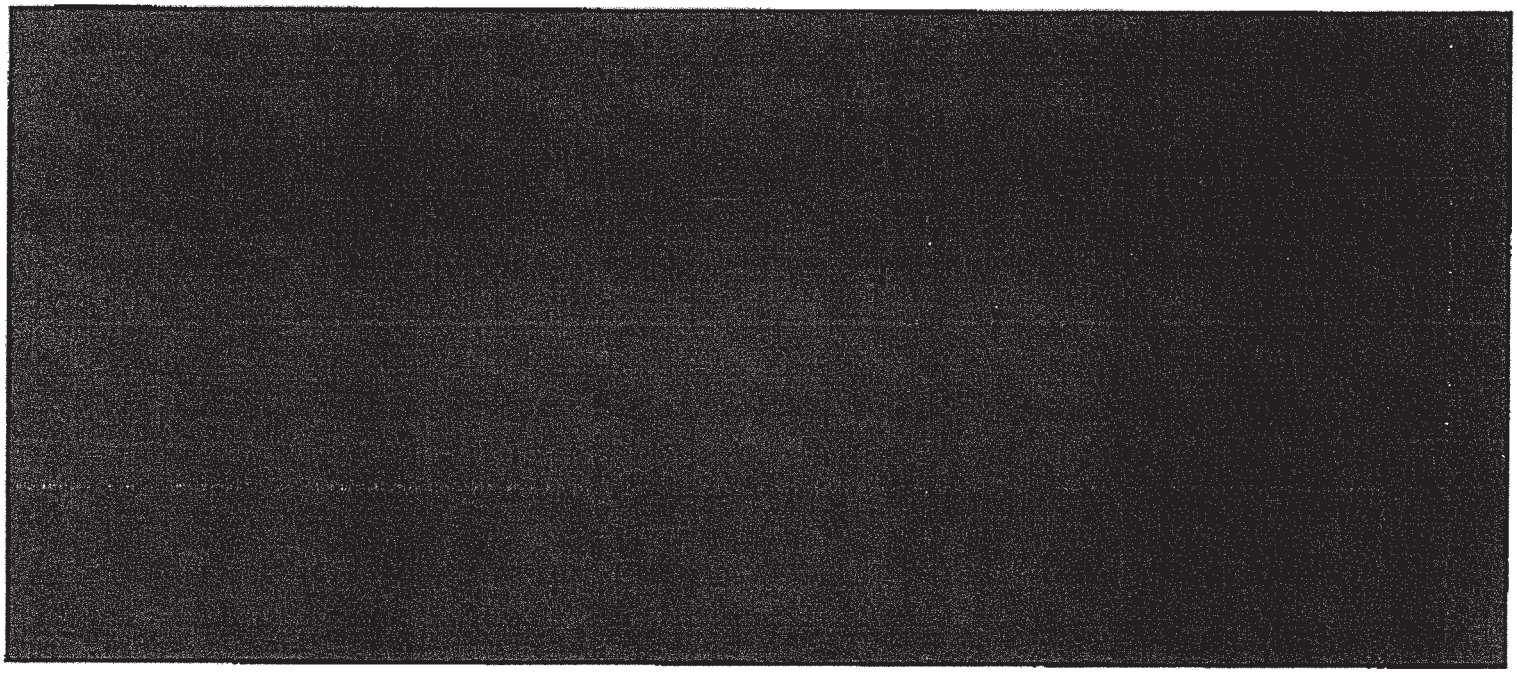
66 EU Regulation No. 1215/2012 *repealing* Regulation 44/2001.

67 *Petter, supra* note 64.

Conclusion

Which jurisdiction's employment laws reach border-crossing staff? Because employment protection laws are "mandatory rules" applicable by force of public policy, host-country employment protection law—the law of the current place of employment—usually controls. In addition but not instead, *home*-country workplace rules rarely but occasionally also apply simultaneously, such as where a home-country statute has "extraterritorial" reach or where an employer and employee have contractually selected home-country law. While these general principles usually prevail, international choice-of-employment-law and -forum issues can get complex.

Work through these situations strategically, accounting for the various nuances, refinements, strategies, exceptions and purported exceptions. When drafting cross-border employment agreements, benefits plans or expatriate arrangements, the best drafting strategy might be either to omit any choice-of-law or forum-selection provision entirely, or else simply to select the law and courts of the place of employment.



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RECENT DEVELOPMENT

How Well Do Your Anti-Harassment Tools Work Overseas?

BY DONALD C. DOWLING, JR. ON DECEMBER 7, 2017

The 2017 tsunami of high-profile sex harassment allegations against politicians, entertainers and news reporters has employers rethinking their approach to eradicating workplace harassment. And this issue is global—the news stories splash across media outlets worldwide and the conversation is everywhere.

Overseas, eradicating workplace sex harassment is just as urgent as it is stateside. Anti-harassment laws abroad can be strict. Costa Rica, India, Korea and other countries impose specific rules for sex harassment policies and training. France, Egypt, India and other countries criminalize sex harassment—harassers can actually go to jail and can implicate their employers.

Multinational employers stand exposed to harassment claims outside the United States unless they have implemented tough and effective measures to protect against workplace harassment globally. Fortunately, U.S. employers have spent decades refining sophisticated tools for fighting workplace harassment—anti-harassment policies, reporting requirements for co-worker dating, internal complaint systems, "love contracts," and workplace training.

But U.S. employers engineered these tools for the highly-evolved U.S. legal environment, accounting for rarified concepts such as the "tangible employment action" requirement for imposing vicarious liability, the "unreasonable failure to take advantage of preventive or corrective opportunities" affirmative defense to harassment claims, a "severe and pervasive requirement" for hostile environment harassment, and claims of "implicit quid pro quo third-party harassment."

Before the current flood of sex harassment allegations, U.S.-headquartered multinationals may have assumed their U.S. anti-harassment toolkit was state-of-the-art. They may have exported the U.S. approach to combatting workplace harassment, assuming it a sensible practice worldwide. But because U.S. anti-harassment tools were engineered for the well-evolved, highly-refined—but purely domestic-U.S.—environment, simply exporting these tools does not always work. Law and culture overseas may differ substantially, which often compels a different compliance approach.

For that matter, all the high-profile sex harassment accusations against U.S. politicians, entertainers and reporters leave many wondering how effective U.S. approaches to eradicating workplace harassment have been, all along. Overseas, news reports portray sex harassment as an *American* compliance challenge. For example, one Chinese newspaper suggested that the type of sexual harassment widely reported in recent months could never happen in China because of its cultural traditions.[1]

In this environment, multinationals should revisit, and sharpen, their tools for fighting workplace harassment outside the United States—their anti-harassment policies, reporting procedures, internal complaint systems, "love contracts" and training. An approach honed in the U.S. makes a great starting point, but it may need to be refined and adapted for the very different environment overseas. Consider:

- *Vehicle*: What is the best vehicle for imposing an anti-harassment rule across worldwide operations—a single company-wide global anti-harassment policy, a harassment provision in the global code of conduct, aligned local-country anti-harassment policies, or some combination?
- *Protected group harassment*: Does the company's global approach to fighting harassment export the default U.S. model based on gender and protected-group status? If so, does it comply in countries that prohibit *non-status-linked* workplace bullying, "mobbing," psycho-social harassment and "moral harassment"? For that matter, does the listing of protected groups in the anti-harassment policy and training align with legally-protected categories overseas?
- *Local compliance*: Does the company's global approach account for local mandates and nuances abroad? For example, countries from Costa Rica to India to Korea impose specific requirements for sex harassment policies and training. Do the global anti-harassment materials comply? Do they account for laws in France, Egypt, India and elsewhere that criminalize harassment?
- *Cultural appropriateness:* Is the company's global approach to disclosing co-worker dating and "love contracts" too rooted in U.S. cultural norms? Does it work in environments hostile to these concepts, like Continental Europe and Latin America?
- *Reporting system*: Does the company's reporting and grievance system comply abroad, consistent with Europe's data protection regulation of whistleblower hotlines and overseas employment doctrines that can invalidate mandatory reporting rules?

A U.S.-based company's tools for fighting workplace harassment might need sharpening even domestically, after all the recent attention. Internationally the issue is yet more complex, because U.S. approaches to eradicating workplace harassment need reengineering for the overseas environment.

For a full discussion of globalizing an approach to fighting harassment, see part five (pages 23-29) of our discussion of global discrimination/harassment/diversity policies.

[1] The China Daily said harassment is less common in China compared with western countries. Benjamin Haas, "Anger as Chinese media claim harassment is just a western problem," *The Guardian* (Oct. 17, 2017).

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V. Marketing and Distribution in the U.S. and Around the World

ALTERNATIVE METHODS OF DISTRIBUTION

Prepared for the New York State Bar Association

International Section Bridging the Gap

June 14, 2018

by Andre R. Jaglom[*]

A manufacturer or other supplier seeking to distribute its goods or services internationally has an entire spectrum of distribution options available to it. These options carry varying costs and benefits, offer different advantages and disadvantages, and are regulated in different ways in different countries. Counsel advising a client on choosing among these options must understand the legal distinctions among the alternatives and the legal framework under which they will be regulated, both in the supplier's home country and in the nations in which it will distribute. Qualified local counsel in foreign jurisdictions thus is essential. Equally important, counsel must understand the client's business objectives and culture, so as to be able to select options that will best fulfill those objectives and are subject to restrictions that the client can adhere to, thereby minimizing the legal risks associated with meeting the business goals.

A. **Alternative methods of distribution --- Definitions.**

1. Owned outlets

Perhaps the simplest approach – but not necessarily the best – to distribution abroad is the do-it-yourself method. A domestic manufacturer can set up shop in another country in which it wishes to market, hire employees, and act as its own importer and distributor in that country, either directly or through a wholly-owned subsidiary. A supplier electing this option bears all the costs of distribution, from start-up capital and facilities to employee costs, administration and risks of non-collection from customers. It also subjects itself to full jurisdiction in the market country, may need to qualify to do business there and otherwise comply with national regulation of businesses, including restrictions that may apply to foreign-owned companies, will be subject to taxation on income and assets in the market country, and will have to comply with applicable employment laws, including, in some nations, onerous severance requirements in the event of termination. However, this approach does offer maximum control over distribution, as the supplier itself is in charge of its products and how they are marketed, presented and sold, at the cost, perhaps, depending on the employees hired, of reduced knowledge of local market conditions and sensitivity to local culture and customs.

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2. Sales agents

Next on the spectrum of distribution options is the engagement of a local commercial agent. Such a sales agent does not take title to the goods; instead, it arranges sales on behalf of the supplier, which then makes the sales. Sales fulfillment, billing and collection, while the responsibility of the supplier, may also be delegated to the agent, which is also usually responsible for any product merchandising, and point of sale displays. Advertising and marketing in the market country could be assigned to either party, although typically the local knowledge of the agent makes it advantageous to give it charge of marketing, subject to the supplier's global branding. Local costs are borne by the agent, which is compensated by a sales commission on the sales it arranges (and typically on all sales in the agent's territory, even if arranged by the supplier). In many countries, the supplier will need to comply with the regulations imposed on those doing business there and pay income taxes, since the sales, while arranged by the agent, are legally made by the supplier, although delivery terms where title is transferred in the supplier's home jurisdiction may avoid that need in some countries. The need to comply with market nation employment laws may vary by country and may depend on whether the agent is an individual or a corporate entity with its own employees. Control over the sales and distribution of its products is nearly as great, for the agent will be bound by contract to follow its principal's directions.

3. Independent distributors

Independent distributors, which buy from the supplier and resell in the market country at a profit, can offer local knowledge and experience and substantially reduced costs for the supplier, particularly where an established distributor takes on the supplier's product line. Once the distributor takes title to the products, all sales and distribution costs in the local market are the distributor's, making this perhaps the least costly option from the supplier's perspective, although its reduced investment in the market country comes at the cost of giving up the distribution profit to the local distributor. The supplier generally will not be doing business in the market country, largely minimizing regulatory compliance costs and concerns over jurisdiction and taxation, although some countries do imposes taxes on payments to foreign suppliers for goods. Control over distribution is reduced, except to the extent the distributor can be bound by contract to follow the supplier's instructions as to sales methods, distribution targets, merchandising and presentation. Advertising and marketing responsibilities can be assigned to the distributor, subject to global branding concerns, or retained by the supplier.

4. Franchising

Franchising is a method of distribution that, as defined in most U.S. jurisdictions, amounts to the use of independent distributors who are licensed to use the supplier's trademarks, either in the business name itself or in the products sold, are required to follow a prescribed marketing plan or method of operation, and pay a franchise fee to the supplier.[1] Notably, in New York, however, a franchise is formed where a fee is paid and ***either*** a trademark is licensed ***or*** a marketing plan prescribed, thus subjecting most trademark licenses to franchise regulation.[2] In many U.S.

[1] *See, e.g.,* Federal Trade Commission Franchise Rule, 16 C.F.R. §436.2(a); Calif. Corporations Code §§ 31005.

[2] N.Y. Gen. Bus. Law §§ 681(3). While the New York Department of Law will often grant exemptions for pure trademark licenses that do not carry other indicia of franchising, the need to seek such an exemption in circumstances that would go unregulated by franchise laws in most jurisdictions remains a trap for the unwary.

jurisdictions, franchises are regulated in one or both of two methods. Many jurisdictions require disclosure documents in a prescribed format, akin to a securities prospectus, to be provided to the franchisee, who is treated as an investor in the business. [3] Some jurisdictions regulate the substance of the relationship between franchisor and franchisee in a variety of ways, most notably by restricting the right of the franchisor to terminate the relationship – or even not to renew it on expiration of a stated term – except for statutorily limited good cause, often requiring a specified period in which the franchisee may cure any asserted default in performance of the franchise agreement [4] Jurisdictions that regulate franchising often require franchisors to submit to jurisdiction and appoint an agent for service of process in the market nation or state.[5] The franchisor may also be subject to taxation on franchising income.

International regulation of franchising has grown swiftly in recent decades as well. Disclosure laws, relationship regulation, or both, now exist in Canada, Mexico and several Latin America countries, Europe, Asia and the South Pacific, and other regions.[6]

As with independent distributors, control over the sale, distribution and presentation of products and services is by contract, with franchise agreements typically embodying detailed requirements – the prescribed marketing plan of the franchise definition – and often incorporating a operating manual that sets out in detail the required methods of operation imposed by the franchisor.

Costs are higher than for independent distributors, both because of the costs of regulatory compliance and administration to monitor franchisee compliance with the requirements of the franchisor's marketing methods. These costs can be offset by franchise fees, which may be in the form of upfront fees that provide the franchisor with capital, as well as ongoing royalties on sales, which amount to a sharing of the distribution profit earned by the franchisee.

5. Joint ventures

Not really a separate method of distribution, a joint venture can be established by a supplier with its distribution partner in the market country, whether the partner is an agent, distributor or franchisee, by having the local distribution entity owned in part by the supplier. Such equity can provide greater control through the ownership interest and board or management committee representation, although perhaps leading to jurisdictional and tax exposure. Foreign ownership may be restricted or regulated in some countries or industries.

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[3] *See, e.g.*, Federal Trade Commission Franchise Rule, 16 C.F.R. Part 436, *available at* http://www.ftc.gov/os/2007/01/R511003FranchiseRuleFRNotice.pdf; N.Y. Gen. Bus. Law §§ 680 *et seq.*; Calif. Corporations Code §§ 31000 *et seq.*; Arthur Wishart Act (Franchise Disclosure), R.S.O., c. 3 (2000).

[4] *See, e.g.*, N.J. Rev. Stats. §§ 56:10-1 *et seq.*; Wis. Stats. §§ 135.01 *et seq.*

[5] *See, e.g.*, N.Y. Gen. Bus. Law §§ 686; Calif. Corporations Code §§ 31155; Arthur Wishart Act (Franchise Disclosure), R.S.O., c. 3 § 10 (2000).

6 As of April 2017, the following countries have disclosure laws: Belgium, Brazil, France, Spain, Sweden and Taiwan. The following countries have relationship laws: Angola, Belarus, Estonia, Kazakhstan, Kyrgyzstan, Lithuania, Russia and Ukraine. And the following countries have both: Albania, Argentina, Australia, Azerbaijan, China, Georgia, Indonesia, Italy, Japan, Latvia, Macau, Malaysia, Mexico, Moldova, Mongolia, Romania, South Africa, South Korea, Tunisia, Turkmenistan, Vietnam and the Canadian provinces of Alberta, Manitoba, New Brunswick, Ontario and Prince Edward Island, Philip Zeidman, Presentation to ALI CLE Product Distribution and Marketing Course of Study, June 2015, updated April 2017.

6. Licensing manufacturing rights

Another option for manufacturer is simply to license a manufacturer in a target market country to use its intellectual property – whether patent, copyright, trademark or trade secrets – to make its products locally and sell them. While all the implications of licensing intellectual property are beyond the scope of this presentation, care must be taken by the licensor to maintain quality control over the finished product and the use of the intellectual property. Failure to do so can not only put the brand equity at risk, but also risk the loss of trademark protection.[7] Costs of licensing are relatively low, but for the costs of monitoring compliance with license terms, including quality control, and distribution profit is shared by means of royalty payments. Any national regulation of intellectual property licenses, including registration of the license in some nations, must be complied with, and there may be tax and jurisdictional implications in some countries. Of course, the scope of intellectual property protection in the market country must be considered, along with the risk of disclosure of trade secrets and know-how.

7. Private label

Finally, the distribution of products by private label methods amounts to a reverse licensing arrangement, where a distributor or retailer in the market country distributes the supplier's products under its own trademark. In essence, the supplier gives up its own brand name in exchange for the distribution muscle of its local partner, with the benefits of wider distribution and marketing inuring to the strength of the local partner's brand, with supplier reaping no enhanced brand value. Control over sales, distribution and presentation, as well as marketing and advertising, are in the hands of the local brand owner, resulting in negligible distribution costs to the supplier, virtually no control save perhaps for sales and performance benchmarks in the contract, and benefits to the supplier are limited to its profits on sales of the product to the local brand owner.

B. Advantages and disadvantages of each method.

1. Costs and Control over Brand Image and Services

Each of the distribution methods discussed above carries with it varying costs and degrees of control over the brand image, distribution and sales methods used and presentation to the public, which have been discussed briefly above. In addition, the supplier can require distributors, agents, franchisees and licensees to provide certain services, such as product merchandising and point of sale display installation, warranty service, and the like, or may provide such services itself through owned outlets. In private label contexts, such services are generally in the discretion of the local brand owner.

2. Control over resale prices

In addition, suppliers often desire to maintain control over the resale prices of their products, whether out of a desire to maintain brand image, to provide resellers with profit margins that allow for the provision of brand-enhancing services, or, on the other side of the coin, to maintain the price competitiveness of the products and avoid profiteering by resellers. Such control over resale prices is regulated differently by the antitrust and competition laws of different jurisdictions. So long as the supplier itself is making the sale, as with owned outlets and, in most jurisdictions, through a sales

[7] *See, e.g., Kentucky Fried Chicken v. Diversified Packaging,* 549 F.2d 368, 387, (5th Cir. 1977); *Sheila's Shine Products, Inc. v. Sheila Shine, Inc.*, 486 F.2d 114, 123-24 (5th Cir. 1973).

agent, the pricing is unilateral and usually not problematic. But an agreement between independent entities in which the supplier regulates the resale prices of a distributor, franchisee or licensee, raises antitrust or competition law concerns.

In general, U.S. antitrust laws, in the absence of monopoly power, are concerned with concerted action, not unilateral conduct. Moreover, concerted action among competitors – "horizontal" conduct – is generally considered *per se* unlawful, meaning that economic or other justifications will not be heard. Until 2007, the same was true for vertical agreements – that is, agreements between buyer and seller – that set a minimum resale price for the affected product. The Supreme Court overturned that rule in the landmark decision, *Leegin Creative Leather Products, Inc. v. PSKS, Inc*.[8] Now all vertical agreements, whether related to pricing or to non-price matters such as territorial restrictions, are judged under federal law by the "rule of reason," under which the court must determine whether the anticompetitive harm from the conduct is outweighed by potential competitive benefits.[9] The proof required of a plaintiff in a rule of reason case is generally much greater, as are the costs of litigation. And even under *Leegin*, there are several situations in which resale price maintenance could be found to be anticompetitive, such as where resale price maintenance is initiated by dealers rather than suppliers; where most suppliers in an industry use resale price maintenance; and where either the supplier or dealer involved has market power.

In addition, U.S. state antitrust laws do not always follow federal precedent. At least thirteen states "do not strictly adhere to federal precedent in developing and administering their own antitrust laws … [and] do not appear bound, or even likely, or follow *Leegin*'s interpretation of the Sherman Act as to [RPM]."[10] Moreover, eleven states possess antitrust statutes that explicitly bar RPM programs.[11] As a consequence, at least some state attorneys general are likely to continue to address RPM schemes under state law using the *per se* rule.[12] Businesses should be hesitant to adopt RPM

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[8] 551 U.S. 877, 127 S.Ct. 2705 (2007). It is worth observing that the Supreme Court took pains to observe that there were circumstances in which resale price arrangements would be found to be anticompetitive and unlawful.

[9] *See generally Continental T.V. Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977).

[10] *Id.*

[11] *Id.* (citing Richard A. Duncan, Alison K. Guernsey, *Waiting for the Other Shoe to Drop: Will State Courts Follow 'Leegin'?*, FRANCHISE L.J. 173, 174 (Winter 2008), *available at* http://www2.mnbar.org/sections/antitrust/Duncan-Guernsey.pdf; Lindsay, *Resale Price Maintenance and the World After "Leegin,"* 22 ANTITRUST 32 (No. 1, Fall 2007) (ABA), *available at* http://www.dorsey.com/files/upload/antitrust_lindsay_fall07.pdf. Examples of state statutes prohibiting RPM include California (Cal. Bus. & Prof. Code § 16720(e)), Kansas (Kan. Stat. Ann. § 50-112), Maryland (Md Code Ann., Com. Law § 11-204(b)), and New York (N.Y. Gen Bus. Law § 369-a, rendering RPM agreements unenforceable).

[12] For example, in March 2008, the State of New York filed an antitrust complaint against Herman Miller, Inc. in connection with the company's resale price-fixing. "Although filed post-*Leegin*, in keeping with the New York Attorney General's *per se* stance, the complaint pled only *per se* violations of Section 1 of the Sherman Act and the New York, Illinois, and Michigan antitrust statutes." Herman Miller settled for $750,000 and agreed to a court order that prohibits it from agreeing on retail prices with its retailers, from passing on retail prices among its retailers, and from coercing its retailers to agree on a retail price. Additionally, Herman Miller must notify retailers of their right to set their own prices. *See State of New York, et al. v. Herman Miller, Inc.*, No. 08-CV-02977 (S.D.N.Y. March 21, 2008); *FTC Approves Resale Price Maintenance Agreements under Rule of Reason But State AGs Appear Undeterred*, Morgan Lewis antitrust lawflash (May 14, 2008); New York State Attorney General, Antitrust Bureau Feature release *available at* http://www.oag.state.ny.us/bureaus/antitrust/feature.html. A few years later, the Appellate Division, First Department, affirmed dismissal of a *per se* RPM claim brought by the Attorney General in *New York v.Tempur-Pedic International, Inc.*, 2012 NY Slip Op 3557 (1st Dept. May 8, 2012).NY Slip Op 3557 (1st Dept. May 8, 2012), but that case was

programs in this environment, notwithstanding the widely held, but erroneous, belief that the Supreme Court made resale price-fixing lawful in *Leegin*. If an RPM program is to be implemented, counsel needs to review all the facts and determine whether any of the factors described by the Supreme Court in *Leegin* are present, or if there are other indications that the proposed program will have anticompetitive effects rather than enhancing interbrand competition. In addition, a careful analysis of the applicable state laws in each state in which the firm does business needs to be made, to avoid state enforcement and private actions under the state antitrust laws.

And, of course, outside the U.S., resale price maintenance may still run afoul of the competition laws of other jurisdictions. In Europe, non-compliance with prohibitions on resale price maintenance can have daunting consequences. For example, Greek retail giant Carrefour Marinopoulos SA faced a €12.5 million (US$16.1 million) fine in an investigation by Greek antitrust authorities for imposing resale price restrictions among members of its franchise network in violation of European Union competition laws.[13]

3. Ability to end the relationship

As indicated above, some states restrict the ability of franchisors to end a franchise relationship without statutorily-defined good cause. The same is true for non-franchise relationships in certain industries in many U.S. jurisdictions, notably alcoholic beverages, automobiles dealerships, gas stations and, in the Midwest farm belt, farm equipment.[14] In other countries, restrictions on the termination of commercial agents, or mandatory compensation requirements, are not uncommon,[15] and in some cases termination of independent distributors may also be regulated.[16] The advice of local counsel is critical ***before*** a distribution relationship is entered into, so that an arrangement can be structured that offers the greatest ability to end an unsatisfactory relationship.

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brought only under New York General Business Law § 369-a, and not under New York's general antitrust law, the Donnelly Act, which the court did not consider. Moreover, the facts in *Tempur-Pedic* did not involve a true RPM agreement, but rather a unilaterally announced policy which resellers were free to reject at risk of no longer receiving *Tempur-Pedic* products, a practice long permitted under *United States v. Colgate & Co.*, 250 U.S. 300 (1919). Thus the more general question of whether New York law will treat RPM under the rule of reason or continue to apply the *per se* rule remains unresolved.

[13] *See* "Carrefour Marinopoulos Fined €12.5M for Price-Setting", *available at* http://www.law360.com/web/articles/181155 (subscription required).

[14] *See, e.g.* 15 U.S.C. §§ 1221 et seq. (automobile dealers); 5 U.S.C. §§ 2801 *et seq*. (motor fuel); N.Y. Alc.Bev. Control Law § 55-c (beer); N.Y. Gen.Bus. Law §§ 195 *et seq.* (motor vehicles); N.Y. Gen.Bus. Law §§ 199-a *et seq.* (motor fuel); Kan.Stat.Ann. §§ 16-1201 *et seq.* (farm equipment).

[15] *See, e.g.*, EC Commercial Agents Directive (86/653/EEC) (implemented by national legislation, *e.g.*, "Gesetz zur Durchführung der EG-Direktiv zur Koordinierung des Rechts der Handelsvertreter" dated 23 October 1989 Germany; Commercial Agents Regulations 1993 (UK)).

[16] *See, e.g.*, Law on the Unilateral Termination of Exclusive Distribution Agreements of Indefinite Duration, Act of July 27, 1961 (Belgium).

APPENDIX OF KEY DISTRIBUTION CONTRACT TERMS

The distribution agreement is the critical document defining the rights and obligations of the parties in any distribution relationship, and thus must be drafted carefully, with a full understanding of the business relationship intended and each party's objectives. We can address here only a few of the key provisions.

1. Product definition

The contract should specify whether the distributor has the right to buy the supplier's entire line or only specified products. The supplier may be given the right to reduce the range of products sold to the distributor, under certain specified circumstances. It is important to consider how broadly or narrowly to define the products, as well as the extent to which product characteristics may be changed. For example, a product definition tied to a trademark may leave a distributor without a product if the trademark is changed or a separate one adopted for new products. It is also necessary to decide whether to give the distributor an option or right of first refusal with respect to any new products the supplier may introduce in the future, or to require the distributor to handle such products. In addition, it may be important to specify whether different products or product lines are part of a single distribution agreement or are separable. In one case in which different product lines were included in separate product addenda, they were held to constitute separate franchises, so that the termination of one product line violated a state franchise law. This might not have been the case had the various product lines been part of a single franchise, since a substantial portion of the franchise would have continued.[17]

2. Exclusivity

The distributor may be granted exclusive rights in the territory, or the supplier may sell to others.[18] The distributor may require the supplier to provide protection against "gray market" imports from other distributors outside the Territory.[19] Another option is to require distributors

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[17] *General Motors Corp. v. Gallo GMC Truck Sales, Inc.*, 711 F. Supp. 810 (D.N.J. 1989). *Contra Central GMC Inc. v. General Motors Corp.*, 946 F.2d 327 (4th Cir. 1991).

[18] A supplier's express reservation of rights to sell to others has been held to defeat Puerto Rico dealers' claims that the supplier's sales to others had impaired its existing relationship in violation Law 75, Puerto Rico's strict Dealers' Act. *Graphics Supply, Inc. v. Polychrome Corp.*, BUS. FRAN. GUIDE (CCH) ¶ 11,192 (1st Cir. 1997) (not for publication); *Vulcan Tools of Puerto Rico v. Makita USA, Inc.*, 23 F.2d 564 (1st Cir. 1994).

[19] Alternatively, for trademarked goods, importation of goods bearing the trademark, even if genuine, can be blocked through the U.S. Customs and Border Patrol Service, provided the non-U.S. manufacturer is not affiliated with the U.S. trademark owner, under § 526(a) of the Tariff Act, 19 U.S.C. § 1526, which prohibits the importation of a product manufactured abroad "that bears a trademark owned by a citizen of … the United States and … registered in the U.S. Patent and Trademark Office." In addition, where the parallel imported goods are materially different from the U.S. goods in quality, features, warranty or the like, it may be possible to take action on a theory of trademark infringement where customer confusion is likely to result. *See, e.g., Original Appalachian Artworks, Inc. v. Granada Electronics, Inc.*, 816 F.2d 68 (2d Cir. 1987); *Dial Corp. v. Manghnani Inv. Corp.*, 659 F. Supp. 1230 (D.Conn. 1987).

selling outside their principal territory to pay a portion of their profits over to the distributor in whose territory the sale was made. The supplier may reserve the right to sell to certain types of customers (for example, "national accounts," governmental customers or military bases) directly. Some national retailers insist on purchasing directly from the manufacturer, so reserving the right to make such sales may be critical. In such situations, the distributor may receive compensation for those sales in the form of a per unit or percentage "invasion fee."

The supplier should consider its own long-term goals before granting an exclusive territory to a distributor, particularly in relation to the supplier's possible plans for direct marketing on the internet. One American Arbitration Association decision held that the establishment of a franchisee's exclusive territory precludes internet sales by the franchisor to customers located within the franchisee's territory.[20] (Another arbitration panel came to the opposite conclusion, finding H&R Block's internet offering of its tax preparation services did not unreasonably intrude on the franchisee's operations and so did not violate the exclusive territory provisions of the franchise agreement.)[21] Some state statutes for specific industries also preclude direct sales by suppliers on the internet, and the supplier should be aware of these state regulations when determining exclusive territories.[22]

3. Restrictions on Competition

If the supplier will be providing valuable competitive information to the distributor, including information regarding customers and their needs, a restriction on competition by the distributor with the supplier during and after the agreement may also be advisable, particularly if trade secrets are to be disclosed to the distributor. Otherwise, a knowledgeable distributor could do substantial damage by selling competing products to the supplier's customers. A review of local law is important here, as jurisdiction, differ widely in their treatment of such clauses, with some holding such restrictions to be entirely unenforceable.[23]

To be enforceable in the U.S., at least after the agreement ends, such clauses generally must

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There is much less ability to restrict gray market importation under a copyright theory. The Supreme Court held just this year, in *Kirtsaeng v. John Wiley & Sons, Inc*., 133 S. Ct. 1351 (2013), that a copyright owner cannot exercise any control over a copyrighted work after its first sale, even if that first sale occurs abroad. Moreover, reliance on an insubstantial element of a product protected by copyright to attempt to block parallel imports may be held to be copyright misuse, which blocks enforcement of the copyright. *Costco Wholesale Corp. v. Omega S.A.*, 2011 U.S. Dist. LEXIS 155893 (E.D. Cal. 9 Nov. 2011).

[20] *Emporium Drug Mart., Inc. of Shreveport v. Drug Emporium, Inc*., AAA Case No. 71-114-00126-00(2000), *reported at* BUS. FRANCH. GUIDE (CCH) ¶ 11,966.

[21] *Matter of Arbitration between Franklin 1989 Revocable Family Trust and H&R Block, Inc.*, BUS. FRAN. GUIDE (CCH) ¶12,473 (December 31, 2002).

[22] *See, e.g., Ford Motor Co. v. Texas Department of Transportation*, 106 F. Supp. 2d 905, 2000 U.S. Dist. LEXIS 11666 (2000) (W.D. Tex. 2000) (operation by Ford Motor Company of web site allowing prospective purchasers within the state of Texas to view previously owned vehicles and arrange for them to be viewed at a local dealer brought Ford within the statutory definition of a dealership, thereby violating the Texas law prohibiting a manufacturer from operating or controlling a dealership).

[23] *See, e.g., Cottman Transmission Sys., Inc. v. Melody*, 851 F. Supp. 660 (E.D.Pa. 1994) (Calif. law); *Scott v. Snelling and Snelling, Inc*., 732 F. Supp. 1034 (N.D. Cal. 1990).

be "ancillary" to the agreement and in furtherance of the agreement's lawful purposes.[24] Courts have applied a reasonableness standard in assessing whether a noncompete clause is enforceable, taking into consideration (i) the length of time,[25] geographic area, and activities restricted; (ii) the hardship to the distributor; and (iii) the public interest.[26]

In all cases, it is critical to define precisely the competition that is prohibited. Rather than simply referring to "competing products," it is important to define what is intended. To illustrate the potential spectrum, a distributor of craft beers might restricted from distributing other beverages, alcoholic beverages, beers, craft beers, craft beers from a specified country or region, or craft beers from a specified country or region in a specified style. Rather than allow a court to determine what "competing products" means along such a spectrum, it is best for the parties to define it themselves.

4. Indemnification and Insurance

A distributor typically will want protection against third party claims, in the form of an indemnification, insurance or both. Third party claims can include claims under a product warranty, product liability, and infringement of patents, trademarks or copyright, or claims by a prior distributor of interference. To the extent that the distributor also fabricates or assembles the product, incorporates it into another product or services it, the supplier may require the distributor to identify it for third party claims arising out of those activities.

In examining this issue it is necessary to consider the nature of the product and the use (industrial vs. consumer), as well as the service or assistance which is given to a customer by the manufacturer or distributor. The scope of indemnification should be spelled out, whether it covers all losses or only third party claims, as well as whether the indemnification includes attorneys' fees and either the right or the duty to assume the defense of any claims, and whether it includes only proven claims or all allegations of covered claims. If insurance will be required of either party, the amount should be specified and the other party should be named as an additional insured.

5. Termination

The parties will generally wish to specify the basis on which the agreement may be terminated. Local laws may restrict these grounds.[27] Among the issues to be considered are the

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[24] *See United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 282 (6th Cir. 1898), *modified and aff'd*, 175 U.S. 211 (1899) ("[N]o conventional restraint of trade can be enforced unless the covenant embodying it is merely ancillary to the main purpose of a lawful contract, and necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party").

[25] A case in New York held that a one year non-compete clause was unreasonable in duration as applied to an editor for a technology information publication, because of the speed at which the Internet industry moves. In that context, the court held, one year is "several generations, if not an eternity." *Earth Web, Inc. v. Schlack*, 71 F. Supp. 2d 299, 316 (S.D.N.Y. 1999).

[26] *See, e.g.*, *Interstate Automatic Transmission Co. v. W.H. McAlpine Co.*, 1981 WL 2193, 1982-1 TRADE CAS. (CCH) ¶ 64,538 (N.D. Ohio 1981); *see generally* RESTATEMENT OF CONTRACTS § 514 (1932). Post-term noncompete clauses have been upheld if they are short in duration and in a limited geographic area. *See, e.g.*, *Wilkinson v. Manpower, Inc.*, 531 F.2d 712 (5th Cir. 1976) (in a six-county area; for two years); *Meineke Discount Muffler Shops, Inc. v. Bleier*, Civ. Act. No. H-80-2495 (S.D. Tex. 1981) (25-mile radius of former shop; for one year); *Shakie's, Inc. v. White*, No. 77-106, slip op. (E.D. Mo. 1977) (within 30 miles of the franchised location; for one year); *Snelling & Snelling, Inc. v. Dupay Enters., Inc.*, 125 Ariz. 362, 609 P.2d 1063 (1980) (within 35 miles of franchised location; for three years).

[27] *See, e.g.*, Cal. Bus. & Prof. Code § 20020 *et seq*.

following:

a. *Without Cause*. May either party terminate without cause? If so, this should be explicitly stated.[28]

b. *Performance Standards*. The inclusion of mandatory performance standards appropriate to the product, industry and territory may be desirable. They can be stated in dollar or local currency terms, unit terms, as a percentage of average regional or national performance, in terms of market share, or on some other basis. Sales figures are generally better for the supplier and worse for the distributor than purchase requirements; the latter, if they force a dealer to buy more product than it can sell, might be deemed a franchise fee. Moreover, if achievement of standards results in automatic renewal, standards based on purchases rather than sales allows the dealer to obtain a renewal by buying into inventory without genuinely building a larger market for the product. If the intent is to allow the supplier to terminate or not renew if minimum standards are not met, this should be explicitly set forth. Distributors will wish to make clear that termination is the only remedy for failing to meet the standard and that there is no liability for damages as a result of any shortfall. Similarly, the supplier may wish to provide for a right to terminate if the parties cannot agree on new minimum standards for a renewal term, while distributors should resist such a provision.

Courts may examine the reasonableness of performance standards.[29] The supplier, in setting the standards, thus should be prepared to exercise the right to terminate consistently among those who do not meet the standard.[30] An alternative is to provide for the right to add additional distributors (*i.e.*, to terminate the distributor's exclusivity) if performance levels are not reached.[31]

c. *Other Breaches*. The parties should specify what breaches justify termination and when, if ever, the party in breach is to be afforded an opportunity to cure, and in what period. It may be prudent to stipulate that certain breaches are agreed to be noncurable.

d. *Changes in Ownership and Control*. The supplier may provide that a change in ownership, management, or control of the distributor justifies termination. Some conditions might be included. For example, termination might be permitted upon a transfer of some percentage of the ownership of one or the other party or upon the replacement of specified officers.

e. *Financial Problems*. The supplier may wish to terminate if the distributor is financially unstable. The triggering event can include liens (other than routine financing

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[28] But see notes 4 and 5 above and accompanying text.

[29] *See, e.g., R&R Assocs. of Connecticut, Inc. v. Deltona Corp.*, BUS. FRAN. GUIDE (CCH) ¶ 7526 (D. Conn. 1980); *see generally* E. Spalty and T. Dicus, *Risky Business: Franchise Terminations for Failure to Meet Performance Quotas*, FRANCH. L.J., Spring 1987, at 1.

[30] *See, e.g., Marquis v. Chrysler Corp.*, 577 F.2d 624, 632-33 (9th Cir. 1978) (the selective enforcement of an unrealistic quota may violate the federal Automobile Dealer's Day in Court Act).

[31] This option may not be available in some industries in some states where the practice of "dualing" may be prohibited. *See, e.g.*, Ga. Regs. §560-2-5.02 (Alcohol Beverage Control regulations).

liens), insolvency, the inability to pay debts as they become due, or bankruptcy. Note that if the agreement has not been terminated before a bankruptcy filing, section 365 of the U.S. Bankruptcy Code will allow the distributor the option to reject the contract or to affirm it and so prevent termination unless independent grounds for termination exist apart from the bankruptcy.[32] This suggests providing for a right to terminate for insolvency prior to bankruptcy, although to terminate for insolvency, the supplier may be required to have had knowledge of the insolvency at the time of termination.[33]

Finally, the distributor may wish to be compensated upon termination for the value of its lost distribution rights. Suppliers will generally resist such compensation, although they should consider the benefit of an increased incentive for the distributor to invest in the brand if it knows it will be fairly compensated for the value of its distribution rights on termination, especially given that the incoming distributor should ordinarily be willing to pay fair value for the rights it is obtaining. The practice varies from industry to industry and from jurisdiction to jurisdiction. Beer distribution rights in the U.S. are regularly paid for on termination, and indeed such compensation is required by law in some states.[34] In contrast, such compensation is atypical for wine and spirits, a distinction perhaps lacking in any internal logic.

Assuming compensation is to be provided, the parties may wish to define the basis upon which it is determined. Fair market value, whether based on appraisal or economic analysis, or formulae based upon multiples of sales, gross profits, net profits or other factors, are all possibilities. If the distributor does not pay for the distribution rights initially, then compensation on termination might be based only on increases in value, sales or profits over the life of the distributorship.

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[32] 11 U.S.C § 365. A termination notice given before the bankruptcy filing, but effective afterward, generally will be given effect, so long as only the passage of time is necessary for the termination to become effective, *i.e.*, there is no right to cure remaining after the time of filing. *See Atlantic Richfield Co. v. Herbert*, 806 F.2d 889 (9th Cir. 1986); *Moody v. Amoco Oil Co.*, 734 F.2d 1200, 1212-13 (7th Cir. 1984). *But cf. In re Krystal Cadillac Oldsmobile GMC Truck, Inc.*, 142 F. 3d 631, BUS. FRAN. GUIDE (CCH) ¶ 11,389 (3d Cir. 1998) (where termination was not effective until rejection of appeal by Pennsylvania Vehicle Board, and appeal was not rejected until after bankruptcy filing, franchise agreement was part of bankruptcy estate and subject to automatic stay).

[33] *See Bruno Wine & Spirits, Inc. v. Guimarra Vineyards*, 573 F. Supp. 337 (E.D.Wis. 1983) (applying Wisconsin Fair Dealership Law).

[34] *E.g.*, N.Y. Alc. Bev. Law §55-c; New Jersey Malt Alcoholic Beverage Practices Act, N.J.S.A §§33:1-93.13 *et. seq*.

Tannenbaum Helpern Syracuse & Hirschtritt LLP

DISTRIBUTION OPTIONS

L. Donald Prutzman
Tannenbaum Helpern Syracuse & Hirschtritt LLP,
New York

New York State Bar Association
International Section Bridging The Gap
New York, New York June 14, 2018

Providing Solutions®

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Owned Outlets

- Simple, do-it-yourself
- Hire own employees, directly or through subsidiary

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Sales Agents

- Hire local agent
- Agent:
  - Arranges sales, performs merchandising
  - Does not take title
  - Receives commission on sales
- Agent or supplier:
  - Advertises and markets
  - Fulfills sales
  - Bills and collects

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Independent Distributors

- Distributor buys from supplier
- Takes title and resells at profit

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Franchising

- Essentially an independent distributor with specific elements:
  - License to use trademark in business name or products
  - Prescribed marketing plan or method of operation
  - Franchise fee
  - (Fee plus *either* of first two elements in NY)
- Disclosure/registration requirements
- Restrictions on termination, other aspects

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Joint Ventures

- Partial ownership of foreign distribution partner
- JV can be agent, distributor, franchise

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Licensing Manufacturing Rights

- IP owner licenses manufacturer in target market
  - Patent, copyright, trademark or trade secrets
- Manufacturer makes goods, sells them at profit
- Licensor receives royalty

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Private Label

- **Reverse licensing: Target market retailer distributes under own brand**

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+/-: Costs & brand image control Owned outlets

Advantages

- **Maximum control**
  - **Marketing**
  - **Presentation**
  - **Sales methods**
  - **Service**
- **Retain all profits**

Disadvantages

- **Bear all costs**
  - **Start-up capital**
  - **Facilities and equipment**
  - **Employees**
  - **Administration and overhead**
  - **Collection risk**
- **Jurisdiction for liability**
- **Taxation**
- **Regulatory compliance**
  - **Foreign ownership restrictions**
  - **Qualify to do business**
  - **Employment laws**
- **Less local knowledge?**

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+/-: Costs & brand image control Sales agents

Advantages

- Local knowledge
  - Market conditions
  - Customs and culture
- Agent bears local costs
- Avoid employment laws?
  - Corporate agent with own EEs?
- Options for allocating duties, costs
  - Advertising and marketing
  - Delivery, billing, collection
    - Risk of loss could mean not a true agent
- Control through contract

Disadvantages

- Regulatory compliance
  - Doing business through agent
- Taxation?
  - Where is sale made?
- Employment laws?
  - Could agent be deemed EE?
- Cost of commissions
- Barriers to and costs associated with termination

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+/-: Costs & brand image control Independent Distributors

Advantages

- Local knowledge
  - Market conditions
  - Customs and culture
- Local costs borne by distributor
- Potential to avoid jurisdiction, taxation
- Option to retain or assign advertising and marketing role

Disadvantages

- Give up distribution profit
- Some nations tax payments to foreign businesses
- Reduced control, except by contract
- Potential liabilities and costs of termination
- Possible protection to domestic distributors

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+/-: Costs & brand image control Franchising

Advantages

- **Similar to independent distributor advantages**
- **Franchise fee may provide working capital/income**
- **Control though marketing plan, contract**

Disadvantages

- Give up some distribution profit (but franchise fees)
- Some nations tax payments to foreign businesses
- Regulatory compliance vs. lack of regulation
- Administrative costs to monitor franchisees
- Risk of poor performance

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+/-: Costs & brand image control Joint Ventures

Advantages

- Same pluses as form used
- Added control through ownership, management rights

Disadvantages

- Same minuses as form used
- Potential jurisdictional and tax exposure
- Some nations restrict foreign ownership
- Beware of minority protection

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+/-: Costs & brand image control
Licensing manufacturing rights

Advantages

- Very low cost
- Royalty income

Disadvantages

- Cost to monitor license compliance, especially QC
  - Risk to brand equity, TM
- Risk of lax IP enforcement in target country
- License registration?
- Foreign payment restrictions?
- Loss of distribution profit
- Reduced control, except by contract
- Tax Implications

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+/-: Costs & brand image control
Private Label

Advantages

- Minimal costs
- Partner's distribution strength and scope

Disadvantages

- No brand equity
- No control over marketing, sales or service
  - Can have performance standards
- Potential consumer protection liability

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+/-: Control of resale prices

- Reasons for control
  - Brand image
  - Enhance profit margin for services
  - Cap profit margin for competiveness
- Regulation of RPM
  - Varies by jurisdiction, even within US
  - Europe prohibits (pressure to comply with suggested resale price)
  - Latin America: Relative monopolistic practice
  - *Leegin*: US Supreme Court applies rule of reason
    - But anticompetitive in some circumstances
  - States may differ: NY, CA, NJ, MD, others
  - Generally OK if unilateral – supplier makes "resale"

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+/-: Control of resale prices

RPM Permitted

- Owned Outlets
- True Agents
- Controlled joint venture

RPM Restricted

- Independent distributors
- Franchisees
- Licensees
- Minority joint venture

Alternative methods

Colgate policy: Unilateral condition for dealing
Minimum Advertised Price policy
-- Condition for dealing
-- Condition for co-op payments

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+/-: Termination Rights

Unrestricted

Subject to contract terms:

- Owned outlets
- True agency in US
  - Some payment requirements
- Most independent distributors
  - But Belgium
- Some franchises
- Most licenses

Restricted

- Agents in EU (Mandatory compensation – Dir 86/653/EEC)
- In L.A by operation of law or old contracts prior to legal amendments
- Some U.S. franchises
  - Notably CA, NJ, WI, PR, VI
- Some industries, some states
  - Beer, wine, spirits
  - Auto dealers, gas stations
  - Farm equipment
  - Others

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+/-: Termination Rights

- Typical restrictions:
  - Good cause – narrowly defined
  - Right to cure
  - Right to renew
  - Injunctive relief
    - May need to show irreparable harm
  - Fair market value of distribution rights
  - Unilateral modifications or certain discretionary prerogatives

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Lessons

- **Differences are very fact-based and vary by jurisdiction**
- **The time to plan is *before* selecting a method of distribution**

Get knowledgeable local counsel early

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Key Contract Provisions: Product Definition

- Specified products only
- All products under specified TMs
- All products meeting specifications
- Right of first refusal for new products
  - Same TM
  - Other TM
- Single agreement for all products
- "Most favored" provision

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Key Contract Provisions: Exclusivity

- May supplier sell to others in territory
- May supplier sell directly in territory?
- Protection against gray market imports?
- Profit passover or invasion fees
- Reserved customers or categories
  - National or regional accounts
  - Invasion fees
- Internet sales

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Key Contract Provisions: Exclusivity

- **Distributors generally want exclusivity**
  - **Avoids free-riding**
  - **Allows coordinated marketing of portfolio**
  - **Focus is on interbrand competition with competing brands, not intrabrand**
- **Should suppliers want exclusivity?**
  - **Do you want distributors competing with each other or with your competitors? On price or other metrics?**
  - **Does product require investment in:**
    - Marketing and promotional events
    - Education and other pre-sales service
    - Warranty or other service

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Key Contract Provisions: Restrictions on Competition

- Competing products restrictions
  - Need to define specifically
    - **Beverages**
    - **Alcoholic beverages**
    - **Beer**
    - **Imported beer**
    - **German beer**
    - **Dark beers from Germany**
    - **Munich Oktoberfest style beers**
    - **Bottled Munich Oktoberfest style beers**
  - During term v. post-term

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Key Contract Provisions: Restrictions on Competition

- Ancillary to agreement's purpose
- Reasonable as to:
  - Duration
  - Geographic scope
  - Activities restricted

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Key Contract Provisions: Indemnification and Insurance

- Breaches
- Product liability, recalls
  - Distributor modification, storage, handling
- IP infringement
- Claims of prior distributor
- Proven claims v. alleged claims
- Liability insurance
  - Amounts
  - Additional named insured

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Key Contract Provisions: Termination

- Without cause where lawful
- Performance standards
  - Sales v. purchases
  - Sales v. execution
  - Consistency of enforcement
- Other breaches
- Changes in ownership or control
- Financial condition

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Key Contract Provisions: Termination

- **Notice**
  - **Cure periods**
- **Inventory repurchase**
  - **Mandatory**
  - **One party's option**
  - **Mutual option**
  - **As agreed**
- **Non compete/Non solicitation**

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Key Contract Provisions: Termination

- **Compensation**
  - **Formula**
    - Sales multiple
    - Profit multiple
    - Others
  - **Fair market value**
  - **Fair compensation encourages distributor investment**
  - **New distributor more likely to pay for rights**

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Key Contract Provisions: FCPA Compliance

- **Foreign Corrupt Practices Act prohibits bribery of foreign officials, political parties, candidates**
- **Strict liability for acts of controlled joint venture**
- **Liability for 3rd party acts – *e.g.*, agents, distributors – if knowledge**
  - **Constructive knowledge, willful blindness, deliberate ignorance**

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Key Contract Provisions: FCPA Compliance

- **Take steps before, in and after contract**
  - **Due diligence to vet potential partners**
  - **Contract provisions**
    - Representation that have not violated
    - Agreement to comply – spell it out
    - Reporting obligations, audit rights
    - Subdistributors require due diligence, approval
    - Provisions are material, ground for termination
  - **Ongoing training, monitoring, audit**s

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Thank you

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VI. International Tax

WATSON FARLEY
&
WILLIAMS

BRIDGING THE GAP: INTERNATIONAL TAX

DANIEL PILARSKI
WATSON FARLEY & WILLIAMS
JUNE 14, 2018

International Tax: Challenges

- Multiple Dimensions of International Tax
  - Residence: Individual & entity
  - Source of Income
  - Inbound vs. Outbound Taxation
  - FDAP vs. ECI
  - Treaties
  - Currency
  - Cross-border reorganizations

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Residence; Form of Entity

- US citizens
- Residence – green card holder; physical presence test
- Corporations – place of incorporation
- Trusts
- Estates
- Problem of partnerships
- Check-the-box rules

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Source of Income

- Interest
- Dividends
- Rents/Royalties
- Services
- Sale of goods – inventory/non-inventory
- Other

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FDAP

- FDAP: Fixed or determinable annual or periodical income
- Interest: Portfolio interest exemption
- Dividends
- Rents/royalties
- Services
- Miscellaneous other

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Withholding

- General 30% rate
- Tax Forms: W-8/W-9
- Treaties
- US real estate: FIRPTA
- Partnership withholding
- New rules re: sale of partnership interests
- Foreign Account Tax Compliance Act (FATCA)

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ECI: Effectively Connected Income

- Net income taxation
- US trade or business
- Treaties: permanent establishment
- Agency
- Problem of real estate; FIRPTA
- Offshore securitizations: loan origination; insurance
- Foreign corporations: branch profits tax

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Outbound taxation

- Substantial changes under Tax Cut and Jobs Act (TCJA)
- General principles
  - Worldwide taxation of all US persons
  - Foreign tax credits
  - Deferral: Less relevant due to TCJA

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Foreign Tax Credits

- Foreign Tax Credits
- FTC limitation; basketing
- Indirect FTCs: Repealed (except for Subpart F/GILTI)

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Subpart F; PFICs

- Current taxation of Subpart F income earned by controlled foreign corporations (CFCs)
- CFCS: New attribution rules
- US shareholders: New rules
- Subpart F income
  - Foreign Personal holding company income: Interest, dividends, rents, royalties
  - Active income exceptions
  - Leases vs. service income

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Subpart F; PFIC (continued)

- Related CFC exemption
- Active financing exception
- Foreign base company sales/services income
- Section 956
- Indirect credits for Subpart F/GILTI
- PFIC: Passive Foreign Investment Company
  - Technical definition
  - Taxation of PFICs
  - Qualified Electing Fund (QEF)/Mark to Market (MTM)

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New Rules Under TCJA

- Section 965: End of past deferral
- 245A: Territoriality?
- Global Intangible Low-Taxed Income (GILTI)
- Foreign-Derived Intangible Income (FDII)
- Base Erosion and Anti-Abuse Tax (BEAT)

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Hot Topics

- Transfer Pricing
- Inversions
- Outbound transfer of intangible assets
- Debt/Equity Regulations
- BEPS: Base Erosion and Profit Shifting

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VII. Immigration law

FRAGOMEN
WORLDWIDE

Immigration Law

Thursday, June 14, 2018
5:10 – 5:40 pm

Careen Shannon, Partner, *Fragomen, Del Rey, Bernsen & Loewy, LLP* (New York)

The international movement of people across borders creates many challenges and issues for immigrants, their places of origin, and their destination country. Learn the basics of U.S. immigration law, including the current posture and likely future developments and the most commonly used visa programs, to better advise your clients in this important area.

Topics:

1. Overview of U.S. immigration law and policy
2. Most commonly used visa programs for nonimmigrants
3. Employment-based and family-based immigrants
4. Humanitarian programs
5. Immigration considerations in corporate restructuring
6. Employment eligibility verification for employers
7. Compliance and enforcement
8. The critical need for lawyers in immigration court proceedings

CLE Materials:

1. U.S. Immigration Law Basics (*PowerPoint presentation*)
2. U.S. Immigration Snapshot (*Fragomen handout*)
3. Restrictive Practices Heat Map – Americas (*Fragomen handout*)
4. Restrictive Practices Heat Map – Europe *(Fragomen handout)*

With You
TODAY

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AGENDA

- Overview of U.S. immigration law and policy
- Most commonly used visa programs for nonimmigrants
- Employment-based and family-based immigrants
- Humanitarian programs
- Immigration considerations in corporate restructuring
- Employment eligibility verification for employers
- Compliance and enforcement
- The critical need for lawyers in immigration court proceedings

Trump Administration
IMMIGRATION PRIORITIES

- The travel ban
- Funding for border and enforcement infrastructure and personnel, including a Southern Border wall
- Adopting a points-based migration system
- Implementing the Buy American, Hire American executive order
- Limiting family-based sponsorship to end "chain migration," terminating diversity immigration program, terminating DACA
- Increased federal enforcement powers, including greater interagency and state/local collaboration

Involved Government
AGENCIES

- Department of Homeland Security (DHS)
  - United States Citizenship & Immigration Services (USCIS)
  - Immigration & Customs Enforcement (ICE)
  - Customs & Border Protection (CBP)
- Department of Labor (DOL)
  - Office of Foreign Labor Certification
  - PERM Processing Centers
  - National Prevailing Wage Center (NPWC)
  - State Workforce Agencies (SWAs)
- Department of State (DOS)
  - Bureau of Consular Affairs
  - U.S. Embassies and Consulates

Legal and Regulatory
SOURCES

- Immigration and Nationality Act
- Subsequent legislation
- Agency regulations of DHS, DOL and DOS
- State Department Foreign Affairs Manual (FAM)
- Agency memoranda & operating procedures
  - Not always consistent
  - Frequent changes

MOST COMMON U.S. VISA PROGRAMS

NONIMMIGRANTS

- Foreign nationals coming to the U.S. temporarily
- Must retain residence abroad in most cases
- Some are permitted to have "dual intent"
  - May enter as a non-immigrant *and* pursue permanent residence
  - Available to H-1Bs and L-1s only
- "Alphabet Soup" of nonimmigrant classifications, from A to V

Most Common NONIMMIGRANT VISAS

- Business visitors (B-1) and tourists (B-2)
- Professionals (H-1B, TN, E-3, H-1B1)
- Intracompany transferees (L-1)
- Treaty traders and investors (E-1 & E-2)
- Persons of extraordinary ability (O-1)
- Athletes and entertainers (P)
- Students (F & M)
- Trainees (J-1 & H-3)

IMMIGRANTS

- "Green card holders" = "permanent residents" = "immigrants"
- Foreign national is coming to U.S. permanently
- There are limits on the number of foreign nationals who can attain permanent residence in a given year
  - 675,000 overall "flexible" cap on permanent immigration each year
  - Cap does not include "immediate relatives" of U.S. citizens
- State Department's monthly visa bulletin controls flow of immigrant visas, based on:
  - Foreign national's immigration category
  - Foreign national's country of birth
  - Priority date: the date a preference petition or labor certification (if required) was filed on foreign national's behalf
  - Overall demand for immigrant visas, whether others with earlier priority dates are waiting in the queue

Bases of PERMANENT RESIDENCE

- Family-based
  - Foreign national is sponsored by a qualifying family member who is a U.S. citizen or permanent resident
  - Limited to 480,000 immigrant visas each year
- Employment-based
  - Foreign national is sponsored by an employer on the basis of a job offer
  - Foreign national may self-sponsor in some cases
  - Limited to 140,000 per year
- Diversity visa lottery
  - Foreign national enters online State Department lottery during designated timeframe
  - If chosen, foreign national can submit permanent residence application the following fiscal year
  - Limited to 50,000 each year

Family-Based
PERMANENT RESIDENCE

- Immediate relatives
  - Spouses and minor children (under 21) of U.S. citizens
  - Parents of U.S. citizens 21 or over
  - Not subject to immigrant visa quotas or waiting periods
- Other close family members of citizens or permanent residents, including:
  - Unmarried sons & daughters (over age 21) of citizens
  - Married sons & daughters of citizens
  - Spouses, children & unmarried sons/daughters of permanent residents
  - Brothers & sisters of citizens
  - Subject to immigrant visa quotas and waiting periods

Employment-Based
PERMANENT RESIDENCE

Two- or three-step process:

(1) Labor certification (where required)
- Filed with Dept. of Labor by employer on behalf of foreign national
- Processed under PERM system

(2) Immigrant preference petition
- Form I-140 immigrant worker petition filed by employer or, in some cases, by foreign national
- Processed by USCIS

(3) Adjustment of status or consular processing
- Adjustment or immigrant visa application filed by the foreign national and family members

Employment-Based
CATEGORIES

- Principal employment-based categories:
  - EB-1: Priority workers
  - EB-2: Advanced-degree professionals & persons of exceptional ability*
  - EB-3: Professional, skilled & unskilled workers*
- Other employment-based categories for investors, religious workers

(* labor certification required)

Humanitarian
PROGRAMS

- Refugee resettlement
- Asylum
- Temporary Protected Status
- Violence Against Women's Act (VAWA) visas
- T visas for trafficking victims
- U visas for certain victims of crime in the United States

Immigration
CHALLENGES

A corporate restructuring can present unique immigration challenges:

- Human Resources and Mobility teams left out of restructuring plans until late in process, leaving little time for immigration filings (often, not enough time)
- Access to information – key information necessary for immigration is considered "top-secret" by legal or business teams until too late
- Employee stress levels increase substantially during a restructuring; the volume of questions increases and the queries become more demanding

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Key
CONSIDERATIONS

- Due Diligence
- Compliance Risks
- Transactional Work
- Talent Retention and Future Needs

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Questions to
CONSIDER

The Deal
- What is the company doing?

The Employees
- What will this mean for the immigration-supported employee population?

The Timing
- What is the current status or stage of the deal?
- What is the target closing date? Is there a different employee transfer date?
- When do immigration-supported employees need to be "in place"?

Practical Details
- Globally, what countries are involved in the transaction?
- How many immigration-supported employees are in each country?

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EMPLOYMENT ELIGIBILITY VERIFICATION

Statutory
AUTHORITY

Immigration Reform and Control Act of 1986

- Obligations imposed on employers:
  - Prohibits knowingly hiring or continuing to hire unauthorized workers
    - Employers may be liable for "constructive knowledge" (8 USC § 1324a)
  - To verify the identity and employment eligibility of new hires post Nov. 6, 1986 (8 USC § 1324a)
    - Verification must be documented on Form I-9
  - To avoid "immigration-related unfair employment practices" (8 USC § 1324b)

Government Agencies
INVOLVED

- U.S. Citizenship and Immigration Service (USCIS), part of DHS, is the agency formulating the policies and publishing forms and regulations
- Immigration and Customs Enforcement (ICE), part of DHS, is the agency enforcing the regulations and imposing penalties against employers
- Immigrant and Employee Rights (IER) Section, USDOJ Civil Rights Division (formerly the Office of Special Counsel for Immigration-Related Unfair Employment Practices), enforces the anti-discrimination provisions and has independent ligation authority
- Various state and local agencies

List of
ACCEPTABLE DOCUMENTS

LISTS OF ACCEPTABLE DOCUMENTS
All documents must be UNEXPIRED

Employees may present one selection from List A
or a combination of one selection from List B and one selection from List C.

LIST A Documents that Establish Both Identity and Employment Authorization	OR	LIST B Documents that Establish Identity	AND	LIST C Documents that Establish Employment Authorization
1. U.S. Passport or U.S. Passport Card		1. Driver's license or ID card issued by a State or outlying possession of the United States provided it contains a photograph or information such as name, date of birth, gender, height, eye color, and address		1. A Social Security Account Number card, unless the card includes one of the following restrictions: (1) NOT VALID FOR EMPLOYMENT (2) VALID FOR WORK ONLY WITH INS AUTHORIZATION (3) VALID FOR WORK ONLY WITH DHS AUTHORIZATION
2. Permanent Resident Card or Alien Registration Receipt Card (Form I-551)		2. ID card issued by federal, state or local government agencies or entities, provided it contains a photograph or information such as name, date of birth, gender, height, eye color, and address		2. Certification of Birth Abroad issued by the Department of State (Form FS-545)
3. Foreign passport that contains a temporary I-551 stamp or temporary I-551 printed notation on a machine-readable immigrant visa		3. School ID card with a photograph		3. Certification of Report of Birth issued by the Department of State (Form DS-1350)
4. Employment Authorization Document that contains a photograph (Form I-766)		4. Voter's registration card		4. Original or certified copy of birth certificate issued by a State, county, municipal authority, or territory of the United States bearing an official seal
5. For a nonimmigrant alen authorized to work for a specific employer because of his or her status: a. Foreign passport; and b. Form I-94 or Form I-94A that has the following: (1) The same name as the passport; and (2) An endorsement of the alien's nonimmigrant status as long as that period of endorsement has not yet expired and the proposed employment is not in conflict with any restrictions or limitations identified on the form.		5. U.S. Military card or draft record		5. Native American tribal document
		6. Military dependent's ID card		6. U.S. Citizen ID Card (Form I-197)
		7. U.S. Coast Guard Merchant Mariner Card		7. Identification Card for Use of Resident Citizen in the United States (Form I-179)
		8. Native American tribal document		8. Employment authorization document issued by the Department of Homeland Security
		9. Driver's license issued by a Canadian government authority		
		For persons under age 18 who are unable to present a document listed above:		
6. Passport from the Federated States of Micronesia (FSM) or the Republic of the Marshall Islands (RMI) with Form I-94 or Form I-94A indicating nonimmigrant admission under the Compact of Free Association Between the United States and the FSM or RMI		10. School record or report card		
		11. Clinic, doctor, or hospital record		
		12. Day-care or nursery school record		

Form I-9
SECTION 1

Employment Eligibility Verification
Department of Homeland Security
U.S. Citizenship and Immigration Services

USCIS Form I-9

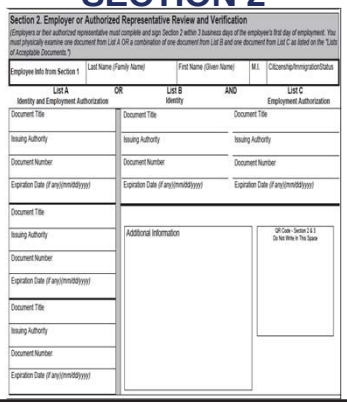
Section 1. Employee Information and Attestation

I attest, under penalty of perjury, that I am (check one of the following boxes):

Most Common Errors on
SECTION 1

- Name in wrong order
- Address incomplete
- Attestation not checked or number(s) not provided
- Signature missing
- Date of birth instead of current date, or date missing

Form I-9
SECTION 2

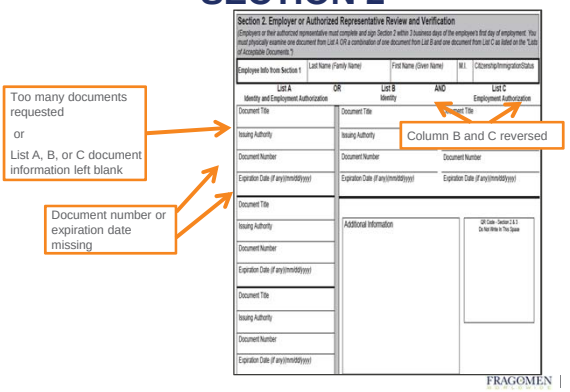

Section 2. Employer or Authorized Representative Review and Verification

List A — Identity and Employment Authorization | OR | List B — Identity | AND | List C — Employment Authorization

Document Title
Issuing Authority
Document Number
Expiration Date (if any)(mm/dd/yyyy)

Additional Information

Most Common Errors on
SECTION 2



- Too many documents requested
  or
  List A, B, or C document information left blank
- Document number or expiration date missing
- Column B and C reversed

Most Common Errors on
SECTION 2 (con't)

Date of hire missing

Certification: I attest, under penalty of perjury, that (1) I have examined the document(s) presented by the above-named employee, (2) the above-listed document(s) appear to be genuine and to relate to the employee named, and (3) to the best of my knowledge the employee is authorized to work in the United States.

The employee's first day of employment (mm/dd/yyyy): _____ (See instructions for exemptions)

Signature of Employer or Authorized Representative	Today's Date(mm/dd/yyyy)	Title of Employer or Authorized Representative
Last Name of Employer or Authorized Representative	First Name of Employer or Authorized Representative	Employer's Business or Organization Name
Employer's Business or Organization Address (Street Number and Name)	City or Town	State / ZIP Code

Employer name, address, signature, or date missing

REVERIFICATION

- Required for all employees with expiring work authorization
  - Not to be confused with expiring documents
  - New M-274 directs employers to use Section 3 instead of new form
- Permanent residents
  - Only reverify if employee presents temporary I-551 stamp
  - Do not reverify after expiration of green card, even if status is "conditional"
- Refugees/Asylees
  - Reverify only if employee presents EAD or I-94 "receipt"
  - Do not reverify if employee presents List B and List C combination
- Practice tips
  - Have an internal reminder at least 90 days prior to expiration
  - Use new I-9 form if old form has expired

Form I-9
SECTION 3

- Only reverify employment authorization
- Must reverify on or before date employee's current authorization expires
- Section 3 can be used in certain circumstances instead of

Section 3. Reverification and Rehires *(To be completed and signed by employer or authorized representative.)*

A. New Name *(if applicable)*			B. Date of Rehire *(if applicable)*
Last Name *(Family Name)*	First Name (Given Name)	Middle Initial	Date *(mm/dd/yyyy)*

C. If the employee's previous grant of employment authorization has expired, provide the information for the document or receipt that establishes continuing employment authorization in the space provided below.

Document Title	Document Number	Expiration Date *(if any)(mm/dd/yyyy)*

I attest, under penalty of perjury, that to the best of my knowledge, this employee is authorized to work in the United States, and if the employee presented document(s), the document(s) I have examined appear to be genuine and to relate to the individual.

Name of Employer or Authorized Representative	*Date (mm/dd/yyyy)*	Signature of Employer or Authorized Representative

Most Common Errors on
SECTION 3

Over-documentation (do not reverify identity)

Reverification not complete timely

Document provided was not acceptable or document title, number or expiration date missing or incomplete

Section 3. Reverification and Rehires *(To be completed and signed by employer or authorized representative.)*

A. New Name *(if applicable)*			B. Date of Rehire *(if applicable)*
Last Name *(Family Name)*	First Name *(Given Name)*	Middle Initial	Date *(mm/dd/yyyy)*

C. If the employee's previous grant of employment authorization has expired, provide the information for the document or receipt that establishes continuing employment authorization in the space provided below.

Document Title	Document Number	Expiration Date *(if any)(mm/dd/yyyy)*

I attest, under penalty of perjury, that to the best of my knowledge, this employee is authorized to work in the United States, and if the employee presented document(s), the document(s) I have examined appear to be genuine and to relate to the individual.

Name of Employer or Authorized Representative	*Date (mm/dd/yyyy)*	Signature of Employer or Authorized Representative

Employer signature or date missing

Retention
OBLIGATIONS

- Employer must have a Form I-9 for every current employee (unless they were hired prior to November 7, 1986)
- Following employee's termination, employer must retain I-9 for the later of
  - 3 years from the date of hire or
  - 1 year after the date of termination

ICE – Consequences of
HIRING UNAUTHORIZED WORKERS

COMPLIANCE AND ENFORCEMENT

Applicant
VETTING INITIATIVES

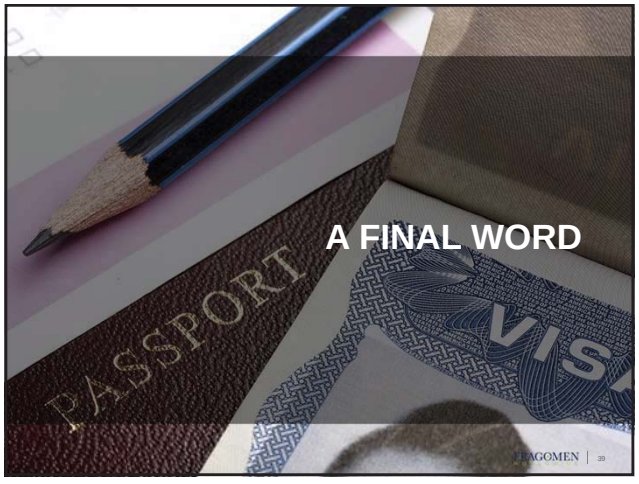
- Presidential memos order more stringent vetting of applicants for immigration benefits
- Effective October 2017, in-person interviews required for all employment-based adjustment of status applicants
- New State Department visa application questions for foreign nationals deemed heightened security risks
  - Social media checks
  - Extensive residence, employment and travel history
  - Scrutiny of family members
- Planned National Vetting Center to facilitate interagency coordination of security screening
  - Impact on applications for visas, permanent residence and admission to the United States not yet known

Worksite
COMPLIANCE INITIATIVES

- Coordinated agency enforcement directives issued in April 2017:
  - Increased investigation/enforcement collaboration among DHS, DOL, DOS and DOJ
  - More DOL Wage and Hour audits
  - Expansion of USCIS Fraud Detection and National Security (FDNS) worksite inspections to new case types
  - Expected 400% increase in ICE I-9 inspections
  - More DOJ investigations of immigration-related discrimination claims
  - Proposed LCA revisions to require more information about employers and end-clients
  - Public campaigns to encourage reporting of suspected H-1B abuse and discrimination against U.S. workers
- Other areas of focus:
  - Joint employer liability
  - False statements on visa applications
  - False claims

Border and Internal
ENFORCEMENT INITIATIVES

- Trump Administration budget requests $23 billion for border security and enforcement:
  - Increased border security infrastructure and personnel
  - New and replacement border wall
  - 2750 new Border Patrol agents and ICE personnel
  - Increased detention capacity
- Greater enforcement cooperation with state and local law enforcement
- Rescission of Obama-era removal priorities



A FINAL WORD

Critical Need for Lawyers in
IMMIGRATION COURT PROCEEDINGS

- Evaluation of New York Immigration Family Unity Project (NYIFUP) shows dramatic difference in results in deportation proceedings if immigrant is represented
  - Prior to NYIFUP, detained immigrants facing deportation without representation had only a 4 percent success rate
  - Success rate for NYIFUP clients is 48 percent
  - This represents an increase of ***1,100 percent***

UNITED STATES

Overview	
	• The U.S. immigration system has two principal categories of foreign nationals: nonimmigrants who enter the U.S. temporarily, and immigrants who intend to obtain permanent residence. There are a number of distinct employment-based nonimmigrant categories. • Most foreign nationals require a B-1 visa for business visits. B-1 beneficiaries are generally admitted to the U.S. for a period of time necessary to conduct their intended activities, for up to 180 days. In the current enforcement climate, stays of more than 6 weeks (or 2 weeks for some countries of origin) could subject the applicant to close scrutiny. B-1 visas can be extended for up to 6 months. Certain citizens are eligible for the Visa Waiver Program (VWP). • There are several employment-based non-immigrant visa categories in the U.S. The most common are the H-1B (specialty occupation), L-1 (intra-company transferee), O-1 (extraordinary ability), the TN (Canadian or Mexican professional worker), and the E-1/E-2 (treaty traders/investors). The J-1 category can be employment based, but also involves a cultural exchange component. The visa's validity period usually corresponds to the period of authorized stay. An exception is the E visa for treaty traders/investors, which normally has a 5 year visa validity period but a period of authorized stay of 2 years. Work visas may be extended if the underlying status is extended.
Red Flags	• Government fees are high compared to many countries. • The annual H-1B quota is set at a level well below demand and is typically reached within the initial filing window. • Depending on the immigrant visa preference category and the applicant's nationality, employment-based permanent residence is subject to multi-year backlogs. • Roughly half of L-1B specialized knowledge worker petitions filed with USCIS are subject to Requests for Evidence (RFE) that delay the adjudication process. Approximately 25% of these cases are denied (based on FY 2016 data). L-1A manager and executive petitions and H-1B petitions are also subject to high RFE rates. Consular blanket L-1 filings are subject to a high rate of denial, particularly at certain consulates. • In order to travel without a visa on the VWP, for 90 days or less, the traveler must obtain authorization through the Electronic System for Travel Authorization (ESTA) prior to boarding a U.S. bound air or sea carrier. ESTA is the Department of Homeland Security (DHS), Customs and Border Protection's (CBP) automated web-based system to determine eligibility to travel without a visa to the U.S. for tourism or business. Each travel authorization under ESTA can be valid for up to 2 years. However, a Visa Waiver Program traveler must obtain a new ESTA authorization if he or she is issued a new passport, or changes his or her name, gender or country of citizenship. In addition, a traveler must obtain a new ESTA authorization if any answer to the ESTA application eligibility questions changes. • The Trump administration has implemented travel restrictions on certain nationalities. The status of the restrictions is in flux, therefore, check with your immigration professional for up-to-date information.

Business Travel	
Name of Visa	B-1
Allowable Activities	• Engaging in meetings with business associates; • Engaging in contract negotiations;

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	• Engage in short-term training activities; • Attending scientific, educational, professional or business conventions or conferences; • Engaging in activities in conjunction with litigation; • Conducting commercial transactions that do not involve gainful employment, such as taking orders or making purchases of inventory or supplies for a foreign employer; and • Performing after-sales service on equipment or machinery purchased from a company outside the United States pursuant to a sales contract, within one year of commencement of the contract. This non-comprehensive list is designed to provide basic information about allowable business visitor activities, is of a general nature and does not constitute legal advice. Immigration laws may change without notice, and there may be other allowable business visitor activities under certain circumstances. Please refer to your Business Visa Matrix assessment or ask your Fragomen immigration professional for information that meets your specific needs.
Business Visitor Restrictions	Business travelers who engage in only allowable business activities may still require work authorization if any of the following conditions will apply to their trip. If any of these conditions apply, please contact your Fragomen representative for fact-specific guidance. • Being placed on the local company's payroll; • Providing services to the benefit of the U.S. company; • Receiving remuneration from the local company; • Signing an employment contract or otherwise establishing an employment relationship with the local entity; or • Making frequent, repeated business trips to the host country.
Maximum Stay for Visitors	Regulations permit B-1 visa holders to be admitted for up to 180 days. However, foreign nationals planning to enter the U.S. for more than 2 weeks are subject to additional scrutiny. Business travelers who are eligible for the Visa Waiver Program may be admitted to the U.S. for 90 days.
Entering For Work	
Short-Term Work Option	Existing nonimmigrant categories may be used for short-term work.
Main Work Authorization Category	H-1B – Open to foreign professionals coming to perform services in specialty occupations, which generally means that the job requires a bachelor's degree in a relevant field and that the foreign national possesses that degree or its U.S. equivalent. L-1 – Open to foreign nationals in executive or managerial positions or with specialized knowledge who are coming to the U.S. to work for a company within the corporate family of their foreign employer. There are also nationality-specific nonimmigrant visa categories that permit work, such as the TN and E categories.
Total Application Lead Time	H-1B – 5-6 weeks if the employee is not subject to the annual quota and if the employer requests premium processing; up to 18 months if the employee is subject to the annual quota, which has been exhausted this year. L-1 – 3-4 weeks if the employer requests premium processing or has a corporate blanket L-1 petition; up to 6 months if the employer opts for regular processing. Note that if the petition includes an additional USCIS processing fee for 'premium' service, and, if no Request for Evidence is made by the USCIS, a decision can be expected 15 calendar days or fewer after filing. Processing times may be delayed by Requests for Evidence from USCIS and/or by high visa

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	application volume at the U.S. consulate.
Process	• H-1B – Employer first files a Labor Condition Application (LCA) with the Department of Labor, on which it must make attestations including to the wages and working conditions it will offer the foreign national. Once the LCA is certified, the employer submits the petition to USCIS. Upon petition approval, the foreign national may apply for an H-1B visa at a U.S. consulate (with the exception of Canadian nationals, who are not required to obtain a visa for entry). If the foreign national is in the U.S. in valid nonimmigrant status, the foreign national may typically begin working for the employer on the start date listed on the approval notice and will not need to obtain a new visa until he or she travels outside the country. Under H-1B portability, if the foreign national is in the U.S. in valid H-1B status and working for another employer, the foreign national may begin working for the petitioning employer upon receipt of the receipt notice while the adjudication process is ongoing. • L-1 – Employer submits petition to USCIS. Upon petition approval, the foreign national may apply for an L-1 visa at a U.S. diplomatic post (with the exception of Canadian nationals, who are not required to obtain a visa). If the foreign national is in the U.S. in valid nonimmigrant status, the foreign national may typically begin working for the company on the start date listed on the approval notice and will not need to obtain a new visa until he or she travels outside the country. In the alternative, if the employer is a large multinational company that is a frequent user of the L-1 program, it may have a corporate "blanket" L-1 petition. If so, the employer is not required to file an individual USCIS petition for the foreign national. Instead, the foreign national can submit an application for a blanket L-1 visa directly to a U.S. consulate or embassy. • If abroad, foreign nationals generally must remain overseas during the processing of their applications for work authorization and visas. Foreign nationals who are abroad must also apply and interview for a visa stamp at a U.S. Consulate or Embassy. The Department of State may place applicants in administrative processing for a variety of reasons, which will delay the processing time for their visas. Different rules apply for foreign nationals who are already in the U.S., depending on their existing nonimmigrant status, what type of petitions are being filed on their behalf, etc. • Foreign nationals generally cannot enter the U.S. as visitors and change status to work authorized in country. (Changing status is explicitly prohibited for entrants under the Visa Waiver Program; change of status for B-1 visa holders is permissible in limited circumstances but is subject to a high degree of scrutiny). • Expedited processing options are available.
Quotas/Ratios	H-1B – The H-1B classification is subject to an annual quota of 65,000 per fiscal year, with an additional quota of 20,000 available to foreign nationals who have a master's or higher degree from a U.S. university. L-1– None
Labor Market Tests	H-1B – Employer must file a LCA with the Department of Labor, on which it must make attestations including the wages and working conditions it will offer the foreign national. L-1 – None
Required Employment Relationship	H-1B – The employer must be a U.S entity. L-1 – A qualifying corporate relationship must exist between the transferring company and the receiving company: parent, subsidiary, affiliate, or branch office.
Minimum Salary Requirements	H-1B – Yes. Wage levels are determined by reviewing the minimum education, experience, and similar requirements the employer has set against a prevailing wage source such as the Bureau of Labor

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	Statistics databases or privately compiled wage surveys. L-1 – None. However, employers must indicate in the petition whether the salary will be paid weekly or annually and advise of any other compensation such as bonuses, allowances paid for overseas assignment, or housing allowances.
Work Authorization Validity Period	H-1B – Typically granted an initial period of stay of up to 3 years. Extensions of stay are available up to a 6 year maximum. Extensions beyond the 6th year are available in limited circumstances where the foreign national is being sponsored for employment-based permanent residence in the U.S. L-1 – Typically granted an initial period of stay of up to 3 years, or 1 year in the case of a foreign national entering to open a new office. Extensions are available up to a 7 year maximum for executives and managers and up to a 5-year maximum for specialized knowledge workers. Any combination of H or L-1 stay counts against the maximum stay in the U.S., except for H-4 and L-2 stays.
Cost (Gov't)	Base filing fee of USD 460 for H-1B and L-1 petitions • H-1B Petitions also require: USD 1,500 (H-1B American Competitiveness and Workforce Improvement Act of 1998) – reduced to USD 750 for employers with 25 or fewer full-time employees); USD 500 fraud prevention and detection fee; and an additional USD 4,000 if the employer has 50 or more employees and more than 50% of its workforce is made up of H-1B and L-1 workers. • L-1 Petitions also require USD 500 fraud prevention and detection fee and an additional USD 4,500 if the employer has 50 or more employees and more than 50% of its workforce is made up of H-1B and L-1 workers. Employer may also request Premium Processing Service, for an additional USD 1,225, whereby a decision on their petition (approval, denial, or request for further evidence) will be issued within 15 calendar days.
Accompanying Family Members	• Legally married spouses (including legally married same-sex spouses); and • Unmarried children under the age of 21. • Some visa classifications, like H-4, allow dependents to obtain work authorization. • Unmarried partners may be eligible for a B-2 visa.
Workplace Language	English

Penalties for Noncompliance

Penalties for Employers	Employers are required to verify the identity and employment authorization of all workers using Form I-9. Civil monetary penalties can be assessed for Form I-9 paperwork violations, while higher penalties are possible for knowingly employing aliens who are unauthorized to work. Employer representatives may also face criminal penalties. Also, employers may be barred from receiving government contracts. Employers must also not: • Discriminate against individuals on the basis of national origin, citizenship, or immigration status. • Hire, recruit for a fee, or refer for a fee aliens he or she knows to be unauthorized to work in the U.S. Employers who violate these provisions may face an administrative order requiring the payment of back pay to the individual discriminated against and/or an administrative order requiring the employer to hire the individual discriminated against.

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Penalties for Foreign Nationals	If a foreign national is found to have overstayed their authorized period of stay or worked without authorization, they may be removed from the U.S., barred from future reentry, and/or have their visitor visa cancelled. If a foreign national overstays by more than 180 days but less than 365 days, they may be barred from reentering the U.S. for 3 years. If a foreign national overstays by more than 365 days, they may be barred from reentering the U.S. for 10 years. Foreign nationals who have overstayed their visa will be required to apply for future U.S. visas in his or her home country.

The information contained herein is current as of September 2017. It is offered for informational purposes only and does not constitute legal advice or give rise to an attorney-client relationship between you and our firm. The information: (i) must be regarded as a practical guide for general information and not a process guide for determining the specific immigration requirements of the countries covered, (ii) should not be a substitute for a more in-depth analysis of applicable facts and circumstances (including, without limitation, criminal or health-related circumstances) conducted by competent professionals, and (iii) does not represent an opinion from Fragomen or any of its agents with regard to the laws of any of the jurisdictions concerned. The information herein does not guarantee the outcome or approval of any particular immigration application. These materials are subject to copyright by our firm with all rights reserved and shall not be disclosed in whole or in part in any form to any third party absent Fragomen's advance written consent.

Restrictive Practices - Americas (Nov 2017)

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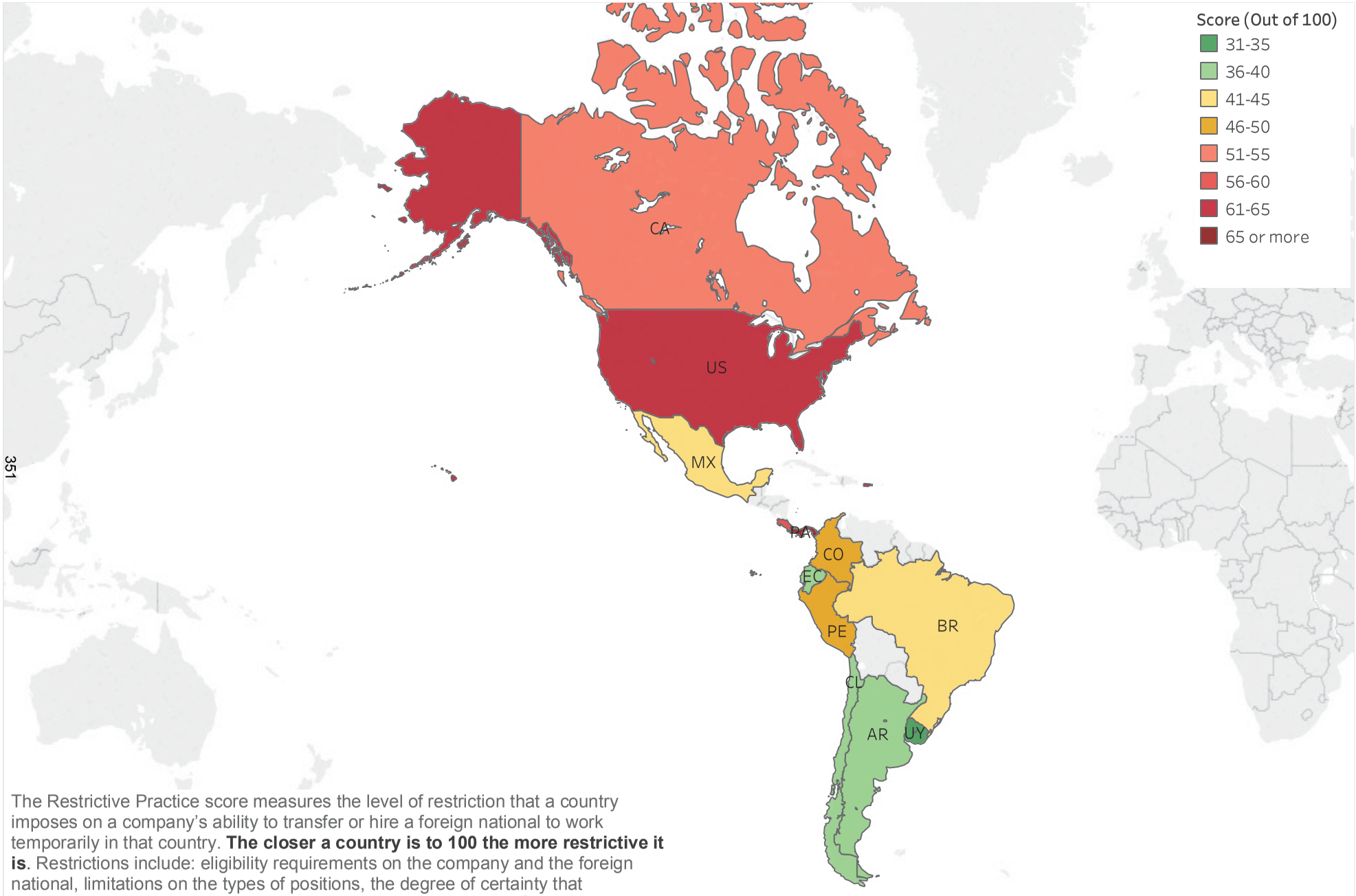

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The Restrictive Practice score measures the level of restriction that a country imposes on a company's ability to transfer or hire a foreign national to work temporarily in that country. **The closer a country is to 100 the more restrictive it is**. Restrictions include: eligibility requirements on the company and the foreign national, limitations on the types of positions, the degree of certainty that authorization will be approved, government processing time and fees, the complexity of the process, the rights attached to the authorization including the length of stay and hidden costs or risks such as penalties and the level of corruption.

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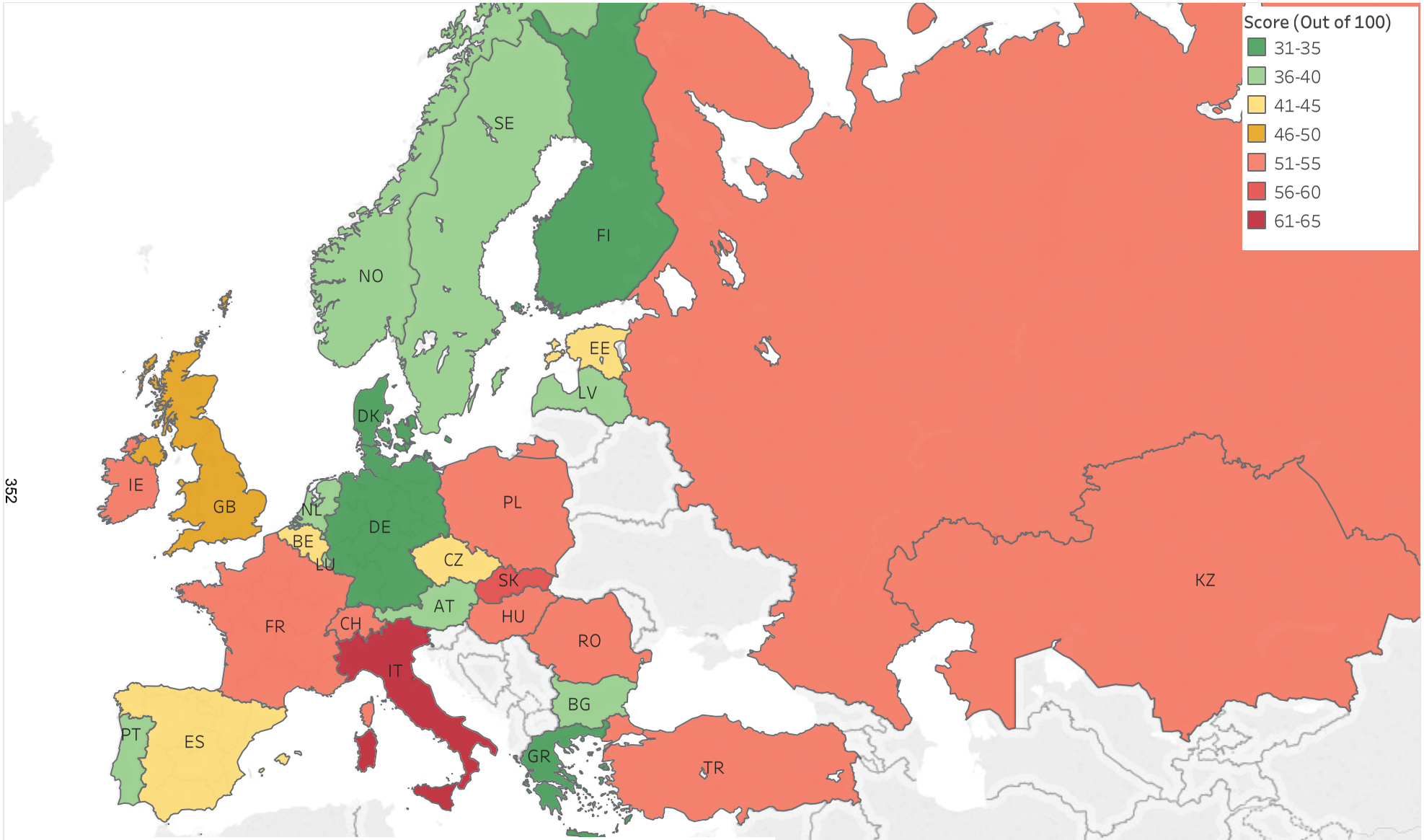

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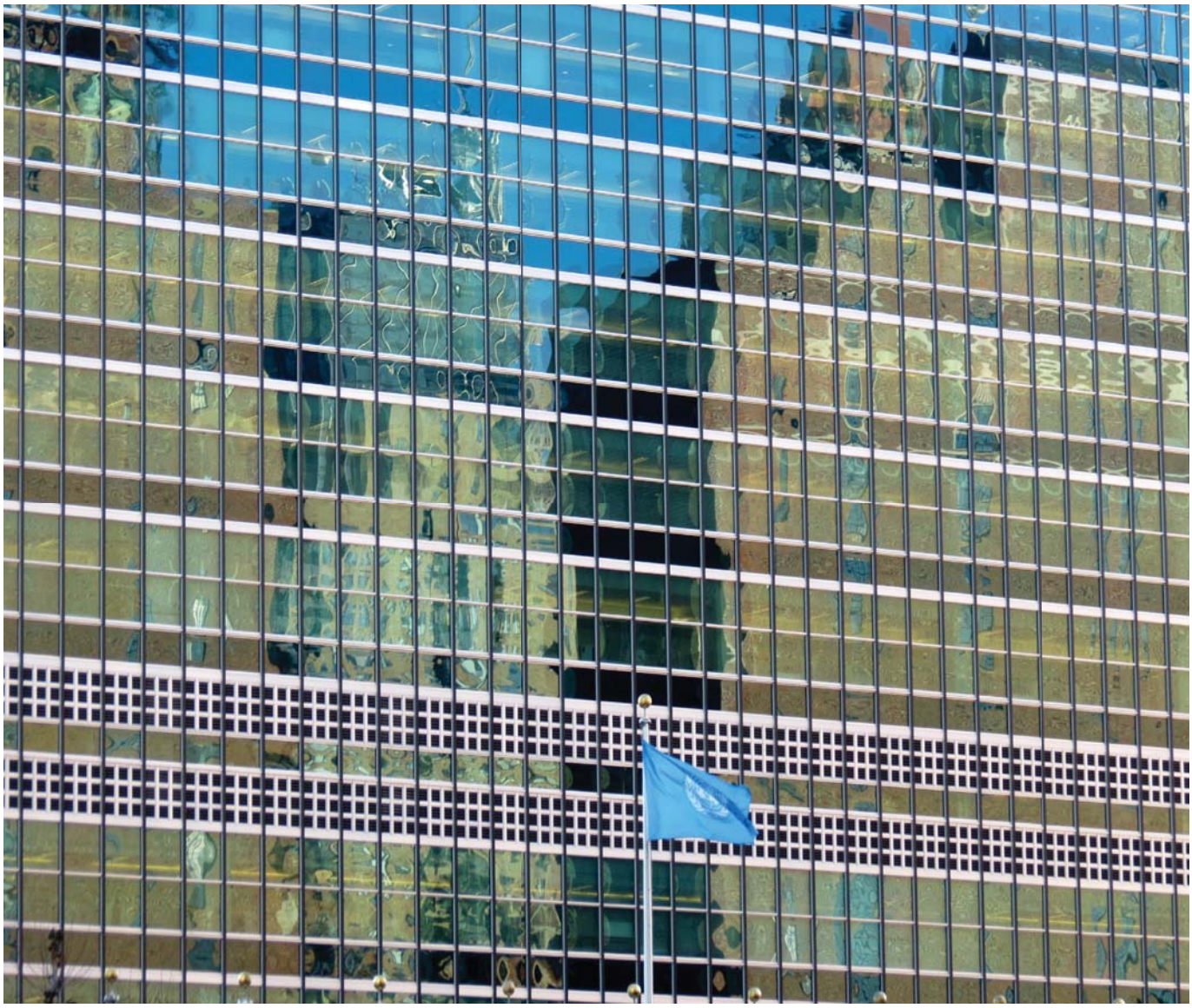
VIII. Business and Human Rights
The UN Guiding Principles



THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS **AN INTRODUCTION**

THE UN WORKING GROUP ON BUSINESS AND HUMAN RIGHTS

ABOUT THIS DOCUMENT

In 2011, the United Nations Human Rights Council unanimously endorsed the UN Guiding Principles on Business and Human Rights, a set of guidelines for States and companies to prevent and address human rights abuses committed in business operations. This document summarises the content of the UN Guiding Principles and describes the mandate of the UN Working Group on Business and Human Rights, which has been established to aid in their implementation.

BACKGROUND

Preventing and Addressing the Human Rights Impacts of Businesses

Business enterprises can profoundly impact the human rights of employees, consumers, and communities wherever they operate. These impacts may be positive, such as increasing access to employment or improving public services, or negative, such as polluting the environment, underpaying workers, or forcibly evicting communities. For decades, local communities, national governments and international institutions have debated the responsibility of companies in managing these adverse impacts and the role of governments in preventing them.

In 2008, the United Nations endorsed the 'Protect, Respect and Remedy Framework' for business and human rights. This framework was developed by the then-Special Representative of the UN Secretary General, Professor John Ruggie, following three years of research and worldwide consultations with businesses, civil society, governments and victims of corporate human rights abuses.

The UN Framework unequivocally recognises that States have the *duty* under international human rights law to *protect* everyone within their territory and/or jurisdiction from human rights abuses committed by business enterprises. This duty means that States must have effective laws and regulations in place to prevent and address business-related human rights abuses and ensure access to effective remedy for those whose rights have been abused.

The UN Framework also addresses the human rights responsibilities of businesses. Business enterprises have the *responsibility to respect* human rights wherever they operate and whatever their size or industry. This responsibility means companies must know their actual or potential impacts, prevent and mitigate abuses, and address adverse impacts with which they are involved. In other words, companies must know—and show—that they respect human rights in all their operations.

Importantly, the UN Framework clarifies that the corporate responsibility to respect human rights exists independently of States' ability or willingness to fulfil their duty to protect human rights. No matter the context, States and businesses retain these distinct but complementary responsibilities.

The UN Framework also recognises the fundamental right of individuals and communities to access effective remedy when their rights have been adversely impacted by business activities. When a business enterprise abuses human rights, States must ensure that the people affected can access an effective remedy through the court system or other legitimate non-judicial process. Companies, for their part, are expected to establish or participate in effective grievance mechanisms for any individuals or communities adversely impacted by their operations.

No matter the context, States and businesses retain distinct but complementary responsibilities.

Protect, respect, remedy. Each of these simple terms hides a complicated reality. In 2011, the UN Human Rights Council unanimously endorsed the UN Guiding Principles on Business and Human Rights, a set of guidelines that operationalize the UN Framework and further define the key duties and responsibilities of States and business enterprises with regard to business-related human rights abuses. Following the endorsement, the UN Working Group on Business and Human Rights, consisting of five independent experts, was appointed to guide the dissemination and implementation of the UN Guiding Principles.

MAKING RIGHTS A REALITY

The UN Guiding Principles on Business and Human Rights

The Guiding Principles contain three chapters, or pillars: protect, respect and remedy. Each defines concrete, actionable steps for governments and companies to meet their respective duties and responsibilities to prevent human rights abuses in company operations and provide remedies if such abuses take place.

The State Duty to Protect

The Guiding Principles affirm that under existing international human rights law, States have the duty to protect against human rights abuses by all actors in society, including businesses. This means States must prevent, investigate, punish and redress human rights abuses that take place in domestic business operations. Furthermore, The Guiding Principles recommend that States set clear expectations that companies domiciled in their territory/jurisdiction respect human rights in every country and context in which they operate.

> The corporate responsibility to respect applies to all internationally recognized human rights.

The Guiding Principles include operational provisions that recommend concrete actions for States to meet their duty to protect human rights in the context of business operations. This includes enacting and enforcing laws that require businesses to respect human rights; creating a regulatory environment that facilitates business respect for human rights; and providing guidance to companies on their responsibilities. The Guiding Principles also stipulate that States should ensure that policies are coherent across departments and functions, and that their participation in multilateral institutions is aligned with their human rights obligations.

The human rights obligations of States, from providing security to delivering utilities, are not voided when such functions are carried out by state-owned or private business enterprises. As conflict-affected areas pose a heightened risk of gross human rights abuses, including by businesses, the Guiding Principles stipulate that States (home and host) should provide guidance, assistance and enforcement mechanisms to ensure that business enterprises are not involved with such abuses in conflict-affected areas.

The Corporate Responsibility to Respect

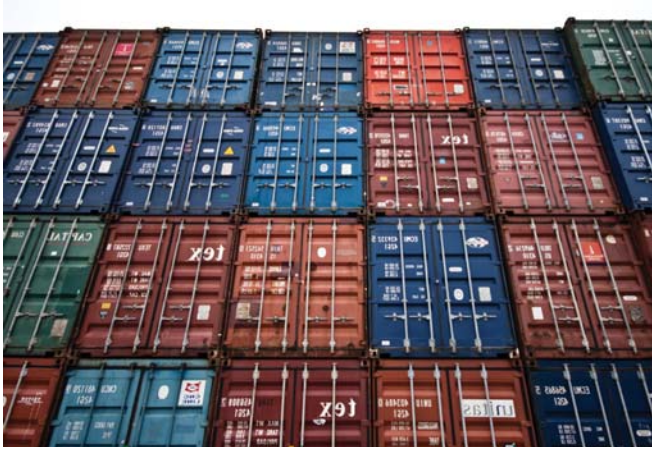
The Guiding Principles clarify what is expected of business enterprises with regard to human rights and outline the process through which companies can identify their negative human rights impacts and demonstrate that their policies and procedures are adequate to address them.

The Guiding Principles affirm that business enterprises must prevent, mitigate and, where appropriate, remedy human rights abuses that they cause or contribute to. Businesses must seek to prevent or mitigate any adverse impacts related to their operations, products or services , even if these impacts have been carried out by suppliers or business partners.

The responsibility to respect applies to all internationally recognized human rights expressed in the International Bill of Human Rights and the International Labour Organization Declaration on Fundamental Principles and Rights at Work. Though the actions businesses need to take to meet the responsibility to respect will depend on their scale or complexity, the responsibility itself applies to all businesses regardless of size, sector or location.

To meet the responsibility to respect, business enterprises must have the necessary policies and processes in place. The Guiding Principles identify three components of this responsibility. First, companies must institute a policy commitment to meet the responsibility to respect human rights. Second, they must undertake ongoing human rights due diligence to identify, prevent, mitigate and account for their human rights impacts. Finally, they must have processes in place to enable remediation for any adverse human rights impacts they cause or contribute to.

Human rights due diligence refers to the process of identifying and addressing the human rights impacts of a business enterprise across its operations and products, and throughout its supplier and business partner networks. Human rights due diligence should include assessments of internal procedures and systems, as well as external engagement with groups potentially affected by its operations.



The Guiding Principles state that companies should integrate the findings of their human rights due diligence processes into policies and procedures at the appropriate level, with resources and authority assigned accordingly. Companies should verify that this objective is achieved by constantly monitoring and evaluating their efforts. Finally, companies should be prepared to communicate how they address their human rights impacts, including to those groups most likely to be affected.

Where businesses identify that they have caused or contributed to adverse impacts, they should cooperate in remediation through legitimate processes.

Access to Remedy

One of the fundamental principles of the international human rights system is that when a right is violated, victims must have access to an effective remedy. The Guiding Principles affirm that the State duty to protect rights includes ensuring that when human rights are violated by companies within their territory and/or jurisdiction, the State must ensure access to an effective remedy for those affected.

The state duty to provide access to effective remedy includes taking appropriate steps to ensure that State-based domestic judicial mechanisms are able to effectively address business-related human rights abuses, and do not erect barriers (such as administrative fees or lack of language interpreters) that prevent victims from presenting their cases. It does not simply mean that countries should fortify their court systems. States should also provide effective and appropriate non-judicial grievance mechanisms with the capacity to hear and adjudicate business-related human rights complaints as part of a comprehensive State-based system for remedy.

The access to remedy principles do not only apply to States. They also stipulate that business enterprises should provide for, or participate in, effective mechanisms for fielding and addressing grievances from individuals and communities who may be adversely impacted by the company's operations. They further maintain that multistakeholder and other collaborative initiatives based on human rights-related standards can also contribute to providing effective access to remedy.

The Guiding Principles set out a list of effectiveness criteria for state- or company-based non-judicial grievance mechanisms. These criteria stipulate that effective grievance mechanisms should be legitimate,

> When human rights are violated by companies, governments must provide a robust and appropriate remedy for those affected.

accessible, predictable, equitable, transparent and rights-compatible. Simply put, they must provide genuine remedies for victims of human rights violations by companies and must not amount to communications or political exercises. Operational-level mechanisms should be based on engagement and dialogue with the stakeholder groups whose rights they seek to remedy.

TOWARD IMPLEMENTATION

The UN Working Group on Business and Human Rights

The UN Working Group on Business and Human Rights consists of five independent experts, appointed for a three-year term. The Working Group is mandated by the UN Human Rights Council to ensure that the Guiding Principles described above are widely disseminated, robustly implemented and firmly embedded in international governance.

The Working Group is mandated to consult with all relevant stakeholders, identify best practices in ongoing implementation efforts, promote capacity-building, issue recommendations on legislation and policies related to businesses, and conduct country visits. The Working Group is also mandated to integrate a gender perspective and pay special attention to vulnerable groups such as indigenous people and children.

The Working Group will hold an Annual Forum on Business and Human Rights every December. The purpose of the Forum is to allow representatives of States, businesses and civil society to discuss trends and challenges in the implementation of the Guiding Principles and to promote dialogue, cooperation and sharing of good practices. The Working Group reports its activities to the UN Human Rights Council and the General Assembly every year.

For the full text of the Guiding Principles, see OHCHR.org

For more information, contact the OHCHR Secretariat
wg-business@ohchr.org

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[PDF]

International Bar Association
Business and Human Rights Working Group
4th Floor, 10 St Bride Street
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United Kingdom

March 25, 2015

To the International Bar Association:

We write to offer our comments to the International Bar Association (IBA)'s working draft, "Business and Human Rights Guidance for Bar Associations." We wholeheartedly welcome the International Bar Association's very timely attention to these issues and recognize the important role lawyers and bar associations play in advancing respect for human rights in business.

However, we are concerned that the IBA's draft guidance devotes too much attention to a due diligence exercise focused of internal company processes and insufficient attention to substantive industry standards that are essential to measuring human rights outcomes. In our view, this is insufficient. On a range of issues that are essential to businesses, lawyers have played an essential role in establishing appropriate standards, from compliance with anti-corruption laws, to environmental safeguards to financial regulatory and reporting. In much the same way, lawyers affiliated with the IBA are ideally suited to counsel the companies they represent on how to develop and apply industry-specific substantive standards and metrics relating to human rights. This is the key contemporary challenge with respect to business and human rights, and the IBA needs to play a leadership role in addressing this challenge.

By way of background, the NYU Stern Center for Business and Human Rights at New York University is the first human rights center at a business school. We co-founded the Center in 2013 with a mission to challenge and empower companies and future business leaders to make practical progress on human rights. We advocate for the adoption and implementation of human rights standards across business sectors as the most effective way to advance respect for human rights in business operations and the essential next step in the evolution of this field.

The importance that businesses attach to these issues was underscored by the Economist Intelligence Unit's recent survey of leading global businesses, "The road from principles to practice: Today's challenges for business in respecting human rights." The survey finds that "companies overwhelmingly perceive a responsibility to respect human rights," with 83% of respondents saying that business, as distinct from governments, is an important player in respecting human rights.

The survey echoes the working draft's assertion that "a strong business case exists for respecting human rights and that the management of legal risks increasingly means that business lawyers need to take human rights into account in their advice and services."

Reflecting the priority that business leaders now place on human rights, the IBA's working draft contains a number of valuable elements, including:

- encouraging individual bar associations to establish and support appropriate structures for developing human rights and business capacities within each association;

- highlighting the need for more training and education for lawyers on business and human rights; and

- stressing the role lawyers can play in helping companies understand what is required of them and what are the best practices among companies in each industry.

Yet the central focus of the Working Draft is the UN Guiding Principles for Business and Human Rights. It proposes the Guiding Principles as the primary substantive tool for lawyers to advise their clients on how best to address human rights challenges in their business operations. We support the Guiding Principles which offer a broad and useful starting place for consideration of these issues. They have helpfully juxtaposed the respective role of governments and of private companies, and rightly assert that states have the primary duty to respect human rights.

But as Professor John Ruggie, the author of the Guiding Principles, has made clear, the adoption of these principles is "the end of the beginning" of the effort to develop the field of business and human rights. The next phase of the effort is companies' adoption and implementation of industry-specific human rights standards and metrics. The working draft fails to contemplate, much less advance, this essential next step. It does not offer the tools lawyers and bar associations need to advise clients on the practical measures they should be taking to address the substantive human rights challenges facing each industry.

Consider the following examples of specific business and human rights challenges that affect companies across different business sectors:

- Faced with serious factory safety and other workplace issues, global brands and retailers need counsel on the appropriate standards they need to apply with respect the rights of workers throughout their manufacturing supply chains. In the event of a deadly factory fire, it will not suffice for a company to say that it was exercising due diligence pursuant to the Guiding Principles. Consumers and the media will focus on the outcome – that workers died in the production of the product bearing the company's brand name. Companies need guidance as they work with their suppliers and their competitors to develop and implement industry-wide standards that make the manufacturing sector safer and more transparent.

- Customers of Internet service providers and telecommunications companies are demanding greater insight into these companies' relationships with governments and other companies that buy and sell private consumer data. They are seeking assurances from the entire industry that there are no backdoors open to the NSA in the United States, or to government security services in

places like China or Russia, and that their personal information will be protected in accordance with harmonized industry standards.

- In the food and beverage industry, consumers increasingly are seeking to compare companies on the basis of their human rights and environmental performance. Consumers want a comprehensive measuring stick for issues such as child and forced labor on family farm, the rights of migrant workers or property rights for agricultural land.

- Mining companies operating in conflict zones in Africa, Latin America or Asia often face violent confrontations in some places where their mining operations are taking place. Issues of security, indigenous rights, and land use pose serious challenges to companies operating in these difficult environments. Essential to a lawyers' role in advising clients in the mining sector is that there are common industry standards and key performance indicators relating to these human rights challenges.
- Along parallel lines, lawyers for a large number of global companies are being asked to devote increased attention to a range of environmental risks, particularly when local governments are failing to develop and apply essential standards. Lawyers have helped to shape international environmental standards, such as the Equator Principles and similar standards that have been established by export credit agencies. Using these substantive standards, a number of companies have drawn up environmental and social risk management plans. Absent these substantive standards and key indicators and metrics, they would have no clear way to measure their company's performance.

In each of these cases, individual assurances from some companies that they are applying internal due diligence processes simply don't go far enough. The test for companies today is whether they are abiding by concrete standards for the specific human rights or environmental issues in their respective industries. Companies also need to measure their performance against their competitors through metrics or key performance indicators so that consumers, investors, and other key constituencies can assess meaningful differences among companies and reward those that demonstrate the greatest respect for human rights or the environment. Business leaders often make reference to the "race to the top". This is what a race to the top will look like in the human rights and environmental fields.

The development of these types of substantive standards and corresponding benchmarks is what lawyers do and do well. For lawyers involved in regulatory work, this is the bread and butter of a successful practice. Whether addressing challenges relating to foreign corrupt practices, compliance with clean air or clean water environmental standards, or adherence to reporting requirements to securities regulators, lawyers are experts in developing and interpreting compliance mechanisms linked to standards. For companies that seek to make compliance with human rights a comparable operational priority, a similar standards-based approach is essential.

In a growing number of industries, important initiatives are now emerging that aim to set, implement, and measure industry-specific human rights standards. The IBA should encourage local bar associations to be part of these evolving efforts. Examples include:

- Fair Labor Association – addresses working conditions in the manufacturing supply chain for

apparel, footwear, and now electronics and agriculture;

- Global Network Initiative – addresses privacy and free expression in the information and communication technology sector;

- Voluntary Principles on Security and Human Rights – addresses human security in the extractive industries; and

- the recently established International Code of Conduct Association – addresses human security in the private security industry.

- Using a country specific model and focused on the issue of factory safety, two separate initiatives – the Accord on Fire and Building Safety and the Alliance on Bangladesh Worker Safety – have set common standards for fire and building safety in Bangladesh that have been adopted by more than 200 global companies.

People can and will debate the strengths and weaknesses of each of these initiatives. But what is important about them is that companies in specific industries are participating in collective efforts to develop and implement substantive human rights standards tailored to their own industries. As they work to implement these substantive standards, companies and external stakeholders also are developing common metrics – benchmarks or key performance indicators – to help evaluate adherence to the standards.

We strongly urge the IBA to revisit the substantive portions of your working draft to explore how the IBA can help advance this standards-based approach to human rights as an essential element of your guidance for bar associations and lawyers. To be sure, development of these standards and metrics is difficult. But in the major industries that have already undertaken such efforts, companies that are commercial competitors, along with their external stakeholders, are building models based on clear standards that hold real promise in successfully tackling business and human rights challenges.

Reporting against common standards in each industry is beginning to give consumers, investors, and regulators the information they need to evaluate and compare the human rights performance of companies operating in the same sector. More importantly, it gives companies in each industry a common benchmark and encourages them to pursue and achieve concrete progress in addressing the most important human rights challenges they face. As these standards are developed and implemented, there will be significant opportunities to help develop reporting procedures. The IBAs involvement in these efforts would be extremely beneficial.

We are eager to work with those involved in developing the working paper to incorporate a standards-based component into the final version of the guidance. We welcome the IBA's engagement in this important area and stand ready to work with you.

Sincerely,

Michael Posner
Co-director and Professor

Sarah Labowitz
Co-director and Research Scholar

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International Bridging the Gap
Day 2

I. International Corporate Compliance

II. International Litigation Basics

14. CONVENTION ON THE SERVICE ABROAD OF JUDICIAL AND EXTRAJUDICIAL DOCUMENTS IN CIVIL OR COMMERCIAL MATTERS[1]

(Concluded 15 November 1965)

The States signatory to the present Convention,
Desiring to create appropriate means to ensure that judicial and extrajudicial documents to be served abroad shall be brought to the notice of the addressee in sufficient time,
Desiring to improve the organisation of mutual judicial assistance for that purpose by simplifying and expediting the procedure,
Have resolved to conclude a Convention to this effect and have agreed upon the following provisions:

Article 1

The present Convention shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad.
This Convention shall not apply where the address of the person to be served with the document is not known.

CHAPTER I – JUDICIAL DOCUMENTS

Article 2

Each Contracting State shall designate a Central Authority which will undertake to receive requests for service coming from other Contracting States and to proceed in conformity with the provisions of Articles 3 to 6.
Each State shall organise the Central Authority in conformity with its own law.

Article 3

The authority or judicial officer competent under the law of the State in which the documents originate shall forward to the Central Authority of the State addressed a request conforming to the model annexed to the present Convention, without any requirement of legalisation or other equivalent formality.
The document to be served or a copy thereof shall be annexed to the request. The request and the document shall both be furnished in duplicate.

Article 4

If the Central Authority considers that the request does not comply with the provisions of the present Convention it shall promptly inform the applicant and specify its objections to the request.

[1] This Convention, including related materials, is accessible on the website of the Hague Conference on Private International Law (www.hcch.net), under “Conventions” or under the “Service Section”. For the full history of the Convention, see Hague Conference on Private International Law, *Actes et documents de la Dixième session (1964)*, Tome III, *Notification* (391 pp.).

Article 5

The Central Authority of the State addressed shall itself serve the document or shall arrange to have it served by an appropriate agency, either –

a) by a method prescribed by its internal law for the service of documents in domestic actions upon persons who are within its territory, or

b) by a particular method requested by the applicant, unless such a method is incompatible with the law of the State addressed.

Subject to sub-paragraph *(b)* of the first paragraph of this Article, the document may always be served by delivery to an addressee who accepts it voluntarily.

If the document is to be served under the first paragraph above, the Central Authority may require the document to be written in, or translated into, the official language or one of the official languages of the State addressed.

That part of the request, in the form attached to the present Convention, which contains a summary of the document to be served, shall be served with the document.

Article 6

The Central Authority of the State addressed or any authority which it may have designated for that purpose, shall complete a certificate in the form of the model annexed to the present Convention.

The certificate shall state that the document has been served and shall include the method, the place and the date of service and the person to whom the document was delivered. If the document has not been served, the certificate shall set out the reasons which have prevented service.

The applicant may require that a certificate not completed by a Central Authority or by a judicial authority shall be countersigned by one of these authorities.

The certificate shall be forwarded directly to the applicant.

Article 7

The standard terms in the model annexed to the present Convention shall in all cases be written either in French or in English. They may also be written in the official language, or in one of the official languages, of the State in which the documents originate.

The corresponding blanks shall be completed either in the language of the State addressed or in French or in English.

Article 8

Each Contracting State shall be free to effect service of judicial documents upon persons abroad, without application of any compulsion, directly through its diplomatic or consular agents.

Any State may declare that it is opposed to such service within its territory, unless the document is to be served upon a national of the State in which the documents originate.

Article 9

Each Contracting State shall be free, in addition, to use consular channels to forward documents, for the purpose of service, to those authorities of another Contracting State which are designated by the latter for this purpose.

Each Contracting State may, if exceptional circumstances so require, use diplomatic channels for the same purpose.

Article 10

Provided the State of destination does not object, the present Convention shall not interfere with –

a) the freedom to send judicial documents, by postal channels, directly to persons abroad,

b) the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination,

c) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination.

Article 11

The present Convention shall not prevent two or more Contracting States from agreeing to permit, for the purpose of service of judicial documents, channels of transmission other than those provided for in the preceding Articles and, in particular, direct communication between their respective authorities.

Article 12

The service of judicial documents coming from a Contracting State shall not give rise to any payment or reimbursement of taxes or costs for the services rendered by the State addressed.

The applicant shall pay or reimburse the costs occasioned by –-

a) the employment of a judicial officer or of a person competent under the law of the State of destination,

b) the use of a particular method of service.

Article 13

Where a request for service complies with the terms of the present Convention, the State addressed may refuse to comply therewith only if it deems that compliance would infringe its sovereignty or security. It may not refuse to comply solely on the ground that, under its internal law, it claims exclusive jurisdiction over the subject-matter of the action or that its internal law would not permit the action upon which the application is based.

The Central Authority shall, in case of refusal, promptly inform the applicant and state the reasons for the refusal.

Article 14

Difficulties which may arise in connection with the transmission of judicial documents for service shall be settled through diplomatic channels.

Article 15

Where a writ of summons or an equivalent document had to be transmitted abroad for the purpose of service, under the provisions of the present Convention, and the defendant has not appeared, judgment shall not be given until it is established that –

a) the document was served by a method prescribed by the internal law of the State addressed for the service of documents in domestic actions upon persons who are within its territory, or

b) the document was actually delivered to the defendant or to his residence by another method provided for by this Convention,

and that in either of these cases the service or the delivery was effected in sufficient time to enable the defendant to defend.

Each Contracting State shall be free to declare that the judge, notwithstanding the provisions of the first paragraph of this Article, may give judgment even if no certificate of service or delivery has been received, if all the following conditions are fulfilled –

a) the document was transmitted by one of the methods provided for in this Convention,

b) a period of time of not less than six months, considered adequate by the judge in the particular case, has elapsed since the date of the transmission of the document,

c) no certificate of any kind has been received, even though every reasonable effort has been made to obtain it through the competent authorities of the State addressed.

Notwithstanding the provisions of the preceding paragraphs the judge may order, in case of urgency, any provisional or protective measures.

Article 16

When a writ of summons or an equivalent document had to be transmitted abroad for the purpose of service, under the provisions of the present Convention, and a judgment has been entered against a defendant who has not appeared, the judge shall have the power to relieve the defendant from the effects of the expiration of the time for appeal from the judgment if the following conditions are fulfilled –

a) the defendant, without any fault on his part, did not have knowledge of the document in sufficient time to defend, or knowledge of the judgment in sufficient time to appeal, and

b) the defendant has disclosed a *prima facie* defence to the action on the merits.

An application for relief may be filed only within a reasonable time after the defendant has knowledge of the judgment.

Each Contracting State may declare that the application will not be entertained if it is filed after the expiration of a time to be stated in the declaration, but which shall in no case be less than one year following the date of the judgment.

This Article shall not apply to judgments concerning status or capacity of persons.

CHAPTER II – EXTRAJUDICIAL DOCUMENTS

Article 17

Extrajudicial documents emanating from authorities and judicial officers of a Contracting State may be transmitted for the purpose of service in another Contracting State by the methods and under the provisions of the present Convention.

CHAPTER III – GENERAL CLAUSES

Article 18

Each Contracting State may designate other authorities in addition to the Central Authority and shall determine the extent of their competence.

The applicant shall, however, in all cases, have the right to address a request directly to the Central Authority.

Federal States shall be free to designate more than one Central Authority.

Article 19

To the extent that the internal law of a Contracting State permits methods of transmission, other than those provided for in the preceding Articles, of documents coming from abroad, for service within its territory, the present Convention shall not affect such provisions.

Article 20

The present Convention shall not prevent an agreement between any two or more Contracting States to dispense with –

a) the necessity for duplicate copies of transmitted documents as required by the second paragraph of Article 3,

b) the language requirements of the third paragraph of Article 5 and Article 7,

c) the provisions of the fourth paragraph of Article 5,

d) the provisions of the second paragraph of Article 12.

Article 21

Each Contracting State shall, at the time of the deposit of its instrument of ratification or accession, or at a later date, inform the Ministry of Foreign Affairs of the Netherlands of the following –

a) the designation of authorities, pursuant to Articles 2 and 18,

b) the designation of the authority competent to complete the certificate pursuant to Article 6,

c) the designation of the authority competent to receive documents transmitted by consular channels, pursuant to Article 9.

Each Contracting State shall similarly inform the Ministry, where appropriate, of –

a) opposition to the use of methods of transmission pursuant to Articles 8 and 10,

b) declarations pursuant to the second paragraph of Article 15 and the third paragraph of Article 16,

c) all modifications of the above designations, oppositions and declarations.

Article 22

Where Parties to the present Convention are also Parties to one or both of the Conventions on civil procedure signed at The Hague on 17th July 1905, and on 1st March 1954, this Convention shall replace as between them Articles 1 to 7 of the earlier Conventions.

Article 23

The present Convention shall not affect the application of Article 23 of the Convention on civil procedure signed at The Hague on 17th July 1905, or of Article 24 of the Convention on civil procedure signed at The Hague on 1st March 1954.

These Articles shall, however, apply only if methods of communication, identical to those provided for in these Conventions, are used.

Article 24

Supplementary agreements between Parties to the Conventions of 1905 and 1954 shall be considered as equally applicable to the present Convention, unless the Parties have otherwise agreed.

Article 25

Without prejudice to the provisions of Articles 22 and 24, the present Convention shall not derogate from Conventions containing provisions on the matters governed by this Convention to which the Contracting States are, or shall become, Parties.

Article 26

The present Convention shall be open for signature by the States represented at the Tenth Session of the Hague Conference on Private International Law.

It shall be ratified, and the instruments of ratification shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

Article 27

The present Convention shall enter into force on the sixtieth day after the deposit of the third instrument of ratification referred to in the second paragraph of Article 26.

The Convention shall enter into force for each signatory State which ratifies subsequently on the sixtieth day after the deposit of its instrument of ratification.

Article 28

Any State not represented at the Tenth Session of the Hague Conference on Private International Law may accede to the present Convention after it has entered into force in accordance with the first paragraph of Article 27. The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force for such a State in the absence of any objection from a State, which has ratified the Convention before such deposit, notified to the Ministry of Foreign Affairs of the Netherlands within a period of six months after the date on which the said Ministry has notified it of such accession.

In the absence of any such objection, the Convention shall enter into force for the acceding State on the first day of the month following the expiration of the last of the periods referred to in the preceding paragraph.

Article 29

Any State may, at the time of signature, ratification or accession, declare that the present Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect on the date of entry into force of the Convention for the State concerned.

At any time thereafter, such extensions shall be notified to the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force for the territories mentioned in such an extension on the sixtieth day after the notification referred to in the preceding paragraph.

Article 30

The present Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 27, even for States which have ratified it or acceded to it subsequently.

If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Netherlands at least six months before the end of the five year period.

It may be limited to certain of the territories to which the Convention applies.

The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

Article 31

The Ministry of Foreign Affairs of the Netherlands shall give notice to the States referred to in Article 26, and to the States which have acceded in accordance with Article 28, of the following –

a) the signatures and ratifications referred to in Article 26;

b) the date on which the present Convention enters into force in accordance with the first paragraph of Article 27;

c) the accessions referred to in Article 28 and the dates on which they take effect;

d) the extensions referred to in Article 29 and the dates on which they take effect;

e) the designations, oppositions and declarations referred to in Article 21;

f) the denunciations referred to in the third paragraph of Article 30.

In witness whereof the undersigned, being duly authorised thereto, have signed the present Convention.

Done at The Hague, on the 15th day of November, 1965, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Netherlands, and of which a certified copy shall be sent, through the diplomatic channel, to each of the States represented at the Tenth Session of the Hague Conference on Private International Law.

20. CONVENTION ON THE TAKING OF EVIDENCE ABROAD IN CIVIL OR COMMERCIAL MATTERS[1]

(Concluded 18 March 1970)

The States signatory to the present Convention,
Desiring to facilitate the transmission and execution of Letters of Request and to further the accommodation of the different methods which they use for this purpose,
Desiring to improve mutual judicial co-operation in civil or commercial matters,
Have resolved to conclude a Convention to this effect and have agreed upon the following provisions –

CHAPTER I – LETTERS OF REQUEST

Article 1

In civil or commercial matters a judicial authority of a Contracting State may, in accordance with the provisions of the law of that State, request the competent authority of another Contracting State, by means of a Letter of Request, to obtain evidence, or to perform some other judicial act.
A Letter shall not be used to obtain evidence which is not intended for use in judicial proceedings, commenced or contemplated.
The expression "other judicial act" does not cover the service of judicial documents or the issuance of any process by which judgments or orders are executed or enforced, or orders for provisional or protective measures.

Article 2

A Contracting State shall designate a Central Authority which will undertake to receive Letters of Request coming from a judicial authority of another Contracting State and to transmit them to the authority competent to execute them. Each State shall organise the Central Authority in accordance with its own law.
Letters shall be sent to the Central Authority of the State of execution without being transmitted through any other authority of that State.

Article 3

A Letter of Request shall specify –
a) the authority requesting its execution and the authority requested to execute it, if known to the requesting authority;
b) the names and addresses of the parties to the proceedings and their representatives, if any;
c) the nature of the proceedings for which the evidence is required, giving all necessary information in regard thereto;
d) the evidence to be obtained or other judicial act to be performed.

[1] This Convention, including related materials, is accessible on the website of the Hague Conference on Private International Law (www.hcch.net), under “Conventions” or under the “Evidence Section”. For the full history of the Convention, see Hague Conference on Private International Law, *Actes et documents de la Onzième session (1968)*, Tome IV, *Obtention des preuves* (219 pp.).

Where appropriate, the Letter shall specify, *inter alia* –

e) the names and addresses of the persons to be examined;

f) the questions to be put to the persons to be examined or a statement of the subject-matter about which they are to be examined;

g) the documents or other property, real or personal, to be inspected;

h) any requirement that the evidence is to be given on oath or affirmation, and any special form to be used;

i) any special method or procedure to be followed under Article 9.

A Letter may also mention any information necessary for the application of Article 11.
No legalisation or other like formality may be required.

Article 4

A Letter of Request shall be in the language of the authority requested to execute it or be accompanied by a translation into that language.
Nevertheless, a Contracting State shall accept a Letter in either English or French, or a translation into one of these languages, unless it has made the reservation authorised by Article 33.
A Contracting State which has more than one official language and cannot, for reasons of internal law, accept Letters in one of these languages for the whole of its territory, shall, by declaration, specify the language in which the Letter or translation thereof shall be expressed for execution in the specified parts of its territory. In case of failure to comply with this declaration, without justifiable excuse, the costs of translation into the required language shall be borne by the State of origin.
A Contracting State may, by declaration, specify the language or languages other than those referred to in the preceding paragraphs, in which a Letter may be sent to its Central Authority.
Any translation accompanying a Letter shall be certified as correct, either by a diplomatic officer or consular agent or by a sworn translator or by any other person so authorised in either State.

Article 5

If the Central Authority considers that the request does not comply with the provisions of the present Convention, it shall promptly inform the authority of the State of origin which transmitted the Letter of Request, specifying the objections to the Letter.

Article 6

If the authority to whom a Letter of Request has been transmitted is not competent to execute it, the Letter shall be sent forthwith to the authority in the same State which is competent to execute it in accordance with the provisions of its own law.

Article 7

The requesting authority shall, if it so desires, be informed of the time when, and the place where, the proceedings will take place, in order that the parties concerned, and their representatives, if any, may be present. This information shall be sent directly to the parties or their representatives when the authority of the State of origin so requests.

Article 8

A Contracting State may declare that members of the judicial personnel of the requesting authority of another Contracting State may be present at the execution of a Letter of Request. Prior authorisation by the competent authority designated by the declaring State may be required.

Article 9

The judicial authority which executes a Letter of Request shall apply its own law as to the methods and procedures to be followed.

However, it will follow a request of the requesting authority that a special method or procedure be followed, unless this is incompatible with the internal law of the State of execution or is impossible of performance by reason of its internal practice and procedure or by reason of practical difficulties.
A Letter of Request shall be executed expeditiously.

Article 10

In executing a Letter of Request the requested authority shall apply the appropriate measures of compulsion in the instances and to the same extent as are provided by its internal law for the execution of orders issued by the authorities of its own country or of requests made by parties in internal proceedings.

Article 11

In the execution of a Letter of Request the person concerned may refuse to give evidence in so far as he has a privilege or duty to refuse to give the evidence –

a) under the law of the State of execution; or

b) under the law of the State of origin, and the privilege or duty has been specified in the Letter, or, at the instance of the requested authority, has been otherwise confirmed to that authority by the requesting authority.

A Contracting State may declare that, in addition, it will respect privileges and duties existing under the law of States other than the State of origin and the State of execution, to the extent specified in that declaration.

Article 12

The execution of a Letter of Request may be refused only to the extent that –

a) in the State of execution the execution of the Letter does not fall within the functions of the judiciary; or

b) the State addressed considers that its sovereignty or security would be prejudiced thereby.

Execution may not be refused solely on the ground that under its internal law the State of execution claims exclusive jurisdiction over the subject-matter of the action or that its internal law would not admit a right of action on it.

Article 13

The documents establishing the execution of the Letter of Request shall be sent by the requested authority to the requesting authority by the same channel which was used by the latter.
In every instance where the Letter is not executed in whole or in part, the requesting authority shall be informed immediately through the same channel and advised of the reasons.

Article 14

The execution of the Letter of Request shall not give rise to any reimbursement of taxes or costs of any nature.
Nevertheless, the State of execution has the right to require the State of origin to reimburse the fees paid to experts and interpreters and the costs occasioned by the use of a special procedure requested by the State of origin under Article 9, paragraph 2.
The requested authority whose law obliges the parties themselves to secure evidence, and which is not able itself to execute the Letter, may, after having obtained the consent of the requesting authority, appoint a suitable person to do so. When seeking this consent the requested authority shall indicate the approximate costs which would result from this procedure. If the requesting authority gives its consent it shall reimburse any costs incurred; without such consent the requesting authority shall not be liable for the costs.

Article 15

In a civil or commercial matter, a diplomatic officer or consular agent of a Contracting State may, in the territory of another Contracting State and within the area where he exercises his functions, take the evidence without compulsion of nationals of a State which he represents in aid of proceedings commenced in the courts of a State which he represents.
A Contracting State may declare that evidence may be taken by a diplomatic officer or consular agent only if permission to that effect is given upon application made by him or on his behalf to the appropriate authority designated by the declaring State.

Article 16

A diplomatic officer or consular agent of a Contracting State may, in the territory of another Contracting State and within the area where he exercises his functions, also take the evidence, without compulsion, of nationals of the State in which he exercises his functions or of a third State, in aid of proceedings commenced in the courts of a State which he represents, if –

a) a competent authority designated by the State in which he exercises his functions has given its permission either generally or in the particular case, and
b) he complies with the conditions which the competent authority has specified in the permission.

A Contracting State may declare that evidence may be taken under this Article without its prior permission.

Article 17

In a civil or commercial matter, a person duly appointed as a commissioner for the purpose may, without compulsion, take evidence in the territory of a Contracting State in aid of proceedings commenced in the courts of another Contracting State if –

a) a competent authority designated by the State where the evidence is to be taken has given its permission either generally or in the particular case; and
b) he complies with the conditions which the competent authority has specified in the permission.

A Contracting State may declare that evidence may be taken under this Article without its prior permission.

Article 18

A Contracting State may declare that a diplomatic officer, consular agent or commissioner authorised to take evidence under Articles 15, 16 or 17, may apply to the competent authority designated by the declaring State for appropriate assistance to obtain the evidence by compulsion. The declaration may contain such conditions as the declaring State may see fit to impose.
If the authority grants the application it shall apply any measures of compulsion which are appropriate and are prescribed by its law for use in internal proceedings.

Article 19

The competent authority, in giving the permission referred to in Articles 15, 16 or 17, or in granting the application referred to in Article 18, may lay down such conditions as it deems fit, *inter alia*, as to the time and place of the taking of the evidence. Similarly it may require that it be given reasonable advance notice of the time, date and place of the taking of the evidence; in such a case a representative of the authority shall be entitled to be present at the taking of the evidence.

Article 20

In the taking of evidence under any Article of this Chapter persons concerned may be legally represented.

Article 21

Where a diplomatic officer, consular agent or commissioner is authorised under Articles 15, 16 or 17 to take evidence –

a) he may take all kinds of evidence which are not incompatible with the law of the State where the evidence is taken or contrary to any permission granted pursuant to the above Articles, and shall have power within such limits to administer an oath or take an affirmation;

b) a request to a person to appear or to give evidence shall, unless the recipient is a national of the State where the action is pending, be drawn up in the language of the place where the evidence is taken or be accompanied by a translation into such language;

c) the request shall inform the person that he may be legally represented and, in any State that has not filed a declaration under Article 18, shall also inform him that he is not compelled to appear or to give evidence;

d) the evidence may be taken in the manner provided by the law applicable to the court in which the action is pending provided that such manner is not forbidden by the law of the State where the evidence is taken;

e) a person requested to give evidence may invoke the privileges and duties to refuse to give the evidence contained in Article 11.

Article 22

The fact that an attempt to take evidence under the procedure laid down in this Chapter has failed, owing to the refusal of a person to give evidence, shall not prevent an application being subsequently made to take the evidence in accordance with Chapter I.

CHAPTER III – GENERAL CLAUSES

Article 23

A Contracting State may at the time of signature, ratification or accession, declare that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries.

Article 24

A Contracting State may designate other authorities in addition to the Central Authority and shall determine the extent of their competence. However, Letters of Request may in all cases be sent to the Central Authority.
Federal States shall be free to designate more than one Central Authority.

Article 25

A Contracting State which has more than one legal system may designate the authorities of one of such systems, which shall have exclusive competence to execute Letters of Request pursuant to this Convention.

Article 26

A Contracting State, if required to do so because of constitutional limitations, may request the reimbursement by the State of origin of fees and costs, in connection with the execution of Letters of

Request, for the service of process necessary to compel the appearance of a person to give evidence, the costs of attendance of such persons, and the cost of any transcript of the evidence.
Where a State has made a request pursuant to the above paragraph, any other Contracting State may request from that State the reimbursement of similar fees and costs.

Article 27

The provisions of the present Convention shall not prevent a Contracting State from –

a) declaring that Letters of Request may be transmitted to its judicial authorities through channels other than those provided for in Article 2;

b) permitting, by internal law or practice, any act provided for in this Convention to be performed upon less restrictive conditions;

c) permitting, by internal law or practice, methods of taking evidence other than those provided for in this Convention.

Article 28

The present Convention shall not prevent an agreement between any two or more Contracting States to derogate from –

a) the provisions of Article 2 with respect to methods of transmitting Letters of Request;

b) the provisions of Article 4 with respect to the languages which may be used;

c) the provisions of Article 8 with respect to the presence of judicial personnel at the execution of Letters;

d) the provisions of Article 11 with respect to the privileges and duties of witnesses to refuse to give evidence;

e) the provisions of Article 13 with respect to the methods of returning executed Letters to the requesting authority;

f) the provisions of Article 14 with respect to fees and costs;

g) the provisions of Chapter II.

Article 29

Between Parties to the present Convention who are also Parties to one or both of the Conventions on Civil Procedure signed at The Hague on the 17th of July 1905 and the 1st of March 1954, this Convention shall replace Articles 8-16 of the earlier Conventions.

Article 30

The present Convention shall not affect the application of Article 23 of the Convention of 1905, or of Article 24 of the Convention of 1954.

Article 31

Supplementary Agreements between Parties to the Conventions of 1905 and 1954 shall be considered as equally applicable to the present Convention unless the Parties have otherwise agreed.

Article 32

Without prejudice to the provisions of Articles 29 and 31, the present Convention shall not derogate from conventions containing provisions on the matters covered by this Convention to which the Contracting States are, or shall become Parties.

Article 33

A State may, at the time of signature, ratification or accession exclude, in whole or in part, the application of the provisions of paragraph 2 of Article 4 and of Chapter II. No other reservation shall be permitted.
Each Contracting State may at any time withdraw a reservation it has made; the reservation shall cease to have effect on the sixtieth day after notification of the withdrawal.
When a State has made a reservation, any other State affected thereby may apply the same rule against the reserving State.

Article 34

A State may at any time withdraw or modify a declaration.

Article 35

A Contracting State shall, at the time of the deposit of its instrument of ratification or accession, or at a later date, inform the Ministry of Foreign Affairs of the Netherlands of the designation of authorities, pursuant to Articles 2, 8, 24 and 25.
A Contracting State shall likewise inform the Ministry, where appropriate, of the following –

a) the designation of the authorities to whom notice must be given, whose permission may be required, and whose assistance may be invoked in the taking of evidence by diplomatic officers and consular agents, pursuant to Articles 15, 16 and 18 respectively;
b) the designation of the authorities whose permission may be required in the taking of evidence by commissioners pursuant to Article 17 and of those who may grant the assistance provided for in Article 18;
c) declarations pursuant to Articles 4, 8, 11, 15, 16, 17, 18, 23 and 27;
d) any withdrawal or modification of the above designations and declarations;
e) the withdrawal of any reservation.

Article 36

Any difficulties which may arise between Contracting States in connection with the operation of this Convention shall be settled through diplomatic channels.

Article 37

The present Convention shall be open for signature by the States represented at the Eleventh Session of the Hague Conference on Private International Law.
It shall be ratified, and the instruments of ratification shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

Article 38

The present Convention shall enter into force on the sixtieth day after the deposit of the third instrument of ratification referred to in the second paragraph of Article 37.
The Convention shall enter into force for each signatory State which ratifies subsequently on the sixtieth day after the deposit of its instrument of ratification.

Article 39

Any State not represented at the Eleventh Session of the Hague Conference on Private International Law which is a Member of this Conference or of the United Nations or of a specialised agency of that Organisation, or a Party to the Statute of the International Court of Justice may accede to the present Convention after it has entered into force in accordance with the first paragraph of Article 38.
The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Netherlands.
The Convention shall enter into force for a State acceding to it on the sixtieth day after the deposit of its instrument of accession.

The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession. Such declaration shall be deposited at the Ministry of Foreign Affairs of the Netherlands; this Ministry shall forward, through diplomatic channels, a certified copy to each of the Contracting States.
The Convention will enter into force as between the acceding State and the State that has declared its acceptance of the accession on the sixtieth day after the deposit of the declaration of acceptance.

Article 40

Any State may, at the time of signature, ratification or accession, declare that the present Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect on the date of entry into force of the Convention for the State concerned.
At any time thereafter, such extensions shall be notified to the Ministry of Foreign Affairs of the Netherlands.
The Convention shall enter into force for the territories mentioned in such an extension on the sixtieth day after the notification indicated in the preceding paragraph.

Article 41

The present Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 38, even for States which have ratified it or acceded to it subsequently.
If there has been no denunciation, it shall be renewed tacitly every five years.
Any denunciation shall be notified to the Ministry of Foreign Affairs of the Netherlands at least six months before the end of the five year period.
It may be limited to certain of the territories to which the Convention applies.
The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

Article 42

The Ministry of Foreign Affairs of the Netherlands shall give notice to the States referred to in Article 37, and to the States which have acceded in accordance with Article 39, of the following –

a) the signatures and ratifications referred to in Article 37;
b) the date on which the present Convention enters into force in accordance with the first paragraph of Article 38;
c) the accessions referred to in Article 39 and the dates on which they take effect;
d) the extensions referred to in Article 40 and the dates on which they take effect;
e) the designations, reservations and declarations referred to in Articles 33 and 35;
f) the denunciations referred to in the third paragraph of Article 41.

In witness whereof the undersigned, being duly authorised thereto, have signed the present Convention.

Done at The Hague, on the 18th day of March, 1970, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Netherlands, and of which a certified copy shall be sent, through the diplomatic channel, to each of the States represented at the Eleventh Session of the Hague Conference on Private International Law.

100 N.Y.2d 215
Court of Appeals of New York.

CIBC MELLON TRUST COMPANY, as Trustee of Chrysler Canada, Ltd.'s Benefits Plan and Others, et al., Respondents,
v.
MORA HOTEL CORPORATION N.V. et al., Appellants.

May 8, 2003.

Synopsis

Investors brought action against two Netherlands corporations doing business in New York, seeking recognition and enforcement of judgment entered against corporations by English court, pursuant to the Uniform Foreign Country Money–Judgments Recognition Act. The Supreme Court, New York County, Ira Gammerman, J., granted summary judgment in favor of investors, and the Supreme Court, Appellate Division, Saxe, J., 296 A.D.2d 81, 743 N.Y.S.2d 408, affirmed. Corporations appealed. The Court of Appeals, Read, J., held that: (1) English system was not incompatible with requirements of due process of law, and (2) corporations' voluntary appearance in English court subjected them to personal jurisdiction in England.

Affirmed.

West Headnotes (5)

[1] **Judgment**
Judgments of Courts of Foreign Countries

New York's version of the Uniform Foreign Country Money–Judgments Recognition Act was designed to codify and clarify existing case law on the subject and, more importantly, to promote the efficient enforcement of New York judgments abroad by assuring foreign jurisdictions that their judgments would receive streamlined enforcement in New York. McKinney's CPLR 5301 et seq.

16 Cases that cite this headnote

[2] **Judgment**
Judgments of Courts of Foreign Countries

In proceeding under New York's version of the Uniform Foreign Country Money–Judgments Recognition Act, the judgment creditor does not seek any new relief against the judgment debtor, but instead merely asks the court to perform its ministerial function of recognizing the foreign country money judgment and converting it into a New York judgment. McKinney's CPLR 5301 et seq.

18 Cases that cite this headnote

[3] **Constitutional Law**
Foreign Judgments

Judgment
Judgments of Courts of Foreign Countries

English High Court's use of "Mareva" orders, pursuant to which Netherlands corporations' assets were frozen during pendency of proceeding upon their failure to comply with discovery orders, did not render English system as a whole incompatible with requirements of due process of law, as would preclude recognition and enforcement of English judgment entered against corporations in favor of investors, under New York's version of the Uniform Foreign Country Money–Judgments Recognition Act; corporations were given ample notice and numerous opportunities to present their defense in English court. U.S.C.A. Const.Amend. 14; McKinney's CPLR 5304(a), par. 1.

12 Cases that cite this headnote

[4] **Constitutional Law**
Foreign Judgments

Judgment
Judgments of Courts of Foreign Countries

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Section of New York's version of the Uniform Foreign Country Money–Judgments Recognition Act requiring that, for a foreign country money judgment to be considered conclusive between the parties, the judgment must be rendered under a system with procedures compatible with the requirements of due process of law, does not demand that the foreign tribunal's procedures exactly match those of New York. U.S.C.A. Const.Amend. 14; McKinney's CPLR 5304(a), par. 1.

23 Cases that cite this headnote

[5] Judgment
In Personam

Netherlands corporations' application to the English High Court seeking relief from English money judgment in favor of investors amounted to voluntary appearance subjecting corporations to personal jurisdiction of English courts, and thus, recognition and enforcement of English judgment under New York's version of the Uniform Foreign Country Money–Judgments Recognition Act was not precluded on ground of lack of personal jurisdiction; in prosecuting appeal, corporations went beyond jurisdictional arguments to attack merits of English judgment. McKinney's CPLR 5305(a), par. 2.

6 Cases that cite this headnote

Attorneys and Law Firms

***6 *216 **156** Pryor Cashman Sherman & Flynn LLP, New York City (Gideon Cashman, Jamie M. Brickell, Lisa M. Buckley and Benjamin K. Semel of counsel), for appellants.

*217 Proskauer Rose LLP, New York City (Leon P. Gold, Karen E. Clarke, Karen D. Coombs and Bart Schectman of counsel), for respondents.

***218 OPINION OF THE COURT**

READ, J.

Defendants here appeal from an order of the Appellate Division, which, among other ***7 **157** things, affirmed Supreme Court's order and judgment recognizing and docketing certain judgments entered against them by the English High Court of Justice, Chancery Division, pursuant to New York's version of the Uniform Foreign Country Money–Judgments Recognition Act (CPLR art 53). For the reasons that follow, we conclude that the English judgments at issue satisfy the statutory prerequisites for recognition.

I.

In 1992, Castor Holdings Ltd., a Canadian real estate and financial investment company, declared bankruptcy. Plaintiffs CIBC Mellon Trust Company, as trustee of several pension and other benefit funds, and DaimlerChrysler Canada, Inc. had lost millions of dollars in investments in Castor. In May 1996, plaintiffs commenced legal proceedings in England in the High Court, alleging that they had been duped into making these investments by what amounted to a massive, multinational fraud. The suit named Wolfgang Otto Stolzenberg, the president, CEO and chairman of Castor, as the primary defendant accused of masterminding the fraud.

Marco Gambazzi, a Swiss attorney, was also individually named as a defendant. Gambazzi owned, in whole or in part, and controlled Mora Hotel Corporation N.V. and Chascona N.V.,[1] which were among the numerous corporations eventually named as defendants in the English proceedings. Plaintiffs initially asserted only a "tracing" claim against Mora for receipt of funds for no consideration, which were traceable to the alleged fraud. When plaintiffs added a claim of conspiracy against Mora in January 1999, they joined Chascona as a coconspirator.

Mora is the ground lessee and operator of the Gorham Hotel, located in midtown Manhattan, and Chascona is the fee owner *219 of the property. They are both Netherlands Antilles corporations authorized to do business in New York. The Gorham Hotel is apparently their sole asset.

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Plaintiffs made two kinds of ex parte applications to the High Court. The first sought leave to serve various nonresident defendants, including Mora (and later, Chascona), as "necessary or proper" parties. This rule (*see* UK Civ Pro Rules [1998] SI 1998/3132, part 6[III], rules 6.20, 6.21) allows out-of-the-jurisdiction service on such a party when the liability of the defendants, either jointly or individually, depends upon a single investigation (*see Massey v. Heynes & Co.,* 21 QBD 330 [Ct App 1888]). In order for the High Court to exercise such "necessary or proper" jurisdiction, however, at least one defendant —in this instance, Stolzenberg—must be an English domiciliary and serve as the base or anchor defendant (*see* rules 6.20, 6.21). The second kind of ex parte application sought *Mareva* injunctions or orders (*see Mareva Cia. Naviera S.A. v International Bulkcarriers S.A.,* 2 Lloyd's Rep 509 [1975]) to freeze defendants' assets on a world-wide basis during the pendency of the English proceedings and to direct certain discovery. The initial *Mareva* order required Mora to provide information and documents relating to the tracing claim and its assets as well as copies of any documents relevant to the proceedings. In support of this application, plaintiffs submitted attorney affidavits and voluminous supporting documentation. After reviewing these materials over nine days, the High Court determined *****8 **158** that plaintiffs had made the requisite showing; namely, a "good arguable case."

In March 1997, plaintiffs served Mora in New York with a writ of summons and the *Mareva* order. Mora appeared in the English proceedings for the limited purpose of contesting the High Court's jurisdiction over Stolzenberg, the anchor defendant, on the grounds that he was not domiciled in England at the time that Mora argued was critical (i.e., when the writ of summons for Stolzenberg was served rather than when it was issued). In May 1997, the High Court rejected Mora's argument and dismissed its application to set aside service of the writ on it; and the Court of Appeal dismissed Mora's appeal in October 1997. Finally, in October 2000, the House of Lords dismissed Mora's appeal from the Court of Appeal. Chascona abandoned its identical jurisdictional challenge following the House of Lords' dismissal of Mora's appeal.

While disputing the High Court's jurisdiction, Mora elected not to comply with the *Mareva* order relating to the tracing ***220** claim and several subsequent orders to secure compliance with it. Some of these orders were "unless" orders, which explicitly warned Mora that continued recalcitrance would lead to its debarment or preclusion from defending against the tracing claim and permit plaintiffs to obtain judgment. When Mora failed to take heed, a default judgment was entered against it for roughly $600,000 (U.S.) in February 1999, following a damages assessment hearing.

In July 1999, plaintiffs applied ex parte to increase to $420 million (Can.) the value of Mora's assets covered by the *Mareva* order, and to grant the same freezing relief with respect to Chascona on account of the conspiracy claims pending against them both. Once again, before granting plaintiffs' applications, the High Court examined the evidence to determine whether plaintiffs had established the requisite "good arguable case."

Thereafter, as a result of their failure to comply with the new *Mareva* and concomitant "unless" orders, both Mora and Chascona were debarred from defending against the main fraudulent conspiracy claims. Plaintiffs applied to the High Court for an assessment of damages, and a hearing was held. In December 1999, default judgments of roughly $330 million (U.S.) were entered in England against both Mora and Chascona on the conspiracy claims.

In May 2000, plaintiffs commenced an action in Supreme Court, seeking recognition of the English judgments pursuant to the Uniform Foreign Country Money–Judgments Recognition Act (CPLR art 53) and New York common law, as well as an attachment of the Gorham Hotel, reportedly worth approximately $30 million. On January 16, 2001, Supreme Court granted plaintiffs summary judgment recognizing and docketing the English judgments; confirmed the attachment; appointed a postjudgment receiver to manage and sell the Gorham Hotel in satisfaction of the English judgments; and denied defendants' cross motion to dismiss the complaint.

The Appellate Division affirmed Supreme Court's order and judgment on May 28, 2002 (296 A.D.2d 81, 743 N.Y.S.2d 408 [2002]). This appeal pursuant to CPLR 5601(b)(1) followed. The constitutional issues asserted as a basis for our jurisdiction on the appeal are, broadly stated, whether the courts below violated defendants' due process rights by (1) determining that the English courts properly exercised personal jurisdiction over them; and (2) recognizing foreign judgments that were entered on default following defendants' failure to *****9 **159**

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comply with a provisional remedy (the *Mareva* orders) not available in New York.

***221** Subsequent to Supreme Court's decision and order, defendants in 2001 and 2002 applied to the High Court to set aside the default judgments entered against them because of their failure to comply with the "unless" orders, and to allow them to defend the tracing and conspiracy claims on the merits. After a six-day hearing, which took place from December 9–16, 2002, the High Court dismissed defendants' applications on February 3, 2003. Plaintiffs then moved to dismiss this appeal, arguing that defendants' applications to the High Court mooted the asserted constitutional bases. We withheld decision and entertained oral argument on both the motion and the appeal.

II.

[1] New York has traditionally been a generous forum in which to enforce judgments for money damages rendered by foreign courts (*see e.g. Lazier v. Westcott,* 26 N.Y. 146 [1862]; *Dunstan v. Higgins,* 138 N.Y. 70, 33 N.E. 729 [1893]; *Cowans v. Ticonderoga Pulp & Paper Co.,* 246 N.Y. 603, 159 N.E. 669 [1927]; *see also Greschler v. Greschler,* 51 N.Y.2d 368, 376, 434 N.Y.S.2d 194, 414 N.E.2d 694 [1980]; Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C5301:1, at 540); and in 1970, New York adopted the Uniform Foreign Money–Judgments Recognition Act (*see* Uniform Foreign Money–Judgments Recognition Act §§ 1–9, 13 ULA [part II] 43–80; L 1970, ch 981, §§ 1–2)[2] as CPLR article 53. Article 53 was designed to codify and clarify existing case law on the subject and, more importantly, to promote the efficient enforcement of New York judgments abroad by assuring foreign jurisdictions that their judgments would receive streamlined enforcement here (*see* Judicial Conference Mem in Support, Bill Jacket, L 1970, ch 981, at 4; Kulzer, *The Uniform Foreign Money–Judgments Recognition Act,* reprinted in 13th Ann Report of N.Y. Jud Conf 194, 195–196, 226 [1968]).[3]

[2] Article 53 applies to "any foreign country judgment which is final, conclusive and enforceable where rendered even though an appeal therefrom is pending or it is subject to appeal" (CPLR 5302). Simply put, a foreign country judgment is considered "conclusive between the parties to the extent that it grants or denies recovery of a sum of money" (CPLR 5303) unless

> "1. the judgment was rendered under a system ***222** which does not provide impartial tribunals or procedures compatible with the requirements of due process of law; [or]
>
> "2. the foreign court did not have personal jurisdiction over the defendant" (CPLR 5304[a][1], [2]).

Moreover, "[i]n proceeding under article 53, the judgment creditor does not seek any new relief against the judgment debtor, but instead merely asks the court to perform its ministerial function of recognizing the foreign country money judgment and converting it into a New York judgment" (*Lenchyshyn v. Pelko Elec.,* 281 A.D.2d 42, 49, 723 N.Y.S.2d 285 [4th Dept.2001]).

[3] **[4]** On this appeal, defendants direct their principal fire related to CPLR 5304(a)(1) at the High Court's use of *Mareva* *****10** ****160** orders. While we have expressed concern regarding the power and potential commercial disruption of *Mareva* orders (*see Credit Agricole Indosuez v. Rossiyskiy Kredit Bank,* 94 N.Y.2d 541, 550–551, 708 N.Y.S.2d 26, 729 N.E.2d 683 [2000]), the use of this device, standing alone, does not render the English *system* as a whole incompatible with our notions of due process (*see e.g. Guinness PLC v. Ward,* 955 F.2d 875, 900 [4th Cir.1992]). In short, CPLR 5304(a)(1) does not demand that the foreign tribunal's procedures exactly match those of New York. Rather, the statute is satisfied if the foreign court's procedures are "compatible with the requirements of due process of law" (*id.* at 882). Moreover, "[c]onsidering that our own jurisprudence is based on England's, a defendant sued on an English judgment will rarely be in a position to defeat it with such a showing" (Siegel, 2001 Supp Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C5304: 1, 2003 Pocket Part, at 65; *see also Society of Lloyd's v. Ashenden,* 233 F.3d 473, 476 [7th Cir.2000] ["Any suggestion that (England's) system of courts 'does not provide impartial tribunals or procedures compatible with the requirements of due process of law' borders on the risible"]).

In summary, the relevant inquiry under CPLR 5304(a)(1) is the overall fairness of England's legal "system," which is beyond dispute (*see Society of Lloyd's v. Grace,* 278 A.D.2d 169, 718 N.Y.S.2d 327 [1st Dept.2000]; *Society of*

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Lloyd's v. Ashenden, supra; compare Bridgeway Corp. v. Citibank, 201 F.3d 134 [2d Cir.2000] [fairness of Liberian courts]). Indeed, defendants were given ample notice and numerous opportunities to present their defense in England; they simply elected to forego these opportunities (apparently against the advice of their English attorneys) for strategic reasons.

[5] ***223** Turning next to CPLR 5304(a)(2), the question is whether the English courts had jurisdiction over defendants. Before reaching this question, however, we must consider the merits of plaintiffs' motion to dismiss. Plaintiffs argue that when defendants applied to the High Court, seeking relief from the English judgments and the opportunity to defend on the merits, they "voluntarily appeared in the proceedings" within the meaning of CPLR 5305(a)(2), thus mooting this appeal. While such a voluntary appearance would not, in our view, moot the appeal, it would abrogate the reviewability of defendants' argument that the English judgments are unenforceable in New York because the English courts lacked jurisdiction over them.

Section 5305(a)(2) provides in relevant part that a foreign judgment shall not be denied recognition for lack of personal jurisdiction if "the defendant voluntarily appeared in the proceedings, other than for the purpose of protecting property seized or threatened with seizure * * * or of contesting the jurisdiction of the court over him" (CPLR 5305[a][2]). Plaintiffs contend that defendants' application to the High Court does not fall within either exception, particularly the second; i.e., it was not an appearance "for the purpose * * * of contesting * * * jurisdiction * * * over [them]."

The commentary for CPLR 5305(a)(2) explains that this second exception is restricted to an

> "appearance * * * solely to protest jurisdiction, what New York used to call and some places still call a 'special appearance'. *If the judgment debtor did any more than she had to do, however, to preserve her jurisdictional objection in the foreign court, she would thereby have submitted voluntarily to its jurisdiction and forfeited the right to claim* *****11** ****161** *an exception for herself under this paragraph* " (Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C5305:1, at 556 [emphasis supplied]).

Federal courts applying New York law have, in fact, interpreted CPLR 5305(a)(2) to foreclose a defendant from contesting a foreign judgment for lack of personal jurisdiction once the defendant has done anything more than it had to do to preserve its jurisdictional objection (*see S.C. Chimexim S.A. v. Velco Enters. Ltd.,* 36 F.Supp.2d 206, 215 [S.D.N.Y.1999]; *Nippon Emo–Trans Co., Ltd. v. Emo–Trans, Inc.,* 744 F.Supp. 1215, 1222–1226 [E.D.N.Y.1990]).

***224** In *S.C. Chimexim S.A.,* a Romanian plaintiff sued an American corporate defendant with its principal place of business in New York for an alleged breach of contract in Romania. The defendant failed to appear and the Romanian tribunal, thereafter, entered judgment for approximately $200,000. The defendant appealed from the Romanian judgment, raising multiple grounds going to both the merits and personal jurisdiction. In the federal action to enforce the Romanian judgment, the court held that the defendant had made a voluntary appearance pursuant to CPLR 5305(a)(2) and was, thus, precluded from contesting personal jurisdiction (*S.C. Chimexim S.A.* at 215).

In *Nippon Emo–Trans Co., Ltd.,* a Japanese judgment creditor sought an order confirming attachment of a New York company's assets in order to satisfy the judgment it had obtained against the company in Japan. The court determined that the New York company's appearance in the Japanese action to defend on the merits after losing its jurisdictional challenge was a voluntary appearance within the meaning of CPLR 5305(a)(2) (*Nippon Emo–Trans Co., Ltd.* at 1222–1226).

The *Nippon* court reasoned that the traditional conceptual differences between "general" and "special" appearances prevailing at the time CPLR article 53 was adopted formed the "conceptual underpinnings" of section 5305(a)(2) (*id.* at 1225). The court also relied upon a section of the Restatement of the Conflict of Laws, which states that "[a] general appearance is one where the defendant either enters an appearance in an action without limiting the purpose for which he appears or where he asks for relief which the court may give only if it has jurisdiction over him" (*id.* at 1224, quoting Restatement [Second] of Conflict of Laws § 33, Comment *d*). Included in this category are those instances where a defendant "makes a motion raising a question as to the merits of the plaintiff's claim even though the defendant shows that he does not

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intend thereby to submit himself to the jurisdiction of the court" (*id.*).

While New York no longer distinguishes between a general and special appearance (*see* CPLR 320), we agree with the *Nippon* court that the language and structure of CPLR 5305(a)(2) have retained the traditional distinction for purposes of recognition actions. Accordingly, the pertinent question here is whether defendants' applications to the High Court amounted to a voluntary appearance within the meaning of CPLR 5305(a)(2).

***225** The "skeletal argument" submitted by defendants on their applications to set aside the English judgments and the High Court's decision leave no room for doubt that defendants were arguing the merits of the conspiracy claims in the English proceedings. They made arguments and presented proof in an attempt to persuade the High Court that their reasons for disobeying the *Mareva* and "unless" orders were reasonable. Significantly, "[c]onsiderable time was spent, on the hearing of the *****12 **162** Applications, on the issue of the legal merits of the claims against Mora and Chascona" (*CIBC Mellon Trust Co. v. Stolzenberg,* [2003] EWHC 13[Ch], 2003 WL 117093, at ¶ 46 [High Ct Justice, Ch Div, Feb. 3, 2003]). Exploration of the legal merits of the conspiracy claims in particular "took up much of the hearing" (*id.* at ¶ 66).[4] Defendants did not preserve any objection to the High Court's jurisdiction over them for purposes of this recognition proceeding. Indeed, they went so far at oral argument as to suggest that if they had successfully vacated the English judgments and unsuccessfully defended on the merits, they still could have contested personal jurisdiction in a future New York recognition proceeding.

We disagree. When defendants applied to the High Court to set aside the English judgments and to defend on the merits, they did more than they had to do to preserve a jurisdictional objection—which was, in any event, foreclosed to them in England by the House of Lords' decision—and so they voluntarily appeared in the foreign proceeding within the meaning of CPLR 5305(a)(2).

We note that CPLR 5305(a)(2) does not on its face distinguish between voluntary appearances taking place in the foreign proceeding before or after judgment; and the two federal cases discussed above each involved postjudgment appearances by the judgment-debtors. The Restatement of the Conflict of Laws likewise makes no pre- or postjudgment distinction, stating that a defendant may be deemed to have made an appearance in an action and, therefore, to have submitted to a court's jurisdiction, by, among other things, "taking steps in the action ***226** *after judgment either in the trial court or in an appellate court* " (Restatement [Second] of Conflict of Laws § 33, Comment *b* [emphasis supplied]; *see* Restatement [Third] of Foreign Relations Law of United States § 421[3] [stating that "(a) defense of lack of jurisdiction is generally waived by any appearance * * * if the appearance is for a purpose that does not include a challenge to the exercise of jurisdiction"]).

Accordingly, the order of the Appellate Division should be affirmed, with costs.

Judges SMITH, CIPARICK, WESLEY, ROSENBLATT and GRAFFEO concur; Chief Judge KAYE taking no part.
Order affirmed, with costs.

All Citations

100 N.Y.2d 215, 792 N.E.2d 155, 762 N.Y.S.2d 5, 2003 N.Y. Slip Op. 13924

Footnotes

1 Gambazzi had also served as a director of Castor, a managing director of Castor's principal lending subsidiaries and an officer or director of a number of other Castor subsidiaries.

2 Twenty-nine other states and the District of Columbia have adopted variations of the Uniform Act.

3 *See also* Kulzer, *Recognition of Foreign Country Judgments in New York: The Uniform Foreign Money–Judgments Recognition Act,* 18 Buf L Rev 1 (1969).

4 The High Court Judge, The Honourable Mr. Justice Etherton, remarked on both the volume of materials submitted and the length of the proceedings: "There were more than sixty lever-arch files [binders] placed before me, for the purposes

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of the Applications. The hearing before me lasted six days, and undoubtedly would have lasted considerably longer" had defendants' counsel not had another engagement and if the court had allowed plaintiffs to continue in proving the merits of their conspiracy claims (*CIBC Mellon Trust Co. v. Stolzenberg, supra* at ¶ 79).

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KeyCite Yellow Flag - Negative Treatment
Distinguished by Huang v. Advanced Battery Technologies, Inc., S.D.N.Y., May 26, 2010

448 F.3d 176
United States Court of Appeals,
Second Circuit.

Raphael BIGIO, Bahia Bigio, Ferial Salma Bigio, and B. Bigio & Co., Plaintiffs–Appellants,
v.
The COCA–COLA COMPANY and The Coca–Cola Export Corporation, Defendants–Appellees.

Docket No. 05–2426–CV.
|
Argued: March 16, 2006.
|
Decided: May 9, 2006.

Synopsis

Background: Canadian citizens and their Egyptian corporation sued Delaware corporations, alleging that, after plaintiffs' property in Egypt was seized by the Egyptian government because the individual plaintiffs were Jewish, defendants purchased or leased the plaintiffs' property with full knowledge of the unlawful manner in which it had been seized. The United States District Court for the Southern District of New York, John S. Martin, Jr., J., 1998 WL 293990, granted defendants' motion to dismiss and plaintiffs appealed. The Court of Appeals, Sack, Circuit Judge, 239 F.3d 440, reversed and remanded. On remand, the District Court, 2005 WL 287397, again dismissed and plaintiff appealed.

Holdings: The Court of Appeals, Rakoff, J., held that:

[1] international comity did not require district court to dismiss action, and

[2] district court failed to accord deference to plaintiff's choice of forum in dismissing action on forum non conveniens grounds.

Reversed and remanded.

Leval, J., dissented and filed opinion.

West Headnotes (5)

[1] **International Law**
Public policy and comity in general

International comity did not require district court to dismiss action brought by Canadian citizens and their Egyptian corporation against Delaware corporation alleging that Delaware corporation purchased or leased its property in Egypt from Egyptian government with knowledge that property had been unlawfully seized because individual plaintiffs were Jewish; throughout long pendency of lawsuit, Egyptian government never raised objection to adjudication of controversy by United States courts, resolution of case by United States courts would not likely impact international relations with Egypt, and although adjudication may require modest application of Egyptian law, federal courts are regularly called upon to interpret foreign law.

12 Cases that cite this headnote

[2] **Federal Courts**
Discretion in general

Federal Courts
Questions of Law in General

In reviewing the dismissal of an action on grounds of forum non conveniens, the issue is not whether the district court abused its broad discretion, but whether it misapprehended or misapplied the relevant legal standards.

1 Cases that cite this headnote

[3] **Federal Courts**
Parties' choice of forum;forum-shopping

The more that a plaintiff, even a foreign plaintiff, chooses to sue in a United States court for legitimate reasons, the more deference must be given to that choice on a motion to dismiss on grounds of forum non conveniens.

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21 Cases that cite this headnote

[4] **Federal Courts**
Convenience of parties and witnesses; location of evidence

An action should be dismissed on forum non conveniens grounds only if the chosen forum is shown to be genuinely inconvenient and the selected forum significantly preferable.

11 Cases that cite this headnote

[5] **Federal Courts**
Parties' choice of forum;forum-shopping

Federal Courts
Convenience of parties and witnesses; location of evidence

District court, in dismissing action in favor of Egyptian courts on forum non conveniens grounds, failed to accord deference to plaintiff's choice of forum in action against Delaware corporation alleging that it purchased or leased plaintiff's property in Egypt from Egyptian government with knowledge that property had been unlawfully seized because individual plaintiffs were Jewish, requiring remand; it was reasonable for plaintiffs to bring action against United States company in United States, key witnesses resided in United States or Canada, parties and attorneys were all located in United States and Canada, and Egypt had never raised objection to United States court deciding case.

16 Cases that cite this headnote

Attorneys and Law Firms

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Before: JACOBS and LEVAL, Circuit Judges, and RAKOFF, District Judge.*

Opinion

RAKOFF, District Judge.

Plaintiffs—three members of the Bigio family and a company they control (collectively, the "Bigios")—appeal from the dismissal of their suit against the Coca–Cola Company and its wholly owned subsidiary (collectively, "Coca–Cola"). When this case was previously before this Court, *see Bigio v. Coca–Cola Co.,* 239 F.3d 440 (2d Cir.2000), the pertinent allegations were ***178** stated in some detail, so here they may be stated briefly. The Bigios had large commercial holdings in Egypt that were wrongfully seized during the Nasser regime because the Bigio family was Jewish. The Bigio family then fled to Canada, but, after Nasser died, the Egyptian Government ordered the property returned to the Bigios. However, the state-owned entity then holding the property refused to comply and, instead, sold or, according to defendants, leased the bottling plant here in issue to a joint venture in which a substantial interest was purchased by the Bigios' former tenant, Coca–Cola, which rejected the Bigios' claims to ownership. Unable to obtain relief in the Egyptian courts, the Bigios brought suit in the United States against Coca–Cola for violation of the Alien Tort Claims Act and for common law claims such as conversion.

In our previous decision, we affirmed the district court's dismissal of the claim under the Alien Tort Claims Act but reversed its dismissal of the common law claims pursuant to the "Act–of–State" doctrine. We found the Act–of–State doctrine inapplicable because "the resolution of this case by United States courts will not likely impact on international relations or embarrass or hinder the executive in the realm of foreign relations." *Bigio,* 239 F.3d at 452 (internal quotation marks omitted). On remand, the district court again dismissed the remaining claims, this time on the ground of international comity or, in the alternative, on the ground of *forum non conveniens. Bigio v. Coca–Cola Co.,* No. 97 Civ. 2858, 2005 WL 287397, 2005 U.S. Dist. LEXIS 1587 (S.D.N.Y. Feb. 3, 2005). Plaintiffs appeal from that decision.

[1] As to international comity, while application of this doctrine ordinarily lies within the discretion of

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the district court, in this instance no such deference is appropriate because the district court applied the wrong legal standard. Specifically, the district court applied the seven-factor test articulated in *Timberlane Lumber Co. v. Bank of Am. Nat'l Trust & Savings Ass'n,* 749 F.2d 1378 (9th Cir.1984). That test is used to determine whether a court should apply United States law extraterritorially, *see O.N.E. Shipping, Ltd. v. Flota Mercante Grancolombiana, S.A.,* 830 F.2d 449 (2d Cir.1987), but that is not in issue here. Rather, the only issue of international comity properly raised here is whether adjudication of this case by a United States court would offend "amicable working relationships" with Egypt. *JP Morgan Chase Bank v. Altos Hornos de Mex., S.A. de C.V.,* 412 F.3d 418, 423 (2d Cir.2005). *Cf. In re Maxwell Comm. Corp.,* 93 F.3d 1036, 1047 (2d Cir.1996) ("We realize that 'international comity' may describe two distinct doctrines: as a canon of construction, it might shorten the reach of a statute; second, it may be viewed as a discretionary act of deference by a national court to decline to exercise jurisdiction in a case properly adjudicated in a foreign state, the so-called comity among courts."). *See generally Hilton v. Guyot,* 159 U.S. 113, 163–64, 16 S.Ct. 139, 40 L.Ed. 95 (1895).

Throughout the long pendency of this lawsuit, the Government of Egypt has never raised the slightest objection to adjudication of the instant controversy by United States courts. *Cf. Jota v. Texaco Inc.,* 157 F.3d 153, 157 (2d Cir.1998). Moreover, this Court has already determined that resolution of this case by United States courts will "not likely impact on international relations" with Egypt. *Bigio,* 239 F.3d at 452 (internal quotation marks omitted). In its present posture, this is a common law suit for damages primarily between Canadian citizens and a United States company, [1] which may likely focus ***179** on what Coca–Cola knew about the Bigios' ownership rights before it acquired its present interest in the Egyptian bottling plant. While adjudication of plaintiffs' common law claims may also require some modest application of Egyptian law, *see Bigio,* 239 F.3d at 454, the courts of this Circuit are regularly called upon to interpret foreign law without thereby offending principles of international comity. *See, e.g., United States v. Schultz,* 333 F.3d 393 (2d Cir.2003) (Egyptian law); *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara ("Pertamina"),* 313 F.3d 70 (2d Cir.2002) (Indonesian law); *cf. First Am. Corp. v. Price Waterhouse LLP,* 154 F.3d 16, 22 (2d Cir.1998).

[2] **[3]** **[4]** As for *forum non conveniens,* the issue, once again, is not whether the district court abused its broad discretion, but whether it misapprehended or misapplied the relevant legal standards. *See Iragorri v. United Techs. Corp.,* 274 F.3d 65, 72 (2d Cir.2001) (*en banc*) ("In our recent cases, we vacated dismissals for *forum non conveniens* because we believed that the district courts had misapplied the basic rules ...."). Here, the district court, while reciting the principle that even a foreign plaintiff's decision to sue in a U.S. forum is entitled to some weight, *Bigio,* 2005 WL 287397 at *4–5, 2005 U.S. Dist. LEXIS 1587, at *12, appears, so far as its discussion of the balance of conveniences is concerned, to have given the plaintiffs' choice of forum no weight whatsoever, *id.* 2005 WL 287397 at * 5–6, at *14–17. But as we emphasized in our *en banc* decision in *Iragorri,* the more that a plaintiff, even a foreign plaintiff, chooses to sue in a United States court for "legitimate reasons," the more deference must be given to that choice. *Iragorri,* 274 F.3d at 73. Furthermore, even where the degree of deference is reduced, "[t]he action should be dismissed only if the chosen forum is shown to be genuinely inconvenient and the selected forum significantly preferable." *Id.* at 74–75.

[5] Here, the district court appears to have overlooked the legitimate and substantial reasons for plaintiffs choosing to bring this suit in defendants' own country, the United States, rather than in Egypt, after plaintiffs' efforts to seek relief from the Egyptian authorities proved abortive. It was perfectly reasonable under these circumstances for the plaintiffs to bring their action against Coca–Cola, the only U.S. company involved, in the United States. While conceivably they might have brought it in Canada (their home base) or in a different district of the United States, those possibilities are not determinative here, for the motion that the district court granted was a motion to dismiss in favor of the courts of Egypt and the only comparison it made was between the U.S. forum and the Egyptian forum. Given the history outlined above, the plaintiffs' choice of the U.S. forum over an Egyptian forum was eminently reasonable and entitled to considerable deference, which the district court failed to give.

Furthermore, counsel suggest that a major focus of the litigation may be whether Coca–Cola knew before it purchased its interest in the joint venture that owns or (defendants say) leases the bottling plant that the

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plant had been ordered to be returned to the Bigios. The key witnesses to this issue either reside in the United States or Canada or are readily producible here; and to the extent there are witnesses abroad who are beyond the court's subpoena power, their testimony can be provided by depositions taken pursuant to letters rogatory. *See, e.g., Overseas Programming* ***180** *Companies v. Cinematographische Commerz–Anstalt,* 684 F.2d 232, 235 (2d Cir.1982). Likewise, the parties and their attorneys are all located in the United States or Canada. More generally, it cannot be said that there are private inconveniences present here that outweigh the deference that the district court should have accorded plaintiffs' choice of forum.

Likewise, in evaluating the "public interest" factors of inconvenience, *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, 508–09, 67 S.Ct. 839, 91 L.Ed. 1055 (1947), the district court again failed to take account of the deference due the plaintiffs' legitimate choice of forum. Relatedly, the district court stated that "Egypt's interest in deciding this controversy is significant," *Bigio,* 2005 WL 287397 at *5–6, 2005 U.S. Dist. LEXIS 1587, at *17, whereas the suit is primarily over whether a United States company should be liable in damages. And, as noted, Egypt has never raised any objection to the U.S. court deciding this case.

Upon careful review of the record, we are convinced that none of the alleged private or public inconveniences referenced by the district court overcomes the preference reasonably here accorded plaintiffs in their choice of a U.S. forum and that the dismissal of this case on grounds of international comity and *forum non conveniens* was therefore erroneous as a matter of law. *See generally Wiwa v. Royal Dutch Petroleum Co.,* 226 F.3d 88 (2d Cir.2000). Accordingly, we reverse and remand to the district court for further proceedings consistent with this opinion.

LEVAL, J., dissenting in part.

I agree with the majority opinion that the district court applied the wrong test to determine whether the doctrine of *forum non conveniens* calls for dismissal of the case. In my view, however, the proper outcome of this complex question upon application of the correct test is not clear, and may involve discretionary findings on disputed facts. *See Iragorri v. United Technologies Corp.,* 274 F.3d 65, 72 (2d Cir.2001) (en banc) (noting, for example, that plaintiffs' choice of forum is entitled to greater deference when the choice is motivated by convenience and less deference when motivated by forum-shopping reasons, listing relevant factors). It should be resolved in the first instance by the district court. I would have vacated the judgment and remanded for reconsideration under the proper test.

All Citations

448 F.3d 176

Footnotes

* The Honorable Jed S. Rakoff, United States District Judge for the Southern District of New York, sitting by designation.

1 Whether one or more Egyptian entities are indispensable parties to this lawsuit remains for the district court to determine in the first instance. *Bigio,* 239 F.3d at 455.

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United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part V. Procedure
Chapter 117. Evidence; Depositions (Refs & Annos)

28 U.S.C.A. § 1781

§ 1781. Transmittal of letter rogatory or request

Currentness

(a) The Department of State has power, directly, or through suitable channels--

(1) to receive a letter rogatory issued, or request made, by a foreign or international tribunal, to transmit it to the tribunal, officer, or agency in the United States to whom it is addressed, and to receive and return it after execution; and

(2) to receive a letter rogatory issued, or request made, by a tribunal in the United States, to transmit it to the foreign or international tribunal, officer, or agency to whom it is addressed, and to receive and return it after execution.

(b) This section does not preclude--

(1) the transmittal of a letter rogatory or request directly from a foreign or international tribunal to the tribunal, officer, or agency in the United States to whom it is addressed and its return in the same manner; or

(2) the transmittal of a letter rogatory or request directly from a tribunal in the United States to the foreign or international tribunal, officer, or agency to whom it is addressed and its return in the same manner.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 949; Pub.L. 88-619, § 8(a), Oct. 3, 1964, 78 Stat. 996.)

TREATIES AND CONVENTIONS

CONVENTION ON THE TAKING OF EVIDENCE ABROAD IN CIVIL OR COMMERCIAL MATTERS

The States signatory to the present Convention,

Desiring to facilitate the transmission and execution of Letters of Request and to further the accommodation of the different methods which they use for this purpose.

Desiring to improve mutual judicial co-operation in civil or commercial matters.

Have resolved to conclude a Convention to this effect and have agreed upon the following provisions--

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CHAPTER I--LETTERS OF REQUEST

Article 1

In civil or commercial matters a judicial authority of a Contracting State may, in accordance with the provisions of the law of that State, request the competent authority of another Contracting State, by means of a Letter of Request, to obtain evidence, or to perform some other judicial act.

A Letter shall not be used to obtain evidence which is not intended for use in judicial proceedings, commenced or contemplated.

The expression "other judicial act" does not cover the service of judicial documents or the issuance of any process by which judgments or orders are executed or enforced, or orders for provisional or protective measures.

Article 2

A Contracting State shall designate a Central Authority which will undertake to receive Letters of Request coming from a judicial authority of another Contracting State and to transmit them to the authority competent to execute them. Each State shall organize the Central Authority in accordance with its own law.

Letters shall be sent to the Central Authority of the State of execution without being transmitted through any other authority of that State.

Article 3

A Letter of Request shall specify--

(a) the authority requesting its execution and the authority requested to execute it, if known to the requesting authority;

(b) the names and addresses of the parties to the proceedings and their representatives, if any;

(c) the nature of the proceedings for which the evidence is required, giving all necessary information in regard thereto;

(d) the evidence to be obtained or other judicial act to be performed.

Where appropriate, the Letter shall specify, inter alia--

(e) the names and addresses of the persons to be examined;

(f) the questions to be put to the persons to be examined or a statement of the subject-matter about which they are to be examined;

(g) the documents or other property, real or personal, to be inspected;

(h) any requirement that the evidence is to be given on oath or affirmation, and any special form to be used;

(i) any special method or procedure to be followed under Article 9.

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A Letter may also mention any information necessary for the application of Article 11.

No legalization or other like formality may be required.

Article 4

A Letter of Request shall be in the language of the authority requested to execute it or be accompanied by a translation into that language.

Nevertheless, a Contracting State shall accept a Letter in either English or French, or a translation into one of these languages, unless it has made the reservation authorized by Article 33.

A Contracting State which has more than one official language and cannot, for reasons of internal law, accept Letters in one of these languages for the whole of its territory, shall, by declaration, specify the language in which the Letter or translation thereof shall be expressed for execution in the specified parts of its territory. In case of failure to comply with this declaration, without justifiable excuse, the costs of translation into the required language shall be borne by the State of origin.

A Contracting State may, by declaration, specify the language or languages other than those referred to in the preceding paragraphs, in which a Letter may be sent to its Central Authority.

Any translation accompanying a Letter shall be certified as correct, either by a diplomatic officer or consular agent or by a sworn translator or by any other person so authorized in either State.

Article 5

If the Central Authority considers that the request does not comply with the provisions of the present Convention, it shall promptly inform the authority of the State of origin which transmitted the Letter of Request, specifying the objections to the Letter.

Article 6

If the authority to whom a Letter of Request has been transmitted is not competent to execute it, the Letter shall be sent forthwith to the authority in the same State which is competent to execute it in accordance with the provisions of its own law.

Article 7

The requesting authority shall, if it so desires, be informed of the time when, and the place where, the proceedings will take place, in order that the parties concerned, and their representatives, if any, may be present. This information shall be sent directly to the parties or their representatives when the authority of the State of origin so requests.

Article 8

A Contracting State may declare that members of the judicial personnel of the requesting authority of another Contracting State may be present at the execution of a Letter of Request. Prior authorization by the competent authority designated by the declaring State may be required.

Article 9

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The judicial authority which executes a Letter of Request shall apply its own law as to the methods and procedures to be followed.

However, it will follow a request of the requesting authority that a special method or procedure be followed, unless this is incompatible with the internal law of the State of execution or is impossible of performance by reason of its internal practice and procedure or by reason of practical difficulties.

A Letter of Request shall be executed expeditiously.

Article 10

In executing a Letter of Request the requested authority shall apply the appropriate measures of compulsion in the instances and to the same extent as are provided by its internal law for the execution of orders issued by the authorities of its own country or of requests made by parties in internal proceedings.

Article 11

In the execution of a Letter of Request the person concerned may refuse to give evidence in so far as he has a privilege or duty to refuse to give the evidence--

(a) under the law of the State of execution; or

(b) under the law of the State of origin, and the privilege or duty has been specified in the Letter, or, at the instance of the requested authority, has been otherwise confirmed to that authority by the requesting authority.

A Contracting State may declare that, in addition, it will respect privileges and duties existing under the law of States other than the State of origin and the State of execution, to the extent specified in that declaration.

Article 12

The execution of a Letter of Request may be refused only to the extent that--

(a) in the State of execution the execution of the Letter does not fall within the functions of the judiciary; or

(b) the State addressed considers that its sovereignty or security would be prejudiced thereby.

Execution may not be refused solely on the ground that under its internal law the State of execution claims exclusive jurisdiction over the subject-matter of the action or that its internal law would not admit a right of action on it.

Article 13

The documents establishing the execution of the Letter of Request shall be sent by the requested authority to the requesting authority by the same channel which was used by the latter.

In every instance where the Letter is not executed in whole or in part, the requesting authority shall be informed immediately through the same channel and advised of the reasons.

Article 14

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The execution of the Letter of Request shall not give rise to any reimbursement of taxes or costs of any nature.

Nevertheless, the State of execution has the right to require the State of origin to reimburse the fees paid to experts and interpreters and the costs occasioned by the use of a special procedure requested by the State of origin under Article 9, paragraph 2.

The requested authority whose law obliges the parties themselves to secure evidence, and which is not able itself to execute the Letter, may, after having obtained the consent of the requesting authority, appoint a suitable person to do so. When seeking this consent the requested authority shall indicate the approximate costs which would result from this procedure. If the requesting authority gives its consent it shall reimburse any costs incurred; without such consent the requesting authority shall not be liable for the costs.

CHAPTER II--TAKING OF EVIDENCE BY DIPLOMATIC OFFICERS, CONSULAR AGENTS AND COMMISSIONERS

Article 15

In a civil or commercial matter, a diplomatic officer or consular agent of a Contracting State may, in the territory of another Contracting State and within the area where he exercises his functions, take the evidence without compulsion of nationals of a State which he represents in aid of proceedings commenced in the courts of a State which he represents.

A Contracting State may declare that evidence may be taken by a diplomatic officer or consular agent only if permission to that effect is given upon application made by him or on his behalf to the appropriate authority designated by the declaring State.

Article 16

A diplomatic officer or consular agent of a Contracting State may, in the territory of another Contracting State and within the area where he exercises his functions, also take the evidence, without compulsion, of nationals of the State in which he exercises his functions or of a third State, in aid of proceedings commenced in the courts of a State which he represents, if--

(a) a competent authority designated by the State in which he exercises his functions has given its permission either generally or in the particular case, and

(b) he complies with the conditions which the competent authority has specified in the permission.

A Contracting State may declare that evidence may be taken under this Article without its prior permission.

Article 17

In a civil or commercial matter, a person duly appointed as a commissioner for the purpose may, without compulsion, take evidence in the territory of a Contracting State in aid of proceedings commenced in the courts of another Contracting State if--

(a) a competent authority designated by the State where the evidence is to be taken has given its permission either generally or in the particular case; and

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(b) he complies with the conditions which the competent authority has specified in the permission.

A Contracting State may declare that evidence may be taken under this Article without its prior permission.

Article 18

A Contracting State may declare that a diplomatic officer, consular agent or commissioner authorized to take evidence under Articles 15, 16 or 17, may apply to the competent authority designated by the declaring State for appropriate assistance to obtain the evidence by compulsion. The declaration may contain such conditions as the declaring State may see fit to impose.

If the authority grants the application it shall apply any measures of compulsion which are appropriate and are prescribed by its law for use in internal proceedings.

Article 19

The competent authority, in giving the permission referred to in Articles 15, 16 or 17, or in granting the application referred to in Article 18, may lay down such conditions as it deems fit, *inter alia*, as to the time and place of the taking of the evidence. Similarly it may require that it be given reasonable advance notice of the time, date and place of the taking of the evidence; in such a case a representative of the authority shall be entitled to be present at the taking of the evidence.

Article 20

In the taking of evidence under any Article of this Chapter persons concerned may be legally represented.

Article 21

Where a diplomatic officer, consular agent or commissioner is authorized under Articles 15, 16 or 17 to take evidence--

(a) he may take all kinds of evidence which are not incompatible with the law of the State where the evidence is taken or contrary to any permission granted pursuant to the above Articles, and shall have power within such limits to administer an oath or take an affirmation;

(b) a request to a person to appear or to give evidence shall, unless the recipient is a national of the State where the action is pending, be drawn up in the language of the place where the evidence is taken or be accompanied by a translation into such language;

(c) the request shall inform the person that he may be legally represented and, in any State that has not filed a declaration under Article 18, shall also inform him that he is not compelled to appear or to give evidence;

(d) the evidence may be taken in the manner provided by the law applicable to the court in which the action is pending provided that such manner is not forbidden by the law of the State where the evidence is taken;

(e) a person requested to give evidence may invoke the privileges and duties to refuse to give the evidence contained in Article 11.

Article 22

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The fact that an attempt to take evidence under the procedure laid down in this Chapter has failed, owing to the refusal of a person to give evidence, shall not prevent an application being subsequently made to take the evidence in accordance with Chapter I.

CHAPTER III--GENERAL CLAUSES

Article 23

A Contracting State may at the time of signature, ratification or accession, declare that it will not execute Letters of Request issued for the purpose of obtaining pretrial discovery of documents as known in Common Law countries.

Article 24

A Contracting State may designate other authorities in addition to the Central Authority and shall determine the extent of their competence. However, Letters of Request may in all cases be sent to the Central Authority.

Federal States shall be free to designate more than one Central Authority.

Article 25

A Contracting State which has more than one legal system may designate the authorities of one of such systems, which shall have exclusive competence to execute Letters of Request pursuant to this Convention.

Article 26

A Contracting State, if required to do so because of constitutional limitations, may request the reimbursement by the State of origin of fees and costs, in connection with the execution of Letters of Request, for the service of process necessary to compel the appearance of a person to give evidence, the costs of attendance of such persons, and the cost of any transcript of the evidence.

Where a State has made a request pursuant to the above paragraph, any other Contracting State may request from that State the reimbursement of similar fees and costs.

Article 27

The provisions of the present Convention shall not prevent a Contracting State from--

(a) declaring that Letters of Request may be transmitted to its judicial authorities through channels other than those provided for in Article 2;

(b) permitting, by internal law or practice, any act provided for in this Convention to be performed upon less restrictive conditions;

(c) permitting, by internal law or practice, methods of taking evidence other than those provided for in this Convention.

Article 28

The present Convention shall not prevent an agreement between any two or more Contracting States to derogate from--

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(a) the provisions of Article 2 with respect to methods of transmitting Letters of Request;

(b) the provisions of Article 4 with respect to the languages which may be used;

(c) the provisions of Article 8 with respect to the presence of judicial personnel at the execution of Letters;

(d) the provisions of Article 11 with respect to the privileges and duties of witnesses to refuse to give evidence;

(e) the provisions of Article 13 with respect to the methods of returning executed Letters to the requesting authority;

(f) the provisions of Article 14 with respect to fees and costs;

(g) the provisions of Chapter II.

Article 29

Between Parties to the present Convention who are also Parties to one or both of the Conventions on Civil Procedure signed at the Hague on the 17th of July 1905 [99 British Foreign and State Papers 990] and the 1st of March 1954 [286 UNTS 265], this Convention shall replace Articles 8-16 of the earlier Conventions.

Article 30

The present Convention shall not affect the application of Article 23 of the Convention of 1905, or of Article 24 of the Convention of 1954.

Article 31

Supplementary Agreements between Parties to the Conventions of 1905 and 1954 shall be considered as equally applicable to the present Convention unless the Parties have otherwise agreed.

Article 32

Without prejudice to the provisions of Articles 29 and 31, the present Convention shall not derogate from conventions containing provisions on the matters covered by this Convention to which the Contracting States are, or shall become Parties.

Article 33

A State may, at the time of signature, ratification or accession exclude, in whole or in part, the application of the provisions of paragraph 2 of Article 4 and of Chapter II. No other reservation shall be permitted.

Each Contracting State may at any time withdraw a reservation it has made; the reservation shall cease to have effect on the sixtieth day after notification of the withdrawal.

When a State has made a reservation, any other State affected thereby may apply the same rule against the reserving State.

Article 34

A State may at any time withdraw or modify a declaration.

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Article 35

A Contracting State shall, at the time of the deposit of its instrument of ratification or accession, or at a later date, inform the Ministry of Foreign Affairs of the Netherlands of the designation of authorities, pursuant to Articles 2, 8, 24 and 25.

A Contracting State shall likewise inform the Ministry, where appropriate, of the following--

(a) the designation of the authorities to whom notice must be given, whose permission may be required, and whose assistance may be invoked in the taking of evidence by diplomatic officers and consular agents, pursuant to Articles 15, 16 and 18 respectively;

(b) the designation of the authorities whose permission may be required in the taking of evidence by commissioners pursuant to Article 17 and of those who may grant the assistance provided for in Article 18;

(c) declarations pursuant to Articles 4, 8, 11, 15, 16, 17, 18, 23 and 27;

(d) any withdrawal or modification of the above designations and declarations;

(e) the withdrawal of any reservation.

Article 36

Any difficulties which may arise between Contracting States in connection with the operation of this Convention shall be settled through diplomatic channels.

Article 37

The present Convention shall be open for signature by the States represented at the Eleventh Session of the Hague Conference on Private International Law.

It shall be ratified, and the instruments of ratification shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

Article 38

The present Convention shall enter into force on the sixtieth day after the deposit of the third instrument of ratification referred to in the second paragraph of Article 37.

The Convention shall enter into force for each signatory State which ratifies subsequently on the sixtieth day after the deposit of its instrument of ratification.

Article 39

Any State not represented at the Eleventh Session of the Hague Conference on Private International Law which is a Member of this Conference or of the United Nations or of a specialized agency of that Organization, or a Party to the Statute of the International Court of Justice may accede to the present Convention after it has entered into force in accordance with the first paragraph of Article 38.

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The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force for a State acceding to it on the sixtieth day after the deposit of its instrument of accession.

The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession. Such declaration shall be deposited at the Ministry of Foreign Affairs of the Netherlands; this Ministry shall forward, through diplomatic channels, a certified copy to each of the Contracting States.

The Convention will enter into force as between the acceding State and the State that has declared its acceptance of the accession on the sixtieth day after the deposit of the declaration of acceptance.

Article 40

Any State may, at the time of signature, ratification or accession, declare that the present Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect on the date of entry into force of the Convention for the State concerned.

At any time thereafter, such extensions shall be notified to the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force for the territories mentioned in such an extension on the sixtieth day after the notification indicated in the preceding paragraph.

Article 41

The present Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 38, even for States which have ratified it or acceded to it subsequently.

If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Netherlands at least six months before the end of the five year period.

It may be limited to certain of the territories to which the Convention applies.

The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

Article 42

The Ministry of Foreign Affairs of the Netherlands shall give notice to the States referred to in Article 37, and to the States which have acceded in accordance with Article 39, of the following--

(a) the signatures and ratifications referred to in Article 37;

(b) the date on which the present Convention enters into force in accordance with the first paragraph of Article 38;

(c) the accessions referred to in Article 39 and the dates on which they take effect;

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(d) the extensions referred to in Article 40 and the dates on which they take effect;

(e) the designations, reservations and declarations referred to in Articles 33 and 35;

(f) the denunciations referred to in the third paragraph of Article 41.

IN WITNESS WHEREOF the undersigned, being duly authorized thereto, have signed the present Convention.

DONE at The Hague, on the 18th day of March 1970, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Netherlands, and of which a certified copy shall be sent, through the diplomatic channel, to each of the States represented at the Eleventh Session of the Hague Conference on Private International Law. [Signatures omitted.]

Convention on the taking of evidence abroad in civil or commercial matters. Done at The Hague March 18, 1970; entered into force for the United States October 7, 1972. TIAS 7444; 23 UST 2555

Annotations to the Convention

"Report of the U.S. Delegation on the Evidence Convention", 8 Int'l Legal Materials 804 (1969).

Amram, "Explanatory Report on the Convention on the Taking of Evidence Abroad in Civil and Commercial Matters--Message from the President of the United States", Sen.Exec. A, 92nd Cong., 2d Sess. (Feb. 1, 1972).

Edwards, "Taking of Evidence Abroad in Civil or Commercial Matters", 18 Int'l and Comp.L.Q. 646 (1969).

Amram, "U.S. Ratification of the Hague Convention on the Taking of Evidence Abroad" 67 Am.J. Int'l L. 104 (1973).

Model for Letters of Request Recommended for Use in Applying the Hague Convention
of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters

Request for International Judicial Assistance Pursuant to the Hague Convention
of 18 March 1970 on the Taking of Evidence in Civil or Commercial Matters

<N.B. Under the first paragraph of article 4, the Letter of Request shall be in the language of the authority requested to execute it or be accompanied by a translation into that language. However, the provisions of the second and third paragraphs may permit use of other languages.>

<In order to avoid confusion, please spell out the name of the month in each date.>

I. *(Items to be included in all Letters of Request.)*

1. Sender _____*(identity and address)*.....

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.....

.....

2. Central Authority of the Requested State _____*(identity and address)*.....

.....

.....

3. Person to whom the executed request is to be returned _____*(identity and address)*.....

.....

.....

II. *(Items to be included in all Letters of Request.)*

4. In conformity with article 3 of the Convention, the undersigned applicant has the honour to submit the following request:

5. a. Requesting judicial authority (article 3, a) _____*(identity and address)*.....

.....

.....

b. To the competent authority of (article 3, a) _____*(the requested State)*.....

.....

.....

6. Names and addresses of the parties and their representatives (article 3, b)

a. Plaintiff

.....

.....

.....

b. Defendant

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.....

.....

.....

c. Other parties

.....

.....

.....

7. Nature and purpose of the proceedings and summary of the facts (article 3, c) .....

.....

.....

8. Evidence to be obtained or other judicial act to be performed (article 3, d) .....

.....

.....

III. *(Items to be completed where applicable.)*

9. Identity and address of any person to be examined (article 3, e) .....

.....

.....

10. Questions to be put to the persons to be examined or statement of the subject-matter about which they are to be examined (article 3, f) .....

_____*(or see attached list)*.....

.....

.....

11. Documents or other property to be inspected (article 3, g) .....

_____*(specify whether it is to be produced, copied, valued, etc.)*.....

.....

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12.	Any requirement that the evidence be given on oath or affirmation and any special form to be used (article 3, h)	..... _____*(In the event that the evidence cannot be taken in the manner requested, specify whether it is to be taken in such manner as provided by local law for the formal taking of evidence.)*..... .....
13.	Special methods or procedure to be followed (articles 3, i and 9)	....
14.	Request for notification of the time and place for the execution of the Request and identity and address of any person to be notified (article 7)	....
15.	Request for attendance or participation of judicial personnel of the requesting authority at the execution of the letter of Request	....
16.	Specification of privilege or duty to refuse to give evidence under the law of the State of origin (article 11, b)	....
17.	The fees and costs incurred which are reimbursable un-	_____*(identity and address)*.....

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der the second paragraph .....

of article 14 or under arti- .....

cle 26 of the Convention .....

will be borne by

IV. *(Items to be included in all Letters of Request.)*

18. Date of request

.....

19. Signature and seal of the

requesting authority .....

.....

TREATIES AND CONVENTIONS

INTER-AMERICAN CONVENTION ON LETTERS ROGATORY

The Governments of the Member States of the Organization of American States, desirous of concluding a convention on letters rogatory, have agreed as follows:

I. USE OF TERMS

Article 1

For the purposes of this Convention the terms “exhortos” and “cartas rogatorias” are synonymous in the Spanish text. The terms “letters rogatory”, “commissions rogatoires”, and “cartas rogatórias” used in the English, French and Portuguese texts, respectively, cover both “exhortos” and “cartas rogatorias”.

II. SCOPE OF THE CONVENTION

Article 2

This Convention shall apply to letters rogatory, issued in conjunction with proceedings in civil and commercial matters held before the appropriate judicial or other adjudicatory authority of one of the States Parties to this Convention, that have as their purpose:

a. The performance of procedural acts of a merely formal nature, such as service of process, summonses or subpoenas abroad;

b. The taking of evidence and the obtaining of information abroad, unless a reservation is made in this respect.

Article 3

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This Convention shall not apply to letters rogatory relating to procedural acts other than those specified in the preceding article; and in particular it shall not apply to acts involving measures of compulsion.

III. TRANSMISSION OF LETTERS ROGATORY

Article 4

Letters rogatory may be transmitted to the authority to which they are addressed by the interested parties, through judicial channels, diplomatic or consular agents, or the Central Authority of the State of origin or of the State of destination, as the case may be.

Each State Party shall inform the General Secretariat of the Organization of American States of the Central Authority competent to receive and distribute letters rogatory.

IV. REQUIREMENTS FOR EXECUTION

Article 5

Letters rogatory shall be executed in the States Parties provided they meet the following requirements:

a. The letter rogatory is legalized, except as provided for in Articles 6 and 7 of this Convention. The letter rogatory shall be presumed to be duly legalized in the State of origin when legalized by the competent consular or diplomatic agent;

b. The letter rogatory and the appended documentation are duly translated into the official language of the State of destination.

Article 6

Whenever letters rogatory are transmitted through consular or diplomatic channels or through the Central Authority, legalization shall not be required.

Article 7

Courts in border areas of the States Parties may directly execute the letters rogatory contemplated in this Convention and such letters shall not require legalization.

Article 8

Letters rogatory shall be accompanied by the following documents to be delivered to the person on whom process, summons or subpoena is being served:

a. An authenticated copy of the complaint with its supporting documents, and of other exhibits or rulings that serve as the basis for the measure requested;

b. Written information identifying the judicial or other adjudicatory authority issuing the letter, indicating the time-limits allowed the person affected to act upon the request, and warning of the consequences of failure to do so;

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c. Where appropriate, information on the existence and address of the court-appointed defense counsel or of competent legal-aid societies in the State of origin.

Article 9

Execution of letters rogatory shall not imply ultimate recognition of the jurisdiction of the judicial or other adjudicatory authority issuing the letter rogatory or a commitment to recognize the validity of the judgment it may render or to execute it.

V. EXECUTION

Article 10

Letters rogatory shall be executed in accordance with the laws and procedural rules of the State of destination.

At the request of the judicial or other adjudicatory authority issuing the letter rogatory, the authority of the State of destination may execute the letter through a special procedure, or accept the observance of additional formalities in performing the act requested, provided this procedure or the observance of those formalities is not contrary to the law of the State of destination.

Article 11

The authority of the State of destination shall have jurisdiction to determine any issue arising as a result of the execution of the measure requested in the letter rogatory.

Should such authority find that it lacks jurisdiction to execute the letter rogatory, it shall ex officio forward the documents and antecedents of the case to the authority of the State which has jurisdiction.

Article 12

The costs and other expenses involved in the processing and execution of letters rogatory shall be borne by the interested parties.

The State of destination may, in its discretion, execute a letter rogatory that does not indicate the person to be held responsible for costs and other expenses when incurred. The identity of the person empowered to represent the applicant for legal purposes may be indicated in the letter rogatory or in the documents relating to its execution.

The effects of a declaration in forma pauperis shall be regulated by the law of the State of destination.

Article 13

Consular or diplomatic agents of the States Parties to this Convention may perform the acts referred to in Article 2 in the State in which they are accredited, provided the performance of such acts is not contrary to the laws of that State. In so doing, they shall not perform any acts involving measures of compulsion.

VI. GENERAL PROVISIONS

Article 14

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States Parties belonging to economic integration systems may agree directly between themselves upon special methods and procedures more expeditious than those provided for in this Convention. These agreements may be extended to include other States in the manner in which the parties may agree.

Article 15

This Convention shall not limit any provisions regarding letters rogatory in bilateral or multilateral agreements that may have been signed or may be signed in the future by the States Parties or preclude the continuation of more favorable practices in this regard that may be followed by these States.

Article 16

The States Parties to this Convention may declare that its provisions cover the execution of letters rogatory in criminal, labor, and "contentious-administrative" cases, as well as in arbitrations and other matters within the jurisdiction of special courts. Such declarations shall be transmitted to the General Secretariat of the Organization of American States.

Article 17

The State of destination may refuse to execute a letter rogatory that is manifestly contrary to its public policy ("ordre public").

Article 18

The States Parties shall inform the General Secretariat of the Organization of American States of the requirements stipulated in their laws for the legalization and the translation of letters rogatory.

VII. FINAL PROVISIONS

Article 19

This Convention shall be open for signature by the Member States of the Organization of American States.

Article 20

This Convention is subject to ratification. The instruments of ratification shall be deposited with the General Secretariat of the Organization of American States.

Article 21

This Convention shall remain open for accession by any other State. The instrument of accession shall be deposited with the General Secretariat of the Organization of American States.

Article 22

This Convention shall enter into force on the thirtieth day following the date of deposit of the second instrument of ratification.

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For each State ratifying or acceding to the Convention after the deposit of the second instrument of ratification, the Convention shall enter into force on the thirtieth day after deposit by such State of its instrument of ratification or accession.

Article 23

If a State Party has two or more territorial units in which different systems of law apply in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification or accession, declare that this Convention shall extend to all its territorial units or only to one or more of them.

Such declaration may be modified by subsequent declarations, which shall expressly indicate the territorial unit or units to which the Convention applies. Such subsequent declarations shall be transmitted to the General Secretariat of the Organization of American States, and shall become effective thirty days after the date of their receipt.

Article 24

This Convention shall remain in force indefinitely, but any of the States Parties may denounce it. The instrument of denunciation shall be deposited with the General Secretariat of the Organization of American States. After one year from the date of deposit of the instrument of denunciation, the Convention shall no longer be in effect for the denouncing State, but shall remain in effect for the other States Parties.

Article 25

The original instrument of this Convention, the English, French, Portuguese and Spanish texts of which are equally authentic, shall be deposited with the General Secretariat of the Organization of American States. The Secretariat shall notify the Member States of the Organization of American States and the States that have acceded to the Convention of the signatures, deposits of instruments of ratification, accession, and denunciation as well as of reservations, if any. It shall also transmit the information mentioned in the second paragraph of Article 4 and in Article 18 and the declarations referred to in Articles 16 and 23 of this Convention.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, being duly authorized thereto by their respective Governments, have signed this Convention.

DONE AT PANAMA CITY, Republic of Panama, this thirtieth day of January one thousand nine hundred and seventy-five.

[Signatures omitted]

Inter-American Convention on Letters Rogatory.

Done at Panama January 30, 1975; entered into force for the United States August 27, 1988.

ADDITIONAL PROTOCOL TO THE INTER-AMERICAN CONVENTION ON LETTERS ROGATORY

The Governments of the Member States of the Organization of American States, desirous of strengthening and facilitating international cooperation in judicial procedures as provided for in the Inter-American Convention on Letters Rogatory done in Panama on January 30, 1975, have agreed as follows:

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I. SCOPE OF PROTOCOL

Article 1

This Protocol shall apply only to those procedural acts set forth in Article 2(a) of the Inter-American Convention on Letters Rogatory, hereinafter referred to as "the Convention". For the purposes of this Protocol, such acts shall be understood to mean procedural acts (pleadings, motions, orders, and subpoenas) that are served and requests for information that are made by a judicial or other adjudicatory authority of a State Party to a judicial or administrative authority of another State Party and are transmitted by a letter rogatory from the Central Authority of the State of origin to the Central Authority of the State of destination.

II. CENTRAL AUTHORITY

Article 2

Each State Party shall designate a central authority that shall perform the functions assigned to it in the Convention and in this Protocol. At the time of deposit of their instruments of ratification or accession to this Protocol, the States Parties shall communicate the designations to the General Secretariat of the Organization of American States, which shall distribute to the States Parties to the Convention a list containing the designations received. The Central Authority designated by a State Party in accordance with Article 4 of the Convention may be changed at any time. The State Party shall inform the above-mentioned Secretariat of such change as promptly as possible.

III. PREPARATION OF LETTERS ROGATORY

Article 3

Letters rogatory shall be prepared on forms that are printed in the four official languages of the Organization of American States or in the languages of the State of origin and of the State of destination and conform to Form A contained in the Annex to this Protocol.

Letters rogatory shall be accompanied by the following:

a. Copy of the complaint or pleading that initiated the action in which the letter rogatory was issued, as well as a translation thereof into the language of the State of destination;

b. Untranslated copy of the documents attached to the complaint or pleading;

c. Untranslated copy of any rulings ordering issuance of the letter rogatory;

d. Form conforming to Form B annexed to this Protocol and containing essential information for the person to be served or the authority to receive the documents; and

e. Certificate conforming to Form C annexed to this Protocol on which the Central Authority of the State of destination shall attest to execution or non-execution of the letter rogatory.

The copies shall be regarded as authenticated for the purposes of Article 8(a) of the Convention if they bear the seal of the judicial or other adjudicatory authority that issued the letter rogatory.

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A copy of the letter rogatory together with Form B and the copies referred to in items a, b, and c of this Article shall be delivered to the person notified or to the authority to which the request is addressed. One of the copies of the letter rogatory and the documents attached to it shall remain in the possession of the State of destination; the untranslated original, the certificate of execution and the documents attached to them shall be returned to the Central Authority of the State of origin through appropriate channels.

If a State Party has more than one official language, it shall, at the time of signature, ratification or accession to this Protocol, declare which language or languages shall be considered official for the purposes of the Convention and of this Protocol. If a State Party comprises territorial units that have different official languages, it shall, at the time of signature, ratification or accession to this Protocol, declare which language or languages in each territorial unit shall be considered official for the purposes of the Convention and of this Protocol. The General Secretariat of the Organization of American States shall distribute to the States Parties to this Protocol the information contained in such declarations.

IV. TRANSMISSION AND PROCESSING OF LETTERS ROGATORY

Article 4

Upon receipt of a letter rogatory from the Central Authority in another State Party, the Central Authority in the State of destination shall transmit the letter rogatory to the appropriate judicial or administrative authority for processing in accordance with the applicable local law.

Upon execution of the letter rogatory, the judicial or administrative authority or authorities that processed it shall attest to the execution thereof in the manner prescribed in their local law, and shall transmit it with the relevant documents to the Central Authority. The Central Authority of the State Party of destination shall certify execution of the letter rogatory to the Central Authority of the State Party of origin on a form conforming to Form C of the Annex, which shall not require legalization. In addition, the Central Authority of the State of destination shall return the letter rogatory and attached documents to the Central Authority of the State of origin for delivery to the judicial or other adjudicatory authority that issued it.

V. COSTS AND EXPENSES

Article 5

The processing of letters rogatory by the Central Authority of the State Party of destination and its judicial or administrative authorities shall be free of charge. However, this State Party may seek payment by parties requesting execution of letters rogatory for those services which, in accordance with its local law, are required to be paid for directly by those parties.

The party requesting the execution of a letter rogatory shall, at its election, either select and indicate in the letter rogatory the person who is responsible in the State of destination for the cost of such services or, alternatively, shall attach to the letter rogatory a check for the fixed amount that is specified in Article 6 of this Protocol for its processing by the State of destination and will cover the cost of such services or a document proving that such amount has been transferred by some other means to the Central Authority of the State of destination.

The fact that the cost of such services ultimately exceeds the fixed amount shall not delay or prevent the processing or execution of the letter rogatory by the Central Authority or the judicial or administrative authorities of the State of destination. Should the cost exceed that amount, the Central Authority of the State of destination may, when returning the executed letter rogatory, seek payment of the outstanding amount due from the party requesting execution of the letter rogatory.

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Article 6

At the time of deposit of its instrument of ratification or accession to this Protocol with the General Secretariat of the Organization of American States, each State Party shall attach a schedule of the services and the costs and other expenses that, in accordance with its local law, shall be paid directly by the party requesting execution of the letter rogatory. In addition, each State Party shall specify in the above-mentioned schedule the single amount which it considers will reasonably cover the cost of such services, regardless of the number or nature thereof. This amount shall be paid when the person requesting execution of the letter rogatory has not designated a person responsible for the payment of such services in the State of destination but has decided to pay for them directly in the manner provided for in Article 5 of this Protocol.

The General Secretariat of the Organization of American States shall distribute the information received to the States Parties to this Protocol. A State Party may at any time notify the General Secretariat of the Organization of American States of changes in the above-mentioned schedules, which shall be communicated by the General Secretariat to the other States Parties to this Protocol.

Article 7

States Parties may declare in the schedules mentioned in the foregoing articles that, provided there is reciprocity, they will not charge parties requesting execution of letters rogatory for the services necessary for executing them, or will accept in complete satisfaction of the cost of such services either the single fixed amount specified in Article 6 or another specified amount.

Article 8

This Protocol shall be open for signature and subject to ratification or accession by those Member States of the Organization of American States that have signed, ratified, or acceded to the Inter-American Convention on Letters Rogatory signed in Panama on January 30, 1975.

This Protocol shall remain open for accession by any other State that accedes or has acceded to the Inter-American Convention on Letters Rogatory, under the conditions set forth in this article.

The instruments of ratification and accession shall be deposited with the General Secretariat of the Organization of American States.

Article 9

This Protocol shall enter into force on the thirtieth day following the date on which two States Parties to the Convention have deposited their instruments of ratification or accession to this Protocol.

For each State ratifying or acceding to the Protocol after its entry into force, the Protocol shall enter into force on the thirtieth day following deposit by such State of its instrument of ratification or accession, provided that such State is a Party to the Convention.

Article 10

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If a State Party has two or more territorial units in which different systems of law apply in relation to matters dealt with in this Protocol, it may, at the time of signature, ratification or accession, declare that this Protocol shall extend to all its territorial units or only to one or more of them.

Such declaration may be modified by subsequent declarations that shall expressly indicate the territorial unit or units to which this Protocol applies. Such subsequent declarations shall be transmitted to the General Secretariat of the Organization of American States, and shall become effective thirty days after the date of their receipt.

Article 11

This Protocol shall remain in force indefinitely, but any of the States Parties may denounce it. The instrument of denunciation shall be deposited with the General Secretariat of the Organization of American States. After one year from the date of deposit of the instrument of denunciation, the Protocol shall no longer be in effect for the denouncing State, but shall remain in effect for the other States Parties.

Article 12

The original instrument of this Protocol and its Annex (Forms A, B and C), the English, French, Portuguese and Spanish texts of which are equally authentic, shall be deposited with the General Secretariat of the Organization of American States, which will forward an authenticated copy of the text to the Secretariat of the United Nations for registration and publication in accordance with Article 102 of its Charter. The General Secretariat of the Organization of American States shall notify the Member States of that Organization and the States that have acceded to the Protocol of the signatures, deposits of instruments of ratification, accession and denunciation, as well as of reservations, if any. It shall also transmit to them the information mentioned in Article 2, the last paragraph of Article 3, and Article 6 and the declarations referred to in Article 10 of this Protocol.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, being duly authorized thereto by their respective Governments, have signed this Protocol.

DONE AT MONTEVIDEO, Republic of Uruguay, this eighth day of May, one thousand nine hundred and seventy-nine.

[Signatures omitted]

ANNEX TO THE ADDITIONAL PROTOCOL

TO THE INTER-AMERICAN CONVENTION ON LETTERS ROGATORY

FORM A

LETTER ROGATORY [1]

1	2
REQUESTING JUDICIAL OR OTHER ADJUDICATORY AUTHORITY Name	CASE: DOCKET No.:

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Address

3

CENTRAL AUTHORITY OF THE

STATE OF ORIGIN

Name

Address

4

CENTRAL AUTHORITY OF THE

STATE OF DESTINATION

Name

Address

5

REQUESTING PARTY

Name

Address

6

COUNSEL TO THE

Name

Address

PERSON DESIGNATED TO ACT IN CONNECTION WITH THE LETTER ROGATORY

Name

Address

Is this person responsible for

costs and expenses?

YES ☐ NO ☐

* If not, check in the amount

of _____ is attached

* Or proof of payment is

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The Central Authority signing this letter rogatory has the honor to transmit to you in triplicate the documents listed below and, in conformity with the Protocol to the Inter-American Convention on Letters Rogatory:

* A. Requests their prompt service on:

.....

.....

.....

The undersigned authority requests that service be carried out in the following manner:

* (1). In accordance with the special procedure or additional formalities that are described below, as provided for in the second paragraph of Article 10 of the above-mentioned Convention; or

.....

.....

.....

* (2). By service personally on the identified addressee or, in the case of a legal entity, on its authorized agent; or

* (3). If the person or the authorized agent of the entity to be served is not found, service shall be made in accordance with the law of the State of destination.

* B. Requests the delivery of the documents listed below to the following judicial or administrative authority:

Authority .....

.....

.....

* C. Requests the Central Authority of the State of destination to return to the Central Authority of the State of origin one copy of the documents listed below and attached to this letter rogatory, and an executed Certificate on the attached Form C.

Done at _____ this _____ date of _____, 19___.

....

Signature and stamp of the judicial or other adjudicatory

Signature and stamp of the Central Authority of the

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authority of the State of origin State of origin

Title or other identification of each document to be delivered:

.....

.....

(Attach additional pages, if necessary.)

[1] Complete the original and two copies of this form; if A(1) is applicable, attach the original and two copies of the translation of this item in the language of the State of destination.

* Delete if inapplicable.

ANNEX TO THE ADDITIONAL PROTOCOL

TO THE INTER-AMERICAN CONVENTION ON LETTERS ROGATORY

FORM B

ESSENTIAL INFORMATION FOR THE ADDRESSEE [1]

To (Name and address of the person being served).....

.....

You are hereby informed that (Brief statement of nature of service) .....

.....

.....

A copy of the letter rogatory that gives rise to the service or delivery of these documents is attached to this document. This copy also contains essential information for you. Also attached are copies of the complaint or pleading initiating the action in which the letter rogatory was issued, of the documents attached to the complaint or pleading, and of any rulings that ordered the issuance of the letter rogatory.

ADDITIONAL INFORMATION

I*

FOR SERVICE

A. The document being served on you (original or copy) concerns the following:

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.....

.....

B. The remedies sought or the amount in dispute is as follows:

.....

.....

C. By this service, you are requested:

.....

.....

D. * In case of service on you as a defendant you can answer the complaint before the judicial or other adjudicatory authority specified in Form A, Box 1 (State place, date and hour): .....

.....

* You are being summoned to appear as: .....

.....

* If some other action is being requested of the person served, please

describe: .....

.....

.....

.....

E. If you fail to comply, the consequences might be: .....

.....

.....

.....

F. You are hereby informed that a defense counsel appointed by the Court or the following legal aid societies are available to you at the place where the proceeding is pending.

Name: .....

Address: .....

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.....

The documents listed in Part III are being furnished to you so that you may better understand and defend your interests.

II *

FOR INFORMATION FROM JUDICIAL OR ADMINISTRATIVE AUTHORITY

To: .....

.....

.....

(Name and address of the judicial or administrative authority)

You are respectfully requested to furnish the undersigned authority with the following information: .....

.....

.....

.....

The documents listed in Part III are being furnished to you to facilitate your reply.

III

LIST OF ATTACHED DOCUMENTS

.....

.....

.....

.....

.....

.....

.....

.....

(Attach additional pages if necessary.)

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Done at _____ this _____ day of _____, 19___

.....	.....
Signature and stamp of the judicial or other adjudicatory authority of the State of origin	Signature and stamp of the Central Authority of the State of Origin

[1] Complete the original and two copies of this form in the language of the State of origin and two copies in the language of the State of destination.

* Delete if inapplicable.

ANNEX TO THE ADDITIONAL PROTOCOL

TO THE INTER-AMERICAN CONVENTION ON LETTERS ROGATORY

FORM C

CERTIFICATE OF EXECUTION [1]

To: .....

.....

.....

(Name and address of judicial or other adjudicatory authority that issued the letter rogatory)

In conformity with the Additional Protocol to the Inter-American Convention on Letters Rogatory, signed at Montevideo on May 8, 1979, and in accordance with the attached original letter rogatory, the undersigned Central Authority has the honor to certify the following:

*A. That one copy of the documents attached to this Certificate has been served or delivered as follows:

Date: .....

At (Address) .....

By one of the following methods authorized by the Convention.

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*(1) In accordance with the special procedure or additional formalities that are described below, as provided for in the second paragraph of Article 10 of the above-mentioned Convention, or

.....

.....

.....

*(2) By service personally on the identified addressee or, in the case of a legal entity, on its authorized agent, or

*(3) If the person or the authorized agent of the entity to be served was not found, in accordance with the law of the State of destination: (Specify method used)

.....

.....

.....

.....

*B. That the documents referred to in the letter rogatory have been delivered to:

Identity of person .....

.....

.....

Relationship to the addressee .....

(family, business or other)

.....

.....

*C. That the documents attached to the Certificate have not been served or delivered for the following reason(s):

.....

.....

.....

.....

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*D. In conformity with the Protocol, the party requesting execution of the letter rogatory is requested to pay the outstanding balance of costs in the amount indicated in the attached statement.

Done at _____ the _____ day of _____ 19___

.....

Signature and stamp of Central Authority of the State of destination

Where appropriate, attach originals or copies

of any additional documents proving service

or delivery, and identify them.

[1] Complete the original and one copy in the language of the State of destination.

* Delete if inapplicable.

Additional Protocol to the Inter-American Convention on Letters Rogatory, with Annex. Done at Montevideo May 8, 1979; entered into force for the United States August 27, 1988.

Notes of Decisions (58)

28 U.S.C.A. § 1781, 28 USCA § 1781
Current through P.L. 115-171.

End of Document

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United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part V. Procedure
Chapter 117. Evidence; Depositions (Refs & Annos)

28 U.S.C.A. § 1782

§ 1782. Assistance to foreign and international tribunals and to litigants before such tribunals

Effective: February 10, 1996
Currentness

(a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.

A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.

(b) This chapter does not preclude a person within the United States from voluntarily giving his testimony or statement, or producing a document or other thing, for use in a proceeding in a foreign or international tribunal before any person and in any manner acceptable to him.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 949; May 24, 1949, c. 139, § 93, 63 Stat. 103; Pub.L. 88-619, § 9(a), Oct. 3, 1964, 78 Stat. 997; Pub.L. 104-106, Div. A, Title XIII, § 1342(b), Feb. 10, 1996, 110 Stat. 486.)

Notes of Decisions (356)

28 U.S.C.A. § 1782, 28 USCA § 1782
Current through P.L. 115-171.

End of Document

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United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part V. Procedure
Chapter 117. Evidence; Depositions (Refs & Annos)

28 U.S.C.A. § 1783

§ 1783. Subpoena of person in foreign country

Currentness

(a) A court of the United States may order the issuance of a subpoena requiring the appearance as a witness before it, or before a person or body designated by it, of a national or resident of the United States who is in a foreign country, or requiring the production of a specified document or other thing by him, if the court finds that particular testimony or the production of the document or other thing by him is necessary in the interest of justice, and, in other than a criminal action or proceeding, if the court finds, in addition, that it is not possible to obtain his testimony in admissible form without his personal appearance or to obtain the production of the document or other thing in any other manner.

(b) The subpoena shall designate the time and place for the appearance or for the production of the document or other thing. Service of the subpoena and any order to show cause, rule, judgment, or decree authorized by this section or by section 1784 of this title shall be effected in accordance with the provisions of the Federal Rules of Civil Procedure relating to service of process on a person in a foreign country. The person serving the subpoena shall tender to the person to whom the subpoena is addressed his estimated necessary travel and attendance expenses, the amount of which shall be determined by the court and stated in the order directing the issuance of the subpoena.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 949; Pub.L. 88-619, § 10(a), Oct. 3, 1964, 78 Stat. 997.)

Notes of Decisions (24)

28 U.S.C.A. § 1783, 28 USCA § 1783
Current through P.L. 115-171.

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III. International Arbitration

International Arbitration

INTERNATIONAL BRIDGING THE GAP

Fordham University School of Law
June 15, 2018

Speakers:
Nancy M. Thevenin and Oliver J. Armas

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Agenda

- Why International Arbitration?
- The Arbitration Agreement
- The Arbitral Tribunal
- The Arbitral Proceedings
- Recognition and Enforcement of International Awards
- A Word about Investment Arbitration

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Why International Arbitration?

- An alternative to litigation for protecting contractual rights and enforcing contractual obligations
  - Results in a final, binding award – like a court judgment, but with no appeals on the merits
- Track record of use in disputes under:
  - international contracts
  - transactions with developing countries
  - transactions involving States and governmental entities

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Why International Arbitration?

- Arbitration vs. litigation
  - Cost
  - Speed
  - Private v. public
  - Arbitrators v. judge
  - Evidence
  - Appeals
  - Multi-party disputes and ability to consolidate
- Arbitration vs. other forms of alternate dispute resolution
  - Neutral third party
  - Binding versus non-binding
  - Cost-splitting

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The Arbitration Agreement

- Drafting an enforceable arbitration clause
  - Must show a clear and mandatory obligation to refer disputes to arbitration
  - Should cover all disputes that can arise between parties in connection with the contract
- Elements to include
  - Institutional or ad hoc
  - Number of arbitrators
  - Seat
  - Language
  - Governing law

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The Arbitration Agreement

- Separability
  - Arbitration clause is a separate contract
  - If the underlying contract is invalid, the arbitration clause still stands
- Competence – Competence
  - Arbitrators' power to determine their own jurisdiction

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The Arbitration Agreement

- Pathological clauses
  - **Disputes hereunder** shall be referred to arbitration, to be carried out by arbitrators named by the **International Chamber of Commerce in Geneva** in accordance with the arbitration procedure set forth in **the Civil Code of Mexico and in the Civil Code of France**, with **due regard for the law of the place of arbitration**.
  - Any dispute arising from or related to this Contract shall be settled by binding arbitration in Paris through the **International Court of Arbitration**. Arbitration shall be commenced by a Request for Arbitration submitted to the ICC in writing. The respondent shall submit an Answer to the Request for Arbitration within 30 days. **Within 10 days following the Answer, each party shall nominate its arbitrator.** The party-nominated arbitrators shall select the third arbitrator, who shall preside as chairman of the proceedings and who shall have **a minimum of 10 years of experience in the hotel management industry**.

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The Arbitration Agreement

Typical provisions in an arbitration clause:

Arbitral institution and its applicable rules	• Determines who will administer the arbitration • Establishes default rules
Seat of arbitration	• Determines the applicable arbitral and procedural law • Place where award can be annulled
Substantive law	• Law that governs the underlying claims • Unrelated to the seat of arbitration
Venue of arbitration	• Physical place of the arbitration
Number of arbitrators	• Typically 1 or 3 arbitrators
Nationality and experience of arbitrators	• Can require arbitrators to have specific experience and background
Language	• Can specify the language of the proceeding

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The Arbitration Tribunal

- Constitution of the arbitral tribunal
  - Number of arbitrators
  - Method of selection
  - Qualifications/restrictions
  - Impartiality and independence
    - Requirement of disclosure by arbitrators, including party-nominated arbitrators - otherwise, grounds for challenge (IBA Guidelines)
    - See UNCITRAL Model Law, Art. 12
- Institutions
  - Common examples include: ICC, LCIA, AAA/ICDR, SIAC, UNCITRAL
- Ad hoc

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The Arbitration Tribunal

- Challenges to arbitrators
  - UNCITRAL Model Law and Arbitration Rules
    - Article 12: justifiable doubts as to the arbitrator's impartiality or independence
    - Model Law Article 14: failure or impossibility to act
  - IBA Guidelines on Conflicts of Interest in International Arbitration
- Removal and replacement of arbitrators
  - UNCITRAL Model Law, Arts. 13 and 15
  - UNCITRAL Arbitration Rules, Arts. 13 and 14
  - ICC Arbitration Rules, Arts. 14 and 15

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The Arbitral Proceedings

- Applicable law
  - Provisions of arbitration agreement
  - Arbitration rules
  - National laws
  - International arbitral "soft law"
- Gathering and presentation of evidence
  - Limited document production
    - Not traditional American discovery!
    - IBA Rules on the Taking of Evidence in International Arbitration
  - Use of experts
  - Oral hearing

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Recognition and Enforcement of Awards

- Basic procedure
  - Identify jurisdiction(s) where assets are located (and attach them if possible)
  - File proceeding to enforce the award under the law of that jurisdiction
- The New York Convention
  - Article 2(1)
    - "Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration."
  - Makes enforcement easy: minimal burden on enforcing party
  - Very limited grounds for refusal of enforcement
  - Beware elastic concepts of due process and public policy
- Enforcement outside the New York Convention
  - Depends on law of place of enforcement
  - Sometimes more favorable, but usually less so
  - Safest course is to arbitrate in a New York Convention State

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Recognition and Enforcement of Awards

- Challenges to awards
  - **The prospects?** Low – awards are rarely set aside, particularly by courts in the major arbitration venues
  - **Where?** Prevailing view is that the courts of the place of arbitration have exclusive jurisdiction over setting-aside proceedings; decision then has extraterritorial effect
  - **On what grounds?** Very limited under most modern arbitration laws – basically the absence of a valid arbitration agreement, arbitrator bias, or a serious and prejudicial procedural irregularity
  - **With what effect?** The award is legally "dead" and cannot be enforced anywhere
  - But beware "rogue" courts and States

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Investment Arbitration

- Recent increase in investor-state arbitrations under treaties for the promotion and protection of investments
  - Bilateral investment treaties (BITs)
  - Multilateral treaties: NAFTA, Energy Charter Treaty
- Treaties provide for substantive protections for investments of nationals of one state party in the territory of the other
  - Fair and equitable treatment
  - No arbitrary/discriminatory measures
  - National and most favored nation treatment
  - No expropriation without prompt, adequate, and effective compensation
  - Free transfer of investments and return

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Investment Arbitration

- As a further incentive for investment, BITs provide for resolution of disputes out of the host state's courts
  - Direct access for investors to international arbitration with the state
  - "Arbitration without privity"
- Notice of dispute followed by "cooling off" period of 3-6 months before investor may commence arbitration
- Arbitration rules generally ICSID; sometimes UNCITRAL, ICC or SCC
- Increasing body of jurisprudence

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Questions

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Thank You!

IV. International Bankruptcy Basics

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International Bankruptcy Basics

1. Overview of Commercial Insolvency Proceedings Under United States Bankruptcy Code
    a. Chapter 11
    b. Chapter 7
2. International Insolvency Proceedings and how they Make Their Way to the United States
    a. Operating Businesses
        i. While Foreign Insolvency Proceedings are Pending
        ii. After Foreign Insolvency Proceedings have Concluded or After Debtor Entity has Emerged from those Proceedings
    b. Liquidating Businesses
3. Approach Under the Former § 304 Framework Under the Bankruptcy Code
    a. Comity Focus
4. Approach Under Chapter 15 of the Bankruptcy Code
    a. Jurisdiction
        i. 28 U.S.C. § 1334
    b. Unique Statutory Guidance
        i. 11 U.S.C. § 1501
    c. The Petition and Technical Requirements that must be met
        i. 11 U.S.C. §§ 1504, 1515, 1516, 1517
    d. Eligibility for Relief Under Chapter 15
        i. 11 U.S.C. § 109
        ii. *In re Barnet*, 737 F.3d 238 (2d Cir. 2013)
    e. The Foreign Representative
        i. 11 U.S.C. § 101(24)
            1. Appointed by Foreign Court
            2. Selected prior to Commencement of Foreign Proceedings
    f. Recognition and Types of Cases – "Main" and "Non-Main"
        i. Main/Non-Main/Neither
            1. 11 U.S.C. 1502
            2. *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd*., 374 B.R. 122 (Bankr. S.D.N.Y. 2007)
        ii. Timeline
            1. Fed. R. Bankr. P. 2002(q)
        iii. Emergency Relief Pending Recognition
            1. 11 U.S.C. § 1519
    g. Relief that is Automatic Upon Recognition, Relief that is Available, and Timing
        i. 11 U.S.C. §§ 1520, 1521, 1507
    h. Cooperation Among Courts
        i. 11 U.S.C. §§ 1525, 1526, 2527
        ii. Protocol
    i. Dual Plenary Proceedings
        i. 11 U.S.C. §§ 1528, 1529, 1530, 1531, 1532
    j. Public Policy Exception to Availability of Relief in the United States
        i. 11 U.S.C. § 1506
        ii. *In re VITRO S.A.B. de C.V.*, 701 F.3d 1031 (5th Cir. 2012)

Contents: Appendix of Relevant Statutory Provisions and Selected Case Law

Title 28, United States Code:

§ 1334. Bankruptcy cases and proceedings

Title 11, United States Code:

§ 101(23). Definition of Foreign Proceeding
§101(24). Definition of Foreign Representative
§ 109. Who may be a debtor
§ 1501. Purpose and scope of application
§ 1502. Definitions
§ 1503. International obligations of the United States
§ 1504. Commencement of ancillary case
§ 1505. Authorization to act in a foreign country
§ 1506. Public policy exception
§ 1507. Additional assistance
§ 1508. Interpretation
§ 1509. Right of direct access
§ 1510. Limited jurisdiction
§ 1511. Commencement of case under section 301, 302, or 303
§ 1512. Participation of a foreign representative in a case under this title
§ 1513. Access of foreign creditors to a case under this title
§ 1514. Notification to foreign creditors concerning a case under this title
§ 1515. Application for recognition
§ 1516. Presumptions concerning recognition
§ 1517. Order granting recognition
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§ 1519. Relief that may be granted upon filing petition for recognition
§ 1520. Effects of recognition of a foreign main proceeding
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§ 1522. Protection of creditors and other interested persons
§ 1523. Actions to avoid acts detrimental to creditors
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§ 1525. Cooperation and direct communication between the court and foreign courts or foreign representatives
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§ 1530. Coordination of more than 1 foreign proceeding
§ 1531. Presumption of insolvency based on recognition of a foreign main proceeding
§ 1532. Rule of payment in concurrent proceedings

Federal Rules of Bankruptcy Procedure:

Rule 2002(q)

Selected Case Citations:

Drawbridge Spec. Opp. Fund L.P. v. Barnet (In re Barnet), 737 F.3d 238 (2d Cir. 2013)

In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd., 374 B.R. 122 (Bankr. S.D.N.Y. 2007)

In re VITRO S.A.B. de C.V., 701 F.3d 1031 (5th Cir. 2012)

Full Text of Statutes and Selected Decisions:

28 U.S.C. § 1334. BANKRUPTCY CASES AND PROCEEDINGS

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Except as provided in subsection (e)(2), and notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

(c)(1) Except with respect to a case under chapter 15 of title 11, nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

(d) Any decision to abstain or not to abstain made under subsection (c) (other than a decision not to abstain in a proceeding described in subsection (c)(2)) is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title. Subsection (c) and this subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

(e) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction--

(1) of all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate; and

(2) over all claims or causes of action that involve construction of section 327 of title 11, United States Code, or rules relating to disclosure requirements under section 327.

11 U.S.C.A. § 101. DEFINITIONS

In this title the following definitions shall apply:

* * *

(23) The term "foreign proceeding" means a collective judicial or administrative proceeding in a foreign country, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation.

(24) The term "foreign representative" means a person or body, including a person or body appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of such foreign proceeding.

§ 109. WHO MAY BE A DEBTOR

(a) Notwithstanding any other provision of this section, only a person that resides or has a domicile, a place of business, or property in the United States, or a municipality, may be a debtor under this title.

(b) A person may be a debtor under chapter 7 of this title only if such person is not--

(1) a railroad;

(2) a domestic insurance company, bank, savings bank, cooperative bank, savings and loan association, building and loan association, homestead association, a New Markets Venture Capital company as defined in section 351 of the Small Business Investment Act of 1958, a small business investment company licensed by the Small Business Administration under section 301 of the Small Business Investment Act of 1958, credit union, or industrial bank or similar institution which is an insured bank as defined in section 3(h) of the Federal Deposit Insurance Act, except that an uninsured State member bank, or a corporation organized under section 25A of the Federal Reserve Act, which operates, or operates as, a multilateral clearing organization pursuant to section 409 of the Federal Deposit Insurance Corporation Improvement Act of 1991 may be a debtor if a petition is filed at the direction of the Board of Governors of the Federal Reserve System; or

(3)(A) a foreign insurance company, engaged in such business in the United States; or

(B) a foreign bank, savings bank, cooperative bank, savings and loan association, building and loan association, or credit union, that has a branch or agency (as defined in section 1(b) of the International Banking Act of 1978) in the United States.

(c) An entity may be a debtor under chapter 9 of this title if and only if such entity--

(1) is a municipality;

(2) is specifically authorized, in its capacity as a municipality or by name, to be a debtor under such chapter by State law, or by a governmental officer or organization empowered by State law to authorize such entity to be a debtor under such chapter;

(3) is insolvent;

(4) desires to effect a plan to adjust such debts; and

(5)(A) has obtained the agreement of creditors holding at least a majority in amount of the claims of each class that such entity intends to impair under a plan in a case under such chapter;

(B) has negotiated in good faith with creditors and has failed to obtain the agreement of creditors holding at least a majority in amount of the claims of each class that such entity intends to impair under a plan in a case under such chapter;

(C) is unable to negotiate with creditors because such negotiation is impracticable; or

(D) reasonably believes that a creditor may attempt to obtain a transfer that is avoidable under section 547 of this title.

(d) Only a railroad, a person that may be a debtor under chapter 7 of this title (except a stockbroker or a commodity broker), and an uninsured State member bank, or a corporation organized under section 25A of the Federal Reserve Act, which operates, or operates as, a multilateral clearing organization pursuant to section 409 of the Federal Deposit Insurance Corporation Improvement Act of 1991 may be a debtor under chapter 11 of this title.

(e) Only an individual with regular income that owes, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts of less than $394,725[1] and noncontingent, liquidated, secured debts of less than $1,184,200[1], or an individual with regular income and such individual's spouse, except a stockbroker or a commodity broker, that owe, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts that aggregate less than $394,725[1] and noncontingent, liquidated, secured debts of less than $1,184,200[1] may be a debtor under chapter 13 of this title.

(f) Only a family farmer or family fisherman with regular annual income may be a debtor under chapter 12 of this title.

(g) Notwithstanding any other provision of this section, no individual or family farmer may be a debtor under this title who has been a debtor in a case pending under this title at any time in the preceding 180 days if--

(1) the case was dismissed by the court for willful failure of the debtor to abide by orders of the court, or to appear before the court in proper prosecution of the case; or

(2) the debtor requested and obtained the voluntary dismissal of the case following the filing of a request for relief from the automatic stay provided by section 362 of this title.

(h)(1) Subject to paragraphs (2) and (3), and notwithstanding any other provision of this section other than paragraph (4) of this subsection, an individual may not be a debtor under this title unless such individual has, during the 180-day period ending on the date of filing of the petition by such individual, received from an approved nonprofit budget and credit counseling agency described in section 111(a) an individual or group briefing (including a briefing conducted by telephone or on the Internet) that outlined the opportunities for available credit counseling and assisted such individual in performing a related budget analysis.

(2)(A) Paragraph (1) shall not apply with respect to a debtor who resides in a district for which the United States trustee (or the bankruptcy administrator, if any) determines that the approved nonprofit budget and credit counseling agencies for such district are not reasonably able to provide adequate services to the additional individuals who would otherwise seek credit counseling from such agencies by reason of the requirements of paragraph (1).

(B) The United States trustee (or the bankruptcy administrator, if any) who makes a determination described in subparagraph (A) shall review such determination not later than 1 year after the date of such determination, and not less frequently than annually thereafter. Notwithstanding the preceding sentence, a nonprofit budget and credit counseling agency may be disapproved by the United States trustee (or the bankruptcy administrator, if any) at any time.

(3)(A) Subject to subparagraph (B), the requirements of paragraph (1) shall not apply with respect to a debtor who submits to the court a certification that--

(i) describes exigent circumstances that merit a waiver of the requirements of paragraph (1);

(ii) states that the debtor requested credit counseling services from an approved nonprofit budget and credit counseling agency, but was unable to obtain the services referred to in paragraph (1) during the 7-day period beginning on the date on which the debtor made that request; and

(iii) is satisfactory to the court.

(B) With respect to a debtor, an exemption under subparagraph (A) shall cease to apply to that debtor on the date on which the debtor meets the requirements of paragraph (1), but in no case may the exemption apply to that debtor after the date that is 30 days after the debtor files a petition, except that the court, for cause, may order an additional 15 days.

(4) The requirements of paragraph (1) shall not apply with respect to a debtor whom the court determines, after notice and hearing, is unable to complete those requirements because of incapacity, disability, or active military duty in a military combat zone. For the purposes of this paragraph, incapacity means that the debtor is impaired by reason of mental illness or mental deficiency so that he is incapable of realizing and making rational decisions with respect to his financial responsibilities; and "disability" means that the debtor is so physically impaired as to be unable, after reasonable effort, to participate in an in person, telephone, or Internet briefing required under paragraph (1).

§ 1501. PURPOSE AND SCOPE OF APPLICATION

(a) The purpose of this chapter is to incorporate the Model Law on Cross-Border Insolvency so as to provide effective mechanisms for dealing with cases of cross-border insolvency with the objectives of--

(1) cooperation between--

(A) courts of the United States, United States trustees, trustees, examiners, debtors, and debtors in possession; and

(B) the courts and other competent authorities of foreign countries involved in cross-border insolvency cases;

(2) greater legal certainty for trade and investment;

(3) fair and efficient administration of cross-border insolvencies that protects the interests of all creditors, and other interested entities, including the debtor;

(4) protection and maximization of the value of the debtor's assets; and

(5) facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.

(b) This chapter applies where--

(1) assistance is sought in the United States by a foreign court or a foreign representative in connection with a foreign proceeding;

(2) assistance is sought in a foreign country in connection with a case under this title;

(3) a foreign proceeding and a case under this title with respect to the same debtor are pending concurrently; or

(4) creditors or other interested persons in a foreign country have an interest in requesting the commencement of, or participating in, a case or proceeding under this title.

(c) This chapter does not apply to--

(1) a proceeding concerning an entity, other than a foreign insurance company, identified by exclusion in section 109(b);

(2) an individual, or to an individual and such individual's spouse, who have debts within the limits specified in section 109(e) and who are citizens of the United States or aliens lawfully admitted for permanent residence in the United States; or

(3) an entity subject to a proceeding under the Securities Investor Protection Act of 1970, a stockbroker subject to subchapter III of chapter 7 of this title, or a commodity broker subject to subchapter IV of chapter 7 of this title.

(d) The court may not grant relief under this chapter with respect to any deposit, escrow, trust fund, or other security required or permitted under any applicable State insurance law or regulation for the benefit of claim holders in the United States.

§ 1502. DEFINITIONS

For the purposes of this chapter, the term--

(1) "debtor" means an entity that is the subject of a foreign proceeding;

(2) "establishment" means any place of operations where the debtor carries out a nontransitory economic activity;

(3) "foreign court" means a judicial or other authority competent to control or supervise a foreign proceeding;

(4) "foreign main proceeding" means a foreign proceeding pending in the country where the debtor has the center of its main interests;

(5) "foreign nonmain proceeding" means a foreign proceeding, other than a foreign main proceeding, pending in a country where the debtor has an establishment;

(6) "trustee" includes a trustee, a debtor in possession in a case under any chapter of this title, or a debtor under chapter 9 of this title;

(7) "recognition" means the entry of an order granting recognition of a foreign main proceeding or foreign nonmain proceeding under this chapter; and

(8) "within the territorial jurisdiction of the United States", when used with reference to property of a debtor, refers to tangible property located within the territory of the United States and intangible property deemed under applicable nonbankruptcy law to be located within that territory, including any property subject to attachment or garnishment that may properly be seized or garnished by an action in a Federal or State court in the United States.

§ 1503. INTERNATIONAL OBLIGATIONS OF THE UNITED STATES

To the extent that this chapter conflicts with an obligation of the United States arising out of any treaty or other form of agreement to which it is a party with one or more other countries, the requirements of the treaty or agreement prevail.

§ 1504. COMMENCEMENT OF ANCILLARY CASE

A case under this chapter is commenced by the filing of a petition for recognition of a foreign proceeding under section 1515.

§ 1505. AUTHORIZATION TO ACT IN A FOREIGN COUNTRY

A trustee or another entity (including an examiner) may be authorized by the court to act in a foreign country on behalf of an estate created under section 541. An entity authorized to act under this section may act in any way permitted by the applicable foreign law.

§ 1506. PUBLIC POLICY EXCEPTION

Nothing in this chapter prevents the court from refusing to take an action governed by this chapter if the action would be manifestly contrary to the public policy of the United States.

§ 1507. ADDITIONAL ASSISTANCE

(a) Subject to the specific limitations stated elsewhere in this chapter the court, if recognition is granted, may provide additional assistance to a foreign representative under this title or under other laws of the United States.

(b) In determining whether to provide additional assistance under this title or under other laws of the United States, the court shall consider whether such additional assistance, consistent with the principles of comity, will reasonably assure--

(1) just treatment of all holders of claims against or interests in the debtor's property;

(2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;

(3) prevention of preferential or fraudulent dispositions of property of the debtor;

(4) distribution of proceeds of the debtor's property substantially in accordance with the order prescribed by this title; and

(5) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.

§ 1508. INTERPRETATION

In interpreting this chapter, the court shall consider its international origin, and the need to promote an application of this chapter that is consistent with the application of similar statutes adopted by foreign jurisdictions.

§ 1509. RIGHT OF DIRECT ACCESS

(a) A foreign representative may commence a case under section 1504 by filing directly with the court a petition for recognition of a foreign proceeding under section 1515.

(b) If the court grants recognition under section 1517, and subject to any limitations that the court may impose consistent with the policy of this chapter--

(1) the foreign representative has the capacity to sue and be sued in a court in the United States;

(2) the foreign representative may apply directly to a court in the United States for appropriate relief in that court; and

(3) a court in the United States shall grant comity or cooperation to the foreign representative.

(c) A request for comity or cooperation by a foreign representative in a court in the United States other than the court which granted recognition shall be accompanied by a certified copy of an order granting recognition under section 1517.

(d) If the court denies recognition under this chapter, the court may issue any appropriate order necessary to prevent the foreign representative from obtaining comity or cooperation from courts in the United States.

(e) Whether or not the court grants recognition, and subject to sections 306 and 1510, a foreign representative is subject to applicable nonbankruptcy law.

(f) Notwithstanding any other provision of this section, the failure of a foreign representative to

commence a case or to obtain recognition under this chapter does not affect any right the foreign representative may have to sue in a court in the United States to collect or recover a claim which is the property of the debtor.

§ 1510. LIMITED JURISDICTION

The sole fact that a foreign representative files a petition under section 1515 does not subject the foreign representative to the jurisdiction of any court in the United States for any other purpose.

§ 1511. COMMENCEMENT OF CASE UNDER SECTION 301, 302, OR 303

(a) Upon recognition, a foreign representative may commence--

(1) an involuntary case under section 303; or

(2) a voluntary case under section 301 or 302, if the foreign proceeding is a foreign main proceeding.

(b) The petition commencing a case under subsection (a) must be accompanied by a certified copy of an order granting recognition. The court where the petition for recognition has been filed must be advised of the foreign representative's intent to commence a case under subsection (a) prior to such commencement.

§ 1512. PARTICIPATION OF A FOREIGN REPRESENTATIVE IN A CASE UNDER THIS TITLE

Upon recognition of a foreign proceeding, the foreign representative in the recognized proceeding is entitled to participate as a party in interest in a case regarding the debtor under this title.

§ 1513. ACCESS OF FOREIGN CREDITORS TO A CASE UNDER THIS TITLE

(a) Foreign creditors have the same rights regarding the commencement of, and participation in, a case under this title as domestic creditors.

(b)(1) Subsection (a) does not change or codify present law as to the priority of claims under section 507 or 726, except that the claim of a foreign creditor under those sections shall not be given a lower priority than that of general unsecured claims without priority solely because the holder of such claim is a foreign creditor.

(2)(A) Subsection (a) and paragraph (1) do not change or codify present law as to the allowability of foreign revenue claims or other foreign public law claims in a proceeding under this title.

(B) Allowance and priority as to a foreign tax claim or other foreign public law claim shall be governed by any applicable tax treaty of the United States, under the conditions and circumstances specified therein.

§ 1514. NOTIFICATION TO FOREIGN CREDITORS CONCERNING A CASE UNDER THIS TITLE

(a) Whenever in a case under this title notice is to be given to creditors generally or to any class or category of creditors, such notice shall also be given to the known creditors generally, or to creditors in the notified class or category, that do not have addresses in the United States. The court may order that appropriate steps be taken with a view to notifying any creditor whose address is not yet known.

(b) Such notification to creditors with foreign addresses described in subsection (a) shall be given individually, unless the court considers that, under the circumstances, some other form of notification would be more appropriate. No letter or other formality is required.

(c) When a notification of commencement of a case is to be given to foreign creditors, such notification shall--

(1) indicate the time period for filing proofs of claim and specify the place for filing such proofs of

claim;

(2) indicate whether secured creditors need to file proofs of claim; and

(3) contain any other information required to be included in such notification to creditors under this title and the orders of the court.

(d) Any rule of procedure or order of the court as to notice or the filing of a proof of claim shall provide such additional time to creditors with foreign addresses as is reasonable under the circumstances.

§ 1515. APPLICATION FOR RECOGNITION

(a) A foreign representative applies to the court for recognition of a foreign proceeding in which the foreign representative has been appointed by filing a petition for recognition.

(b) A petition for recognition shall be accompanied by--

(1) a certified copy of the decision commencing such foreign proceeding and appointing the foreign representative;

(2) a certificate from the foreign court affirming the existence of such foreign proceeding and of the appointment of the foreign representative; or

(3) in the absence of evidence referred to in paragraphs (1) and (2), any other evidence acceptable to the court of the existence of such foreign proceeding and of the appointment of the foreign representative.

(c) A petition for recognition shall also be accompanied by a statement identifying all foreign proceedings with respect to the debtor that are known to the foreign representative.

(d) The documents referred to in paragraphs (1) and (2) of subsection (b) shall be translated into English. The court may require a translation into English of additional documents.

§ 1516. PRESUMPTIONS CONCERNING RECOGNITION

(a) If the decision or certificate referred to in section 1515(b) indicates that the foreign proceeding is a foreign proceeding and that the person or body is a foreign representative, the court is entitled to so presume.

(b) The court is entitled to presume that documents submitted in support of the petition for recognition are authentic, whether or not they have been legalized.

(c) In the absence of evidence to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the center of the debtor's main interests.

§ 1517. ORDER GRANTING RECOGNITION

(a) Subject to section 1506, after notice and a hearing, an order recognizing a foreign proceeding shall be entered if--

(1) such foreign proceeding for which recognition is sought is a foreign main proceeding or foreign nonmain proceeding within the meaning of section 1502;

(2) the foreign representative applying for recognition is a person or body; and

(3) the petition meets the requirements of section 1515.

(b) Such foreign proceeding shall be recognized--

(1) as a foreign main proceeding if it is pending in the country where the debtor has the center of its main interests; or

(2) as a foreign nonmain proceeding if the debtor has an establishment within the meaning of section

1502 in the foreign country where the proceeding is pending.

(c) A petition for recognition of a foreign proceeding shall be decided upon at the earliest possible time. Entry of an order recognizing a foreign proceeding constitutes recognition under this chapter.

(d) The provisions of this subchapter do not prevent modification or termination of recognition if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist, but in considering such action the court shall give due weight to possible prejudice to parties that have relied upon the order granting recognition. A case under this chapter may be closed in the manner prescribed under section 350.

§ 1518. SUBSEQUENT INFORMATION

From the time of filing the petition for recognition of a foreign proceeding, the foreign representative shall file with the court promptly a notice of change of status concerning--

(1) any substantial change in the status of such foreign proceeding or the status of the foreign representative's appointment; and

(2) any other foreign proceeding regarding the debtor that becomes known to the foreign representative.

§ 1519. RELIEF THAT MAY BE GRANTED UPON FILING PETITION FOR RECOGNITION

(a) From the time of filing a petition for recognition until the court rules on the petition, the court may, at the request of the foreign representative, where relief is urgently needed to protect the assets of the debtor or the interests of the creditors, grant relief of a provisional nature, including--

(1) staying execution against the debtor's assets;

(2) entrusting the administration or realization of all or part of the debtor's assets located in the United States to the foreign representative or another person authorized by the court, including an examiner, in order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy; and

(3) any relief referred to in paragraph (3), (4), or (7) of section 1521(a).

(b) Unless extended under section 1521(a)(6), the relief granted under this section terminates when the petition for recognition is granted.

(c) It is a ground for denial of relief under this section that such relief would interfere with the administration of a foreign main proceeding.

(d) The court may not enjoin a police or regulatory act of a governmental unit, including a criminal action or proceeding, under this section.

(e) The standards, procedures, and limitations applicable to an injunction shall apply to relief under this section.

(f) The exercise of rights not subject to the stay arising under section 362(a) pursuant to paragraph (6), (7), (17), or (27) of section 362(b) or pursuant to section 362(o) shall not be stayed by any order of a court or administrative agency in any proceeding under this chapter.

§ 1520. EFFECTS OF RECOGNITION OF A FOREIGN MAIN PROCEEDING

(a) Upon recognition of a foreign proceeding that is a foreign main proceeding--

(1) sections 361 and 362 apply with respect to the debtor and the property of the debtor that is within the territorial jurisdiction of the United States;

(2) sections 363, 549, and 552 apply to a transfer of an interest of the debtor in property that is within the territorial jurisdiction of the United States to the same extent that the sections would apply to property of an estate;

(3) unless the court orders otherwise, the foreign representative may operate the debtor's business and may exercise the rights and powers of a trustee under and to the extent provided by sections 363 and 552; and

(4) section 552 applies to property of the debtor that is within the territorial jurisdiction of the United States.

(b) Subsection (a) does not affect the right to commence an individual action or proceeding in a foreign country to the extent necessary to preserve a claim against the debtor.

(c) Subsection (a) does not affect the right of a foreign representative or an entity to file a petition commencing a case under this title or the right of any party to file claims or take other proper actions in such a case.

§ 1521. RELIEF THAT MAY BE GRANTED UPON RECOGNITION

(a) Upon recognition of a foreign proceeding, whether main or nonmain, where necessary to effectuate the purpose of this chapter and to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief, including--

(1) staying the commencement or continuation of an individual action or proceeding concerning the debtor's assets, rights, obligations or liabilities to the extent they have not been stayed under section 1520(a);

(2) staying execution against the debtor's assets to the extent it has not been stayed under section 1520(a);

(3) suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under section 1520(a);

(4) providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities;

(5) entrusting the administration or realization of all or part of the debtor's assets within the territorial jurisdiction of the United States to the foreign representative or another person, including an examiner, authorized by the court;

(6) extending relief granted under section 1519(a); and

(7) granting any additional relief that may be available to a trustee, except for relief available under sections 522, 544, 545, 547, 548, 550, and 724(a).

(b) Upon recognition of a foreign proceeding, whether main or nonmain, the court may, at the request of the foreign representative, entrust the distribution of all or part of the debtor's assets located in the United States to the foreign representative or another person, including an examiner, authorized by the court, provided that the court is satisfied that the interests of creditors in the United States are sufficiently protected.

(c) In granting relief under this section to a representative of a foreign nonmain proceeding, the court must be satisfied that the relief relates to assets that, under the law of the United States, should be administered

in the foreign nonmain proceeding or concerns information required in that proceeding.

(d) The court may not enjoin a police or regulatory act of a governmental unit, including a criminal action or proceeding, under this section.

(e) The standards, procedures, and limitations applicable to an injunction shall apply to relief under paragraphs (1), (2), (3), and (6) of subsection (a).

(f) The exercise of rights not subject to the stay arising under section 362(a) pursuant to paragraph (6), (7), (17), or (27) of section 362(b) or pursuant to section 362(o) shall not be stayed by any order of a court or administrative agency in any proceeding under this chapter.

§ 1522. PROTECTION OF CREDITORS AND OTHER INTERESTED PERSONS

(a) The court may grant relief under section 1519 or 1521, or may modify or terminate relief under subsection (c), only if the interests of the creditors and other interested entities, including the debtor, are sufficiently protected.

(b) The court may subject relief granted under section 1519 or 1521, or the operation of the debtor's business under section 1520(a)(3), to conditions it considers appropriate, including the giving of security or the filing of a bond.

(c) The court may, at the request of the foreign representative or an entity affected by relief granted under section 1519 or 1521, or at its own motion, modify or terminate such relief.

(d) Section 1104(d) shall apply to the appointment of an examiner under this chapter. Any examiner shall comply with the qualification requirements imposed on a trustee by section 322.

§ 1523. ACTIONS TO AVOID ACTS DETRIMENTAL TO CREDITORS

(a) Upon recognition of a foreign proceeding, the foreign representative has standing in a case concerning the debtor pending under another chapter of this title to initiate actions under sections 522, 544, 545, 547, 548, 550, 553, and 724(a).

(b) When a foreign proceeding is a foreign nonmain proceeding, the court must be satisfied that an action under subsection (a) relates to assets that, under United States law, should be administered in the foreign nonmain proceeding.

§ 1524. INTERVENTION BY A FOREIGN REPRESENTATIVE

Upon recognition of a foreign proceeding, the foreign representative may intervene in any proceedings in a State or Federal court in the United States in which the debtor is a party.

§ 1525. COOPERATION AND DIRECT COMMUNICATION BETWEEN THE COURT AND FOREIGN COURTS OR FOREIGN REPRESENTATIVES

(a) Consistent with section 1501, the court shall cooperate to the maximum extent possible with a foreign court or a foreign representative, either directly or through the trustee.

(b) The court is entitled to communicate directly with, or to request information or assistance directly from, a foreign court or a foreign representative, subject to the rights of a party in interest to notice and participation.

§ 1526. COOPERATION AND DIRECT COMMUNICATION BETWEEN

THE TRUSTEE AND FOREIGN COURTS OR FOREIGN REPRESENTATIVES

(a) Consistent with section 1501, the trustee or other person, including an examiner, authorized by the court, shall, subject to the supervision of the court, cooperate to the maximum extent possible with a foreign court or a foreign representative.

(b) The trustee or other person, including an examiner, authorized by the court is entitled, subject to the supervision of the court, to communicate directly with a foreign court or a foreign representative.

§ 1527. FORMS OF COOPERATION

Cooperation referred to in sections 1525 and 1526 may be implemented by any appropriate means, including--

(1) appointment of a person or body, including an examiner, to act at the direction of the court;

(2) communication of information by any means considered appropriate by the court;

(3) coordination of the administration and supervision of the debtor's assets and affairs;

(4) approval or implementation of agreements concerning the coordination of proceedings; and

(5) coordination of concurrent proceedings regarding the same debtor.

§ 1528. COMMENCEMENT OF A CASE UNDER THIS TITLE AFTER RECOGNITION OF A FOREIGN MAIN PROCEEDING

After recognition of a foreign main proceeding, a case under another chapter of this title may be commenced only if the debtor has assets in the United States. The effects of such case shall be restricted to the assets of the debtor that are within the territorial jurisdiction of the United States and, to the extent necessary to implement cooperation and coordination under sections 1525, 1526, and 1527, to other assets of the debtor that are within the jurisdiction of the court under sections 541(a) of this title, and 1334(e) of title 28, to the extent that such other assets are not subject to the jurisdiction and control of a foreign proceeding that has been recognized under this chapter.

§ 1529. COORDINATION OF A CASE UNDER THIS TITLE AND A FOREIGN PROCEEDING

If a foreign proceeding and a case under another chapter of this title are pending concurrently regarding the same debtor, the court shall seek cooperation and coordination under sections 1525, 1526, and 1527, and the following shall apply:

(1) If the case in the United States is pending at the time the petition for recognition of such foreign proceeding is filed--

(A) any relief granted under section 1519 or 1521 must be consistent with the relief granted in the case in the United States; and

(B) section 1520 does not apply even if such foreign proceeding is recognized as a foreign main proceeding.

(2) If a case in the United States under this title commences after recognition, or after the date of the filing of the petition for recognition, of such foreign proceeding--

(A) any relief in effect under section 1519 or 1521 shall be reviewed by the court and shall be modified or terminated if inconsistent with the case in the United States; and

(B) if such foreign proceeding is a foreign main proceeding, the stay and suspension referred to in section 1520(a) shall be modified or terminated if inconsistent with the relief granted in the case in the United States.

(3) In granting, extending, or modifying relief granted to a representative of a foreign nonmain proceeding, the court must be satisfied that the relief relates to assets that, under the laws of the United States, should be administered in the foreign nonmain proceeding or concerns information required in that proceeding.

(4) In achieving cooperation and coordination under sections 1528 and 1529, the court may grant any of the relief authorized under section 305.

§ 1530. COORDINATION OF MORE THAN 1 FOREIGN PROCEEDING

In matters referred to in section 1501, with respect to more than 1 foreign proceeding regarding the debtor, the court shall seek cooperation and coordination under sections 1525, 1526, and 1527, and the following shall apply:

(1) Any relief granted under section 1519 or 1521 to a representative of a foreign nonmain proceeding after recognition of a foreign main proceeding must be consistent with the foreign main proceeding.

(2) If a foreign main proceeding is recognized after recognition, or after the filing of a petition for recognition, of a foreign nonmain proceeding, any relief in effect under section 1519 or 1521 shall be reviewed by the court and shall be modified or terminated if inconsistent with the foreign main proceeding.

(3) If, after recognition of a foreign nonmain proceeding, another foreign nonmain proceeding is recognized, the court shall grant, modify, or terminate relief for the purpose of facilitating coordination of the proceedings.

§ 1531. PRESUMPTION OF INSOLVENCY BASED ON RECOGNITION OF A FOREIGN MAIN PROCEEDING

In the absence of evidence to the contrary, recognition of a foreign main proceeding is, for the purpose of commencing a proceeding under section 303, proof that the debtor is generally not paying its debts as such debts become due.

§ 1532. RULE OF PAYMENT IN CONCURRENT PROCEEDINGS

Without prejudice to secured claims or rights in rem, a creditor who has received payment with respect to its claim in a foreign proceeding pursuant to a law relating to insolvency may not receive a payment for the same claim in a case under any other chapter of this title regarding the debtor, so long as the payment to other creditors of the same class is proportionately less than the payment the creditor has already received.

RULE 2002. NOTICES TO CREDITORS, EQUITY SECURITY HOLDERS, ADMINISTRATORS IN FOREIGN PROCEEDINGS, PERSONS AGAINST WHOM PROVISIONAL RELIEF IS SOUGHT IN ANCILLARY AND OTHER CROSS-BORDER CASES, UNITED STATES, AND UNITED STATES TRUSTEE

* * *

(q) Notice of petition for recognition of foreign proceeding and of court's intention to communicate with foreign courts and foreign representatives

(1) Notice of petition for recognition

After the filing of a petition for recognition of a foreign proceeding, the court shall promptly schedule and hold a hearing on the petition. The clerk, or some other person as the court may direct, shall forthwith give the debtor, all persons or bodies authorized to administer foreign proceedings of the debtor, all entities against whom provisional relief is being sought under § 1519 of the Code, all parties to litigation pending in the United States in which the debtor is a party at the time of the filing of the

petition, and such other entities as the court may direct, at least 21 days' notice by mail of the hearing. The notice shall state whether the petition seeks recognition as a foreign main proceeding or foreign nonmain proceeding and shall include the petition and any other document the court may require. If the court consolidates the hearing on the petition with the hearing on a request for provisional relief, the court may set a shorter notice period, with notice to the entities listed in this subdivision.

(2) Notice of court's intention to communicate with foreign courts and foreign representatives

The clerk, or some other person as the court may direct, shall give the debtor, all persons or bodies authorized to administer foreign proceedings of the debtor, all entities against whom provisional relief is being sought under § 1519 of the Code, all parties to litigation pending in the United States in which the debtor is a party at the time of the filing of the petition, and such other entities as the court may direct, notice by mail of the court's intention to communicate with a foreign court or foreign representative.

V. Cross-Border Data Protection and Cyber-Security

BakerHostetler

2018 DATA SECURITY INCIDENT RESPONSE REPORT

Building Cyber Resilience

Compromise Response Intelligence in Action

Key Findings

MFA is the gold standard. Much like encryption of external devices several years ago, multifactor authentication (MFA) has become an essential security measure and is increasingly becoming a regulatory expectation. However, MFA is not infallible, and not all MFA solutions are equally secure.

It's not the cloud, it's you. As entities migrate to the cloud, most security issues are not caused by the cloud service provider, but by how the entity or its service provider configures access to the cloud.

Rise of the regulator. Recent high-profile incidents have rekindled regulatory interest. And large multistate settlements have given state attorneys general the funds to hire experts and more aggressively investigate breaches.

New year, same issues. Entities still are not executing on the basics. Endpoint monitoring agents, security information and event management (SIEM) solutions, and privileged account management tools have become more common, but good hygiene could have prevented many incidents.

Everyone's involved. With incidents on the rise and the stakes higher than ever, senior management, boards, and external auditors are becoming involved in data breach prevention and response.

No one is "too small." Any entity, of any size, may become the victim of a cyber-attack. Hackers are happy to hit "singles" and take advantage of the lax security practices of small and medium-sized entities, and attacker techniques and tools simplify the process of finding even obscure targets of opportunity.

GDPR countdown drives uncertainty. With the May 25, 2018 effective date looming, entities have been racing the clock to get their privacy, data security and incident response practices in order. Expect adjustments to continue as the regulation is implemented.

Reading the litigation tea leaves is an inexact science. The line determining cognizable damages continues to blur. In addition, recent cases show that privilege may not apply to all incident-related communications, and that some entities choose to waive privilege.

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08 Forensics Drive Key Decisions
10 Regulators More Involved
12 Prepare for Privilege Challenges
14 Use Compromise Response Intelligence to Minimize Risk

This is our fourth Report addressing the issues entities care about most when it comes to incident response. The Report's focus remains consistent with that of prior years, although this year we emphasize the importance of using Compromise Response Intelligence in addition to the measures necessary to be Compromise Ready.

2017 was another record-setting year for data security incidents. Attack groups continued to exploit vulnerabilities to gain access to valuable data, phishing remained prevalent and successful, and employees and their vendors made common mistakes that placed sensitive information at risk. But despite attackers' old tactics continuing to work, we saw them also develop new and innovative attacks, including those against supply chains and Internet of Things (IoT) devices. As regulator scrutiny increases and new international breach notification laws take effect, more entities will struggle with these issues globally.

560+
Incidents in 2017

While all incidents cannot be prevented, there are measures entities can take to minimize their attack surface and reduce the frequency and severity of incidents. Equally important, given the increase in attacks intended to disrupt operations, is a focus on building cyber resilience for an agile response. It can be hard to know where to begin, especially in an environment of constant change – but taking steps to proactively address these issues is what we call being Compromise Ready.

Our goal in publishing this Report is to offer practical steps you can take to reduce your risk profile, build resilience, and be better prepared to respond when an incident occurs. The data and experience behind the recommendations come from our work on more than 560 incidents in 2017 and more than 2,000 others in years past. Just as security teams use threat intelligence to prevent attacks, we hope you will use the Compromise Response Intelligence from this Report to prioritize and gain executive support for security spending, educate key stakeholders, fine-tune incident response plans, work more efficiently with forensic firms, assess and reduce risk, build scenarios for tabletop exercises, and determine cyber liability insurance needs.

Please continue to reach out and let us know what information you would find most useful in future reports.

Sincerely,

Ted Kobus
Leader, Privacy and Data Protection Team

Incident Response Trends

Top 5 Causes

34% Phishing

- **32%** Involved Remote Access
- **18%** Involved Ransomware

19% Network Intrusion

- **38%** Involved Ransomware
- **17%** Involved Automated Data Exfiltration

17% Inadvertent Disclosure

11% Stolen/Lost Device or Records

6% System Misconfiguration

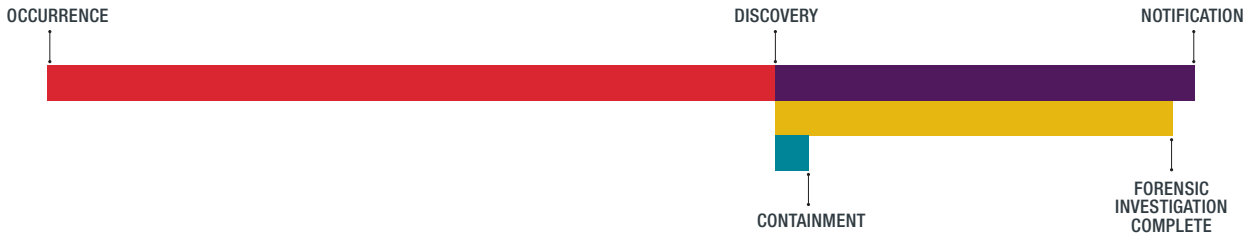
Incident Response Timeline

66 Days
Occurrence to Discovery

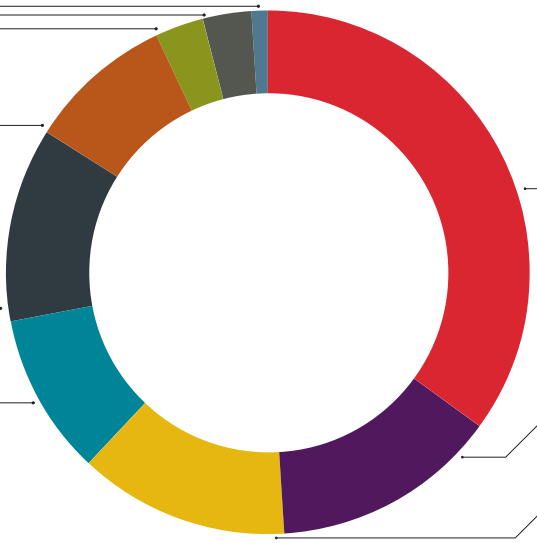
3 Days
Discovery to Containment

36 Days
Time to Complete Forensic Investigation

38 Days
Discovery to Notification

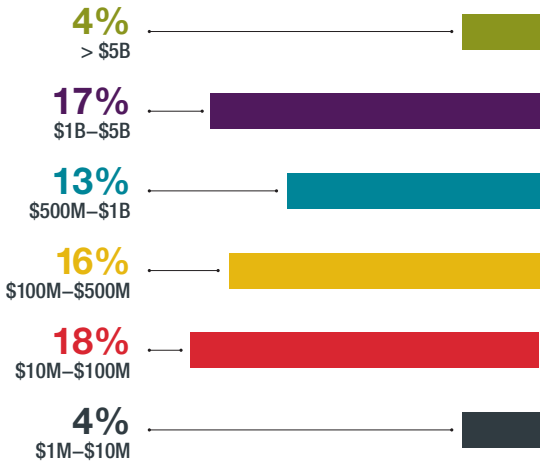


Industries Affected



- **1%** Nonprofit
- **3%** Aerospace & Defense
- **3%** Government
- **9%** Finance & Insurance
- **10%** Other
- **12%** **Hospitality** (including Retail, Food & Beverage, Media & Entertainment)
- **35%** Healthcare
- **14%** Education
- **13%** **Business & Professional Services** (including IT, Legal, Engineering, and Transportation)

Entity Size by Revenue



- **4%** > $5B
- **17%** $1B–$5B
- **13%** $500M–$1B
- **16%** $100M–$500M
- **18%** $10M–$100M
- **4%** $1M–$10M

Breach Discovery

65% Internally Discovered

35% Externally Discovered

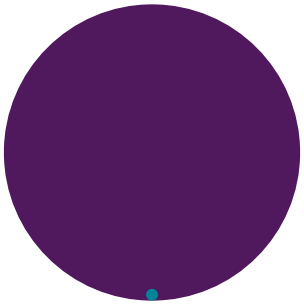
Average Forensic Investigation Costs

$84,417
All Incidents

$436,938
20 Largest Investigations

100%
Increase Over Last Year

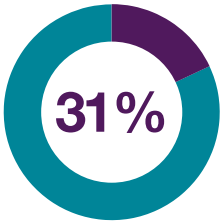
Notifications vs. Lawsuits Filed



350
Notifications

10
Lawsuits Filed

AG Inquiries Following Notification



Non-AG Inquiries

2016	2017
29	43

Why Incidents Occur

Phishing and Exploitation of Vulnerable Systems Top the List

Over one-third (34%) of the incidents we responded to began when an employee was phished – tricked by an email message into providing access credentials to an unauthorized party, visiting a phony website, downloading an infected document, or clicking on a link that installed malware. Both sophisticated and unsophisticated hackers use phishing to obtain direct network access, convince employees to wire money, enable remote access with compromised credentials, or deploy malware and ransomware. These incidents can be costly and difficult to investigate.

Exploitation of vulnerable systems to gain network access was the second-most frequent tactic used by attackers to obtain initial access, accounting for 19% of the total. After gaining access, deployment of ransomware was the most likely next occurrence.

Ransomware Attacks Continue
Ransomware attacks continued to grab the spotlight with their frequency, occasionally dramatic demands for payment, and headline-ready names like WannaCry. Increasingly, the more traditional ransomware incidents occurred through poorly configured Remote Desktop Protocol services – which are susceptible to default-password guessing or brute-force attacks – rather than traditional phishing links. The attacker remains undetected while conducting reconnaissance and can launch a more devastating attack by encrypting critical data (and, in some instances, deleting backup files). In many cases, victims successfully restore data without paying a ransom, thanks to increasingly maintaining robust off-site backups.

Cloud Misconfigurations: A Growing Trend
System misconfiguration is a new category we tracked this year to reflect the growing number of incidents where unauthorized individuals gain access to cloud instances and storage devices because permissions are set to "public" instead of "private." Often the unauthorized persons are "security researchers" who will contact the media regarding what they were able to access. These incidents accounted for 6% of the total.

As the value of bitcoins rose, so did the number of crypto-miner attacks, when hackers install malware that uses the victim entity's computer resources to mine bitcoins or other cryptocurrencies for the attacker.

Phishing for Mail Access

As entities continued moving to cloud-based email systems like Office 365 without enabling MFA, we saw a surge in phishing incidents targeting Office 365 login credentials. Often multiple employees, sometimes 20 or more, were phished at the same time, giving the attacker access to all the compromised accounts. The default log settings for most Office 365 instances are not granular enough to show which emails and data an attacker accessed, complicating notification determinations. To address this concern, several forensics firms have developed custom scripts to extract logs with sufficient detail to support notification determinations. Some entities experienced multiple incidents before enabling MFA.

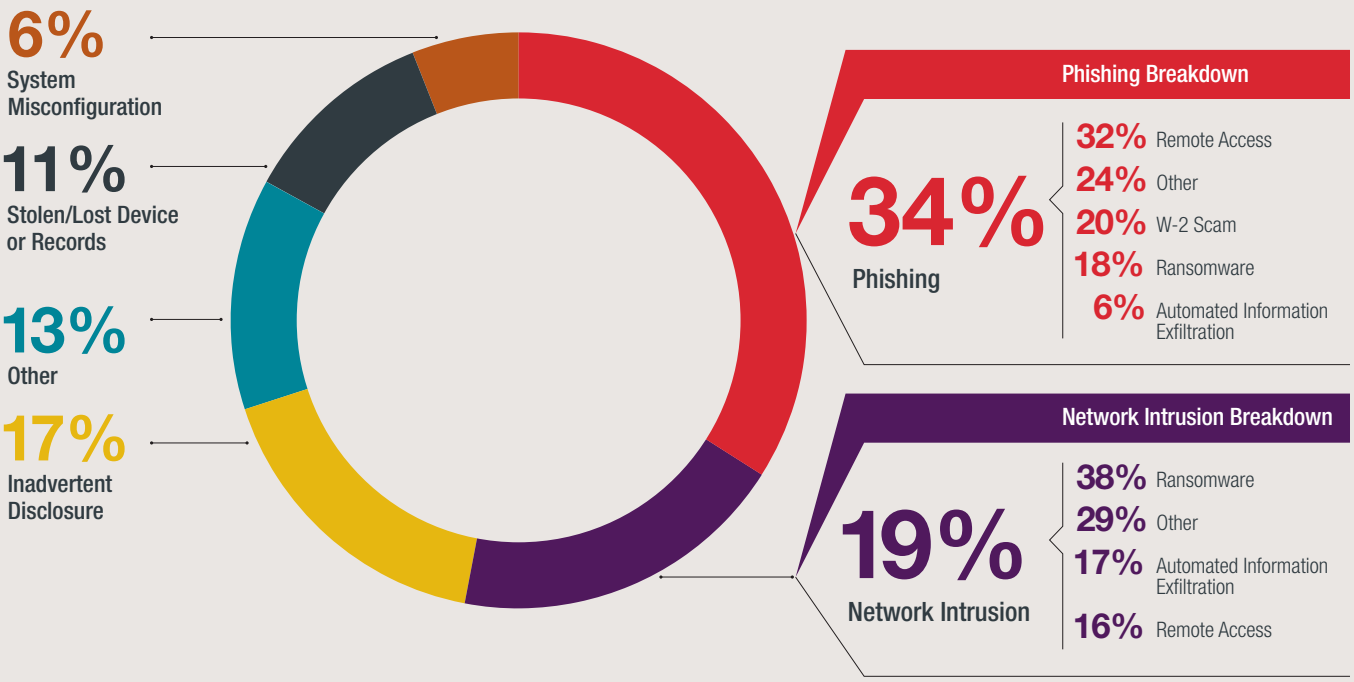
One tactic used by attackers to avoid detection was so common that it is worth a special note. After compromising a user's mail account and using the target's account to send fraudulent emails (in furtherance of a wire fraud scam, W-2 theft or some other fraud), an attacker will typically add mailbox rules to ensure that replies to the imposter emails are forwarded to the attacker and deleted from the mailbox, preventing the real user from seeing replies to the imposter's emails. Thus, merely changing passwords is not enough to contain an incident. Entities must search for and deactivate unauthorized rules changes immediately upon learning of an incident. **Important: Do not delete these rules – they must be preserved for forensic investigation.**

Take Action: Close the Employee Loophole

The number of phishing incidents, inadvertent disclosures, and cloud misconfigurations shows that employees and third-party vendors continue to cause incidents. Effective training can reduce the frequency and severity of these incidents. Because people are fallible, training is not enough and technological safety nets are needed. For incident prevention, a strong training and technology mix includes:

- **Phishing training, including test phishing campaigns, to increase awareness.**
- **Educating employees to not provide login credentials or use the same credentials for multiple sites or services.**
- **Enabling MFA throughout the entity.**
- **Deploying endpoint security agents and advanced email threat protection tools.**
- **Developing effective network segmentation.**

Overall



Responsible Party

53%
Employees (includes employee error such as mistakenly providing information in a phishing scam)

31%
Unrelated Third Parties
(e.g., security researchers)

16%
Vendors/Service Providers

Breach Discovery

65%
of Breaches Internally Discovered

35%
of Breaches Externally Discovered

Ransomware

$40,000
Average Payment

100% relied on vendor when payment in bitcoins requested

Timeline Provides Context for Response Expectations

When an incident occurs, entities often want to notify regulators and affected individuals as quickly as possible. However, it is critical to first take the time to contain the attack. The forensic, legal and in-house team will then work to determine who is affected, identify measures to prevent a reoccurrence, and mitigate potential harm. To help you set realistic expectations, we looked at the timing of the incident response life cycle's core elements: detection, containment, analysis, and notification.

Network Intrusion Timeline
Network intrusions tend to take longer to detect and contain than other types of attacks, because multiple steps are involved. However, the timeline follows the overall pattern of other types of attacks. More than 90% of all network intrusions were detected in less than six months and contained in less than a week. More than half of all forensic investigations were completed within a month, with only 4% taking longer than three months.

Overall Incident Response Time

Detection

The time from initial occurrence to detection continues to be where entities have the most room to improve. Earlier detection usually means more forensic data is available, which leads to more effective mitigation efforts and more certainty about what occurred. Good logging and visibility are also critical.

Entities are more aware than ever of the importance of constant vigilance. Of the data breaches in this year's survey, 65% were detected internally. Only 8% remained undetected for more than six months, and only 4% for more than a year.

Occurrence to Discovery

NETWORK INTRUSION
84 Days

Containment

Ending the attack is critical to reducing exposure, and incident response teams continue to find faster containment strategies. Time to containment was less than a week in 97% of incidents; only 2% took more than a month to contain. Key factors in time to containment are as follows: (1) an existing relationship with a forensic firm, (2) quick access to forensic data such as logging and endpoint information, and (3) effective project management to build and execute the containment plan.

Discovery to Containment

HEALTHCARE
1 Day

NETWORK INTRUSION
5 Days

Number of Individuals Notified

AVERAGE:

87,952

Notifications by Industry

Hospitality (Food/Beverage, Retail)	627,723
Education	46,783
Business & Professional Services	8,284
Healthcare	6,470
Finance & Insurance	3,572
Other	2,729
Nonprofit	957
Government	927
Aerospace & Defense	275

Take Action: Keys to Shortening the Timeline

- **Increase SIEM log storage to look back at incidents.**
- **Identify a forensic firm in advance, and conduct onboarding to speed the process later.**
- **Use endpoint security tools to get visibility faster.**
- **Be mindful that the pressure to move quickly must be balanced with the need for a complete, thorough investigation and effective containment.**

Analysis

Forensic analysis is getting faster and more sophisticated, with new tools and increased personnel. This year's analysis period was shorter than last year's, with 55% of investigations completed in less than one month and 87% in less than two. Only 4% of investigations took more than three months from start to finish. Despite the understandable desire for speed, it is important to let the forensics process run its full course to determine the actual scope of the incident. Entities that rush or skip this important step and simply assume the worst-case scenario run the risk of making a broader notification than is necessary or appropriate.

Engagement of Forensics to Completion

HEALTHCARE
29 Days

NETWORK INTRUSION
36 Days

Notification

With local, national, and internet media continuing to make data breaches headline news, entities feel increased pressure to make notifications quickly. In response, notification times dropped in 2017. As in the past, entities are preparing to notify as close in time as possible to when a complete forensic investigation reveals who may have been affected.

Discovery to Notification

HEALTHCARE
43 Days

NETWORK INTRUSION
45 Days

Forensics Drive Key Decisions

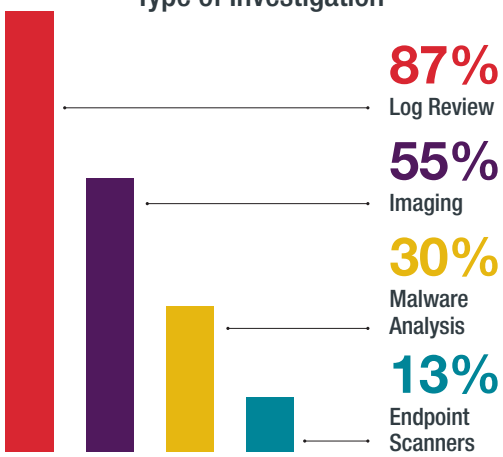
In the first days after an intrusion is discovered, the ability to quickly and efficiently conduct a forensic investigation is critical. A focused forensic investigation can help you answer the essential questions: What happened? How did it happen? How do we contain it? Whom do we need to tell? How can we protect affected individuals? Getting fast, accurate answers is especially important when the compromised data includes personal information that may trigger a reporting requirement.

In 2017, forensics were used in 41% of intrusion incidents overall, compared with 34% in 2016, showing that entities are realizing the value of hiring outside investigators with broad experience and resources. Forensics were used in 65% of network intrusion incidents, probably due to the inherent complexity of those investigations.

Forensic investigators use a variety of tools to determine the scope of information affected and the extent of the incident. Depending on the situation, they may analyze information from an entire network, a specific application, or a particular computer, mobile device, or other endpoint. In 2017, the most frequently used tool was log review, which enables the investigator to reconstruct how data was accessed and to determine whether it was exfiltrated. It can tell you who clicked on a phishing link, and how effective your defenses are. Log review was used in 87% of forensics investigations this year, probably due to the increase in Office 365 incidents involving attackers gaining access to different accounts. This trend further demonstrates how critical it is for entities to collect and retain robust logs in both on-premises and cloud environments.

Device imaging, used in 55% of investigations in 2017, helps evaluate servers and databases for malware and other forensics artifacts. Malware analysis, used 30% of the time, looks at the specific types of malware – where they came from, how they work, and whom they may impact. And endpoint scanners, which review activity in desktops, laptops, and point-of-sale devices, were used in only 13% of investigations, down from 28% in 2016.

Type of Investigation



Use of Outside Forensics

65%
of Network Intrusion Incidents

41.5%
of Data Breach Incidents

Forensic Investigation Costs

$84,417
for All Incidents

$86,751
for Network Intrusion Incidents

$436,938
for 20 Largest Investigations

36
Days
Average Completion Time for Forensic Investigation

24%
Evidence of Data Exfiltration in Network Intrusion Incidents

Data at Risk*

46% Social Security

39% Health Information

26% Other Confidential Information such as student ID numbers, usernames and passwords, and intellectual property

24% Birthdate

15% Financial Data

12% PCI Data

10% Driver's License

** These amounts total more than 100% because many incidents involved multiple types of data.*

Latest Trends in Forensics

Forensic investigators have been creative in developing tools that respond to new types of attacks. For example, faced with a huge jump in Office 365 intrusions, some firms have developed tools that can determine which emails were opened and which objects the attacker accessed. This information can significantly limit the scope of review, as well as the number of required notifications.

Investigating in the Cloud

Although forensic techniques and principles are generally the same in cloud investigations, cloud environments raise some special challenges. In a Software as a Service (SaaS) environment, the vendor – not the entity – controls the underlying infrastructure, including logging. Because logs are so often critical to investigations, make sure to understand a vendor's log detail, obligations, and preservation practices well in advance of an incident.

An Infrastructure as a Service (IaaS) arrangement moves some or all of an entire entity's infrastructure into a cloud environment. Forensic investigators typically cannot connect to physical machines to collect images and data. Instead, they must have processes in place to collect and analyze data in cloud environments. Some forensic firms have overcome this challenge by creating their own virtual systems with forensic tools in the cloud, which they use to connect to and analyze client storage devices.

Take Action: Choose the Right Forensic Firm

In considering whether to hire an outside forensic firm or deciding between possible firms, consider the 3Cs:

- **Capability:** What tools does the outside firm use to conduct investigations? Will its tools work in your environment? Can it quickly provide visibility to endpoints, capture network traffic, and search for current indicators of compromise? Or will it want to forensically image all devices and conduct manual analysis?
- **Capacity:** What's their – and your – bandwidth? Will the firm have a competent team available when you call? Do you have enough resources to deploy the tools, support the investigation, and carry out containment and remediation actions while still doing your day job?
- **Credibility:** Will stakeholders (e.g., regulators, customers, board members, shareholders) expect you to have engaged an external firm? And will they have confidence in the forensic firm's findings? Does the firm have experience responding to the types of incidents you are likely to face?

Even if you have preselected a forensic firm, when an incident arises you should take a close look at whether that firm is best-suited for the particular investigation. Some investigations call for a firm that can tell you exactly what attackers did within your environment. Others require specialized knowledge of a particular application or system. Consult with experienced counsel and your cyber carrier to leverage their experience – their Compromise Response Intelligence – with the options you are considering.

Regulators More Involved

In the wake of several recent high-profile incidents, regulators are taking a more aggressive role in investigating data breaches. We are seeing increases in both the number of inquiries and the speed with which the inquiries are made. No longer confined to a few active state attorneys general (AGs), investigations may be opened by any AG whose state's residents are affected. Additionally, although the number of resolution agreements has dropped, the Office for Civil Rights (OCR) continues to heavily investigate HIPAA (Health Insurance Portability and Accountability Act) compliance following breaches affecting more than 500 people, and more quickly than in years past.

Higher Budgets, Higher Stakes
Regulatory investigations are no longer just informal inquiries that seek voluntary cooperation. More and more, we are seeing agencies issue subpoena-like civil investigative demands (CIDs) that require significant effort to respond.

State AGs and other regulators, well-funded by large multistate settlements, are combining their power to compel testimony and documents with more experts to help them dive deeper into your operations than ever before. CIDs and informal letters now request not only your entity's information security plan and remediation steps, but also more burdensome technical requests, including details about your environment and its physical, technical, and administrative controls. OCR in particular has added instructions to its data requests that may change existing assumptions about how long and in what format an entity must hold and preserve data.

Outcomes of these inquiries often go well beyond the incident itself. While settlement proposals often contain a monitoring component and a corrective action plan, regulators are also beginning to issue closing letters. These letters do not support enforcement action, but contain certain findings and require the entity to acknowledge that it must comply with all statutory obligations. OCR can use this acknowledgment against the entity in a future incident. Similarly, after a complaint investigation or compliance review, OCR may negotiate a resolution agreement requiring an entity to take corrective action to comply with HIPAA. These can be far-reaching agreements that call for a systemic change in the way a state operates, or they may cover a single healthcare provider or hospital.

Size Doesn't Matter
AGs are looking beyond the number of affected residents to explore an entity's "systemic issues." Those that are slow to investigate, are slow to notify and experience repeat data incidents may be especially vulnerable.

AG Inquiries Following Notifications

2016	2017
37	64

Non-AG Inquiries

2016	2017
29	43

OCR Inquiries Where Notice in a Healthcare Incident Exceeded 500

2016	2017
13	22

What an AG Wants

Incident Response Plan

Employee Training Manual

Policies and Procedures

Forensic Reports

Information on Specific Data Loss Prevention

Information on Use of MFAs

Technology Helps Protect Payment Cards

Adoption of EMV technology is making it harder to use stolen card data, and point-to-point encryption use is reducing the number of large card-present theft incidents. When they do occur, because Visa and Mastercard raised the operating expense reimbursement rates across all card types, the baseline expectation for the combined network liability assessment (recovery of operating expense and counterfeit fraud) increases. On average, the lowest expectation starts at $4 per at-risk account. The per card assessment amount can climb to $20 or more based on the amount of fraud that issuing banks report. Generally, larger incidents will be on the low end of the range because the percentage of cards with attributable fraud will be lower than small incidents where the attacker may be able to sell a larger percentage of the cards on a forum. American Express changed its Data Security Operating Policy (DSOP), so when it decides its DSOP applies the opening demand from American Express will be $5 per at-risk account.

As experts predicted, EMV adoption has caused attackers to more frequently target e-commerce sites, and we saw a resurgence in these attacks. Even if a site uses tokenization, an attacker with access to the site's administrative console or checkout-page code can bypass tokenization and capture payment card data. Liability assessment programs apply to these incidents now too.

EU Update: Preparing for GDPR Notification Requirements

The EU's General Data Protection Regulation (GDPR), effective May 25, 2018, addresses personal data breach notification in Article 33 (notifying authorities) and Article 34 (notifying individuals). The harm threshold for notifying regulators is lower than the threshold for notifying individuals – notification to authorities should occur within 72 hours after the entity has "become aware" of a personal data breach that is likely to result in a "risk to the rights and freedoms of natural persons." By contrast, notification to individual data subjects must occur when the breach is likely to result in a high risk to the rights and freedoms of natural persons. In both cases, the risk analysis must broadly consider the confidentiality, integrity, and availability of data.

Because the GDPR's definitions of "personal data" and "personal data breach" are broader than those in the United States, a notifiable breach may be triggered by different incidents. For example, unauthorized disclosure of a list of names and addresses with religious affiliations and church attendance frequency might be perceived as threatening to the rights and freedoms of EU data subjects, but would not trigger a U.S. notification requirement.

Multinationals must plan to manage incidents that affect multiple jurisdictions, as notification under one regulatory regime could create legal risk in another. For example, providing notice to an EU regulator within the 72-hour window could prompt questions about notification timing in the United States. Incident response plans should designate a single decision-maker or a central team to manage potential conflicts. Our incident response tabletop exercises for global entities help their distributed teams take a collaborative and consistent approach to managing multijurisdictional events.

2017 Per Card Assessment Range for Operating Expense and Fraud

$4–$20

Credit Monitoring Offered When Notification Occurred

60%

Average Redemption

35%

Take Action: Manage Regulatory Risk

- **Have a response plan and team in place and practice.**
- **Investigate incidents expeditiously and notify as soon as possible, ideally within 30 days of discovering the incident.**
- **Communicate a culture of transparency and compliance when responding to regulatory inquiries.**

Prepare for Privilege Challenges

Motions to dismiss can still help defendants reduce exposure and limit the scope of discovery. In 2017, courts appeared to favor dismissing specific causes of action while allowing others to proceed. For example, in *In re: Banner Health Data Breach Litigation*, an Arizona federal court dismissed breach of contract, good faith and implied duty of care claims, but allowed others to move forward.

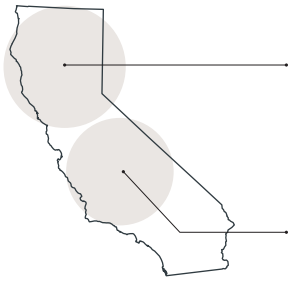
Data breach litigation is surviving motions to dismiss and proceeding to discovery, where plaintiffs seek breach investigation records and challenge defendants' assertions that the investigations are protected by various legal privileges. In 2017, three courts ruled on these challenges, with different results.

California Protects Forensics Documents

In a case involving a health insurance entity, a federal court in the Northern District of California held that the attorney work-product doctrine protected documents sent by a forensics vendor to its client. The key issue was whether the vendor created the documents in "anticipation of litigation." Although some documents had been created both to assist in litigation and to help the entity respond to the suspected incident, the court held that the "litigation purpose permeate[d] the documents" and warranted protection.

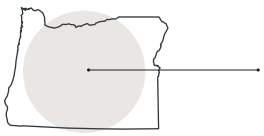
The United States District Court for the Central District of California reached a similar conclusion in a case involving a major consumer credit reporting agency. The plaintiffs argued that the forensic report and related documents were not protected by the attorney work-product doctrine because the company "had independent business duties to investigate data breaches and it hired [forensics vendor] Mandiant to do exactly that ..." But the court found that the company's duty to perform the work did not remove work-product protection. Instead, the court used a Ninth Circuit standard to analyze whether the documents were created "because of" litigation or the threat thereof. In ruling that the privilege applied, the court noted that (1) Mandiant was hired by a law firm to help it provide legal advice in anticipation of litigation; (2) Mandiant provided its report to the law firm, not to the entity; and (3) the form and content of Mandiant's report were largely dictated by the law firm's instructions.

Are Forensic Documents Protected From Discovery?



Northern District of California
Work-product protection exists for documents created in anticipation of litigation, even when they also serve another purpose.

Central District of California
Work-product protection exists for documents created because of litigation or the threat of litigation, despite independent business duty to investigate.



District of Oregon
There is no protection for documents not prepared by or sent to counsel, documents relating to third-party work, or communications with parties not involved in the breach.

Oregon Limits the Privilege

The United States District Court for the District of Oregon reached a different conclusion. That court required the defendant to show that each document it intended to withhold was specifically "legal advice." However, the facts of that case were unique. In October 2014, the entity had proactively engaged Mandiant to conduct a forensic investigation independent of counsel, and the court scrutinized the timing and scope of that engagement in its ruling.

The court focused on the requirement for the business entity to prepare most of the documents in response to the data breach (such as press releases and customer notices) regardless of the litigation. It said the entity's intention to have an attorney review the documents, and the possibility that attorneys advised on the drafting "[do] not make every internal draft and every internal communication relating to those documents privileged and immune from discovery." To maintain the privilege, the entity had to show that the communications were sent to or from counsel seeking or providing legal advice.

Take Action: Build the Paper Trail

- **Certain work performed during incident investigation and response serves a business purpose and therefore may not be privileged. Consider the timing and language of your vendor engagements and scope of work letters.**
- **Where vendors will have dual purposes, one of which is to assist counsel in litigation, use additional engagement letters or scope of work agreements to make that purpose clear.**
- **Assume communications with PR and crisis management firms are not privileged. Act and write accordingly.**
- **Consult with the litigation team early to develop a privilege strategy for confidential communications.**
- **Remember that privilege fights happen months or years after a communication is created. Develop a labeling strategy for privileged documents and emails that will streamline litigation review.**

Use Compromise Response Intelligence to Minimize Risk

Any entity, of any size, may find itself the victim of a cyberattack. Criminal organizations and security researchers constantly scan the internet for vulnerabilities and poorly configured systems. If your systems and data are exposed to the internet, it's only a matter of time before an attacker will target you.

While new threats continue to appear, the incident preparation and response landscape has not changed dramatically from prior years. Our recommendations from previous years still hold true, and we have added some new ones to reflect developing threats and updated strategies.

PREVIOUS RECOMMENDATIONS ARE STILL CRITICAL

1 Increase awareness of cybersecurity issues.

In particular, employees must receive training and education on the dangers of phishing emails and what they look like.

2 Identify and implement basic security measures.

- Segregate subnetworks that contain sensitive and valuable data from other parts of the network.
- Disable or harden remote desktop access on internet-facing systems.
- Ensure that patch management procedures are in place and critical patches are installed in a timely manner.
- Remove administrative rights from normal users, and limit the number of privileged accounts.
- Implement a web proxy that can block access to untrusted websites.
- Utilize threat intelligence and endpoint protection tools.
- Deploy endpoint monitoring and an intrusion detection and prevention system.
- Aggregate logs from critical sources into an SIEM tool, and configure properly tuned, real-time alerts.
- Retain logs for at least one year, preferably longer.
- Prohibit access to personal email accounts from the entity's network.

3 Create a forensics plan.

You can't protect what you don't understand. Create and maintain accurate network diagrams, device inventories, and data maps to ensure that the internal IT team knows your entity's environment. The plan should also address internal procedures and tools for collecting and preserving forensic evidence, and identify pre-vetted forensic firms and those for which a master service agreement is in place.

4 Build business continuity into your incident response plan.

With ever-growing ransomware and distributed denial of service (DDoS) attacks, business continuity should be built into your incident response plan and tested.

5 Manage your vendors.

Vendor incidents are still occurring. It is critical to know your vendors and how they operate. You must understand what data is being shared, how it is being secured, and what happens if the vendor has an incident. Explore what logs your vendor maintains, what level of detail they provide, how long they are retained, and your ability to access those logs to investigate an incident.

6 Combat ransomware.

The best defense against a ransomware demand is a full and complete backup that is readily available. Creating a Bitcoin wallet in advance and prefunding it can minimize impact if backups are unavailable; however, there are other considerations that need to be addressed before creating a wallet. Most entities engage a forensic firm with a funded Bitcoin wallet.

7 Purchase the right cyber insurance policy.

Look for risk management services and guidance from your carrier in addition to a solid policy, appropriate limits, and claims experience.

8 Implement a strong, top-down risk management program.

- Your entity's information security posture starts at the top. Unfortunately, senior executives are often the most vocal opponents of enhanced security measures. It is imperative for executives at the highest level to be "all in" and constantly project the importance of information security.
- Conduct a comprehensive risk assessment as the basis for your risk management program. This will help you identify and reduce legal risk in your information security practices, respond to regulatory and legal challenges, and focus information security resources on the most critical risk scenarios.
- Entities in every industry should look at the New York Department of Financial Services Cybersecurity Requirements for Financial Services Companies. Even if your entity is not covered by this regulation, experts believe it may be the model for future state or federal cybersecurity regulations.

9 Adopt updated password guidance, and implement MFA or other risk-based authentication controls.

Authentication by username and password alone can no longer protect sensitive information or secure remote access to network resources and third-party providers. This is true for several reasons. First, outdated guidance on password complexity and rotation (now updated) has inadvertently trained users to create bad passwords and share them across sites and services. Second, attackers have breached so many large stores of username and password combinations that billions of breached password records are now in the public domain. Third, attackers use simple tools to automate so-called credential-stuffing attacks, in which attackers use these stolen password databases to brute-force their way into poorly protected services and sites.

As with any good security solution, this problem calls for a layered approach tailored to your entity's risk scenarios and tolerance:

- **Adopt updated password guidance.** Consider updated password policies to match recent guidance published by the National Institute for Standards and Technology (NIST) and Microsoft, which eliminates complex, hard-to-remember passwords and arbitrary password-rotation rules in favor of rules that (1) encourage longer, easier-to-remember "memorized secrets"; (2) check proposed passwords against the corpuses of known breached passwords; (3) implement protections (like rate limiting) that mitigate brute-force attacks; and (4) rotate passwords only if there's a good reason to do so (e.g., password database stolen, password phished).
- **Use strong MFA or other risk-based authentication controls.** To mitigate phishing, credential-stuffing attacks and password reuse scenarios, implement strong MFA controls using software- or hardware-based tokens. Entities concerned about the business impact of full MFA can consider risk-based controls that require additional authentication steps only when suspicious activity is detected. Besides being a good security practice, MFA and other advanced authentication methods are on regulatory agencies' radars.

Consider implementing these controls in any scenario involving (1) remote access to email (on-premises or in the cloud); (2) remote access to network resources through VPN; (3) remote access to cloud resources, including third-party SaaS providers that handle sensitive information like HR or payroll data; and (4) login pages to customer-facing web applications containing sensitive data or processes.

10 Keep data secure in the cloud.

Migrating to the cloud is a great step to increase your entity's data security, but it doesn't mean you can let up on other security measures. Data in the cloud is more secure in some respects, but it is still vulnerable if the entity's overall security posture is weak. When considering a cloud solution, work with your risk management team to ensure that its security model works with your program.

Understand the shared-responsibility model, and ensure that you are doing your part to secure and monitor your data in the cloud. Different uses of the cloud – IaaS, SaaS or PaaS – carry different security obligations. All cloud deployments should be approved by management after being screened for security implications, and secured by personnel with the training and experience to secure data in cloud environments.

11 Prepare for more regulatory inquiries.

- Because of recent settlements between regulators and entities, regulators have more funds to investigate entities that suffer data breaches. As a result, expect more regulatory inquiries, including formal inquiries in the form of CIDs, and more extensive requests for information.
- Because of greater regulatory scrutiny as well as the potential for litigation, think strategically about the timing and language in investigation vendor engagements and scope of work

letters/documentation, especially when engaging existing vendors to assist with an incident investigation. Attorney-client and work-product privileges may not protect all communications.

- Focus on complete and timely remediation following an incident. Regulators want to know you have taken significant steps to prevent another incident from occurring.

12 If you are a publicly traded entity, update your Item 1A Risk Factors regarding privacy and security.

Based on the Securities and Exchange Commission's guidance on cyber risk factors, entities generally disclose three categories of risks: (1) operations/business resiliency – the entity relies heavily on technology to run the business, and if the technology fails, then there may be impact; (2) a data breach risk – what cyber risks the entity may face on a going-forward basis, and what material cyber incidents have already occurred; and (3) privacy/security regulatory compliance – the ability to adapt and comply with new laws as they are enacted and modified globally. Review your risk factors and ensure that these areas are covered.

Risk Assessments: An Essential Guide

Risk assessments are a critical foundation for any information security program. They help satisfy regulatory requirements, demonstrate a commitment to cybersecurity and suggest where to invest limited security resources. In fact, risk assessments have proven so valuable that many standards and regulatory frameworks now require them (HIPAA's Security Rule, the Payment Card Industry Data Security Standard [PCI DSS], NIST, and the New York Department of Financial Services Cybersecurity Requirements, to name a few).

Many entities, however, still do not incorporate true risk assessments into their information security planning, often because of confusion about what a risk assessment is – and is not.

- **A risk assessment identifies threats, vulnerabilities, likelihood and impact.** Risk assessments are often confused with other risk-management tools, such as vulnerability assessments, penetration tests and red-team exercises, compromise assessments, gap analyses, and compliance audits. These are valuable tools, but they do not accomplish the purposes of a true risk assessment. Indeed, they may be rejected by regulators evaluating an entity's compliance with risk assessment requirements.
- **A risk assessment prioritizes and tailors recommendations to a particular entity.** To be useful, a risk assessment must do more than merely catalog an entity's vulnerabilities. Nor can it base its recommendations on generic risk ratings that ignore environment, culture, and risk appetite. Rather, the assessment must tie known vulnerabilities to the threats and attack scenarios most likely to affect the entity.
- **A risk assessment is an ongoing process.** Entities often err by treating a risk assessment as a point-in-time compliance exercise. In fact, it's a continuous process of reflection and improvement. As part of its risk assessment program, an entity should establish a committee or group to meet regularly to evaluate emerging threats and vulnerabilities.
- **A risk assessment focuses on the entire entity, not just information technology.** True risk assessments evaluate all aspects of security management programs, including vendor-management policies and procedures, security awareness training programs, staffing and competence of security engineers and compliance officers, incident response programs, and the management structure of security teams.

About BakerHostetler

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BakerHostetler has more than 940 lawyers in 14 offices, and is widely regarded as having one of the leading data privacy and cybersecurity practices. Our attorneys have managed more than 2,500 data security incidents for some of the world's most recognized brands. Our Privacy and Data Protection team's work extends beyond incident response and is one of the largest of its kind. In addition to privacy and data breach issues, we handle regulatory compliance, GDPR and other cross-border issues, marketing and advertising, eDiscovery, regulatory, and class action defense.

To learn more about how to prevent, prepare for, or manage a data breach, contact BakerHostetler.

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VI. Introduction to Cross-Border Estate Planning

NYSBA International Section Bridging the Gap Global Law Week 2018

Introduction to Cross Border Estate Planning
June 15, 2018, 3:15 – 4:05pm

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Basic Tools of Wealth Planning

3

Overview

Offshore Corporations

Trusts / Foundations

Offshore Financial Centers

Life Insurance / Pensions

Marital Contracts / Waivers of Forced Heirship

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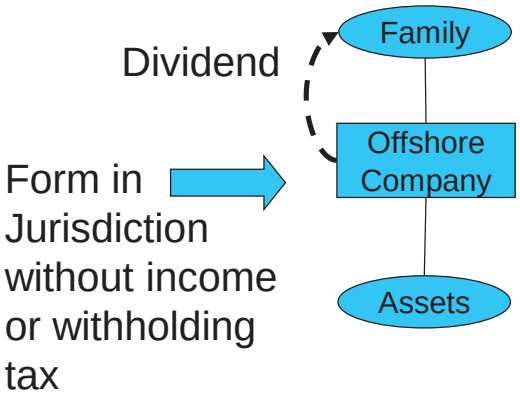
Offshore Corporations



- Used where home country taxes residents/citizens on worldwide income
- Taxation of income deferred until repatriated through dividends
- Some jurisdictions have anti-deferral of controlled foreign corporations that tax income whether distributed or not
  - Examples of those that do are - U.S., U.K., Canada
- May not provide estate tax protection

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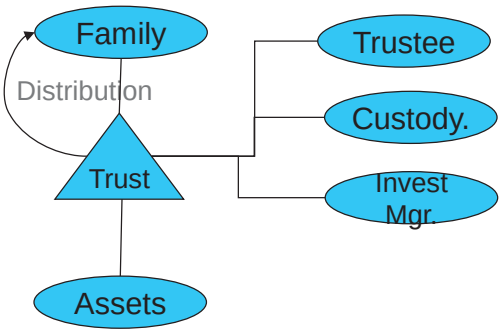
Offshore Trusts / Foundations



- Origins
  - Trusts – Common Law
  - Foundations – Civil Law
- Not all jurisdictions recognize
- Not commonly used in some jurisdictions
  - Tax treatment can be unsettled
- Many people do not want to give up control
- Can be especially useful for
  - Deferring Income tax
  - Planning for Estate/Inheritance/Gift Tax purposes
  - Addressing forced heirship rules
  - Can provide protection if expropriation is a concern
  - Useful in keeping assets exempt from new tax jurisdiction when migrating there

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Offshore Financial Centers

Traditional Benefits

Political and Financial Stability

Well developed financial institutions

Privacy – But this is being eroded

Protection against expropriation and loss

- Fraudulent Conveyance
- Enforcement of foreign judgments
- Most useful for foreign situs assets

Reputational considerations

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Life Insurance/Pensions

Advantages

Liquidity for business succession planning or estate tax liabilities

Tax advantaged in many jurisdictions, but not all

- Investments grow free of income tax
- Loans against policy value
- Death benefits may be tax-free of income/death tax to recipients
- deductions for payment of premiums
- asset / creditor protection
- avoidance of probate / forced heirship

Some jurisdictions provide no tax benefits or very different benefits

Issues

Abuse of life insurance has led many jurisdictions to narrow the definition of what qualifies as life insurance

In some cases, benefits only available if the policy is purchased from a domestic insurer

Pensions can provide similar benefits and are increasing in popularity

Combine with Trusts/ Foundations

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Marital Contracts / Waivers of Forced Heirship

Marital law very overlooked area in wealth planning

Community property large issue in LATAM and some U.S. states

Common law marriage in some U.S. states

Local law may limit ability to dispose of assets by will

Marital contracts and foreign trusts and corporations in foreign financial centers are a common way of dealing with such issues

Examples of jurisdictions that have no limits –US (by state, subject to spousal right of election), Singapore (for non-Muslims) and Hong Kong, all of which are common law

Examples of countries with limits – Romania (part forced heirship) and Singapore (if Sharia law applies)

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Other Issues

Succession planning

Incapacity

Validity of Wills

Use of multiple wills

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Families with U.S. Connections

The U.S. Impact on Multi-National Families

Many multijurisdictional families have some contacts with U.S.

U.S. rules hard to ignore

U.S. Income Tax

Citizens and resident aliens taxed on worldwide income

Non-residents

- Taxed on U.S. business income
- Withholding tax on non-business investment income

Anti-deferral rules for both corporations and trusts

Transfer Tax (Gift and Estate)

Citizens and residents taxed on worldwide assets

Non-Citizens taxed on U.S. situs assets

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U.S. Trends

Aggressively pushing greater transparency (although this may change under Trump)

- 38,000 voluntary disclosures of overseas accounts since 2009
- $5.5 billion collected since inception of voluntary disclosure program

FATCA (effective January 1, 2013)

- Arguably makes U.S. capital markets less attractive
- Making more difficult for U.S. persons with foreign bank accounts
- New account opening procedures and FATCA withholding from nonparticipating foreign financial institutions on US source fixed and determinable periodic income begins on July 1, 2014
- Push my conservatives legislators in the US to repeal

US has not adopted the OECD's common reporting standards (CRS)

- Arguably may make the US more attractive for non-US taxpayers
- Structures should not be set up in the US just to avoid CRS

Recent tax legislation permanently lowered maximum corporate income tax rate to 21%, lowered maximum individual income tax rate to 37 temporarily until 1 January 2026, and increased estate and gift exemption temporarily until 1 January 2026.

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Background On US Wealth Transfer Laws

US Wealth Transfer Laws

- The manner in which property is transferred by gift during life and upon death is determined by the laws of each state. Therefore, in essence there are 51 different legal systems for the transfer of wealth (since there are 50 states and the District of Columbia).
- All 50 states, with the exception of Louisiana, base their systems of wealth transfer on the common law handed down through English law.
- Under the laws of all states, during one's lifetime a person is generally free to give away any or all of his or her property without any restrictions.

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US Wealth Transfer Laws (Cont'd.)

- Likewise, upon death a person is free to bequeath any or all of his or her property to anyone he or she desires, with one exception.
- The exception is that a spouse is entitled to elect to receive up to 1/3 of the deceased spouse's estate in most states (other than Georgia) if the spouse has been bequeathed less than 1/3.
- Children are not entitled to any inheritance.
- Therefore, with a will a person can disinherit his children and his spouse (other the spouse's 1/3 right of election).

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US Wealth Transfer Laws (Cont'd.)

- If a person dies without a Will, state intestacy law will determine how property passes upon death (usually in some combination to spouse and children).
- All of the US states, including Louisiana, permit the transfer of assets to lifetime trusts or testamentary trusts (trusts created upon death under a Will) for the benefit of the creator of the trust or anyone else.
- Whether or not a decedent has a Will, prior to his or her assets passing to the beneficiaries or heirs, a separate "estate" will exist that is managed by a personal representative called an "administrator" (for intestate estates) or an "executor" (when there is a Will).
- Once the personal representative has paid all debts and marshalled all assets, he or she distributes the estate to the beneficiaries pursuant to intestacy law or the Will.
- Trusts can be revocable or irrevocable, can be created by agreement or under a Will, and are used for legitimate tax planning in the US pursuant to state and federal tax law.

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US Wealth Transfer Laws (Cont'd.)

- Depending upon how property is titled under state law, it may avoid probate (i.e., it may avoid the need to pass under a Will upon death). Examples are:
- Jointly held real property or personal property (e.g., joint tenants with rights of survivorship).
- Property that passes by beneficiary designation (e.g., life insurance, retirement accounts, "in trust for" accounts, etc.).
- Property held in trust.

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Background On US Income Tax

Income Subject to Income Tax

- US citizens, US permanent residents and non-US citizens who reside or spend a requisite number of days in the US are subject to US income tax on worldwide income.
- Non-US Resident/Non-US citizen (“NRNC”) subject to US income tax only on certain types of income from US sources and, to a limited extent, foreign source income connected with a U.S. trade or business.

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Examples of US Source Income (non-ECI) Subject to US Income Tax for NRNC

- Interest, dividends, rents, salaries, wages, premiums, annuities, compensation, remuneration, emolument, and other fixed or determinable annual or periodic gains, profits, and income
- Certain gains from the sale or exchange of patents, copyrights, secret processes and formulas, goodwill, trademarks, trade brands, franchises, and other like property.
- Exceptions are bank deposits in the US and capital gains from US sources assets, which are not subject to income tax.

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Individual Income Tax Rates

- 37% rate on ordinary income over $600,000 for married US citizen or resident filing jointly, over $500,000 for single US citizen or resident, and over $300,000 for married US citizen or resident filing separately (10% to 35% for lower brackets) – *Note that these rates revert to higher pre-2018 rates as of 1 January 2026.*
- 15% rate on capital gains of US citizen or resident if income is otherwise taxed at lower ordinary income rates.
- 20% rate on capital gains of US citizen or resident if income is otherwise taxed at 37% rate.
- Additional 3.8% tax on net investment income.
- Income Tax Rate for NRNC – 30%

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Non-US citizen treated as a Resident for U.S. Income Tax Purposes

- Non-US citizen treated as a resident for U.S. income tax purposes, if individual:
  - Is lawfully admitted for permanent residence (receives green card);
  - Qualifies under the substantial presence test; or
  - Makes an election to be treated as a U.S. tax resident.

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Substantial Presence Test

Substantial presence test satisfied if:

- Non-US citizen present in the U.S. on at least 31 days during the calendar year; and
- Sum of the number of days on which such individual was present in the U.S. during the current year and the 2 preceding calendar years equals or exceeds 183 days.
  - For purposes of 183 day test, each day in the 2nd preceding calendar year counts as 1/6 of a day, each day in the 1st preceding year counts as 1/3 of a day, and each day in the current year counts as a whole day.
  - Cannot satisfy test if not present more than 121 days in any year.

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Background On US Estate Tax & Gift Tax

Assets Subject to U.S. Estate and Gift Tax

- Persons who are U.S. citizens at the time of their death, or who are domiciled in the U.S. at the time of their death, are subject to U.S. estate tax on all of their worldwide property and receive a foreign death tax credit for any foreign death taxes.
- Persons who are U.S. citizens or who are domiciled in the U.S. are also subject to U.S. gift tax on lifetime gifts they make. There is no U.S. gift tax credit for foreign gift taxes paid unless allowed by treaty.
- Persons who are neither U.S. citizens nor domiciled in the U.S. at the time of their death ("NRNCs") are subject to U.S. estate tax only on "U.S.-situs" property, with no credit for foreign death taxes paid. (foreign country will usually allow a credit against its death taxes for U.S. estate tax paid).

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US Situs Property for NRNC Estate Tax

- Real property and tangible personal property (including cash, cars, furniture, jewelry, artwork, etc.) situated in the U.S.
- Shares of stock issued by a U.S. corporation.
- Subject to significant exceptions (set forth below), any debt obligation, the primary obligor of which is a U.S. person or the U.S., a state or any political subdivision of the U.S., or the District of Columbia, or any agency or instrumentality of any such government.

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US Situs Property for NRNC Estate Tax (Cont'd.)

- Property gratuitously transferred by an NRNC decedent during life if
  - (i) the NRNC decedent retained for life some type of possession, control, or enjoyment of said property or its income,
  - (ii) said property was, on the date of the NRNC decedent's death, subject to his or her right to revoke the transfer (or if such a power was relinquished by the NRNC decedent within three years of the date of his or her death), or
  - (iii) the transferee must survive the NRNC decedent in order to possess the property and the decedent retained a right of reversion in the property, and the property so transferred was situated in the U.S. at the time of the transfer or at the time of the decedent's death.

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US Situs Property for NRNC Estate Tax (Cont'd.)

An interest in a partnership, if the partnership does not qualify as a separate legal entity under the law of the jurisdiction where it was established or is dissolved on the death of one partner, and the underlying assets of the partnership are situated in the U.S., or if the partnership is a separate legal entity under the laws of the jurisdiction where it was established and it survives the death of a partner and the partnership carries out its business in the U.S. (However, this conclusion as to US situs property is subject to debate, as noted below).

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Non-US Situs Property for NRNC Estate Tax

- Shares of stock issued by a foreign corporation.
- Deposits with persons carrying on the banking business, deposits or withdrawable accounts with a federal or state chartered savings institution (if the interest on such accounts is withdrawable on demand subject only to customary notice requirements), and amounts held by an insurance company under an agreement to pay interest thereon, as long as, in each case, the interest on such deposits or amounts is not effectively connected with the conduct of a trade or business in the U.S. by the recipient thereof.
- Deposits with a foreign branch of a domestic corporation or partnership engaged in the commercial banking business.

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Non-US Situs Property for NRNC Estate Tax (Cont'd.)

- "Portfolio Debt Obligations", as long as the decedent was an NRNC for income tax purposes. Portfolio Debt Obligations are bonds, debentures, notes or other forms of debt which meet specific requirements, such as non-registered obligations available only to non U.S. persons or registered obligations if the payor is advised that the owner is not a U.S. person.
- Proceeds from a life insurance policy on the NRA decedent's life.

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Property of NRNC Subject to Gift Tax

- Persons who are neither U.S. citizens nor domiciled in the U.S. are also subject to U.S. gift tax on lifetime gifts of U.S.-situs property, but not gifts of intangible property (unless person is a US expatriate).
- Property which is not considered intangible property and is therefore subject to U.S. gift tax for NRNC includes:
  - Real property situated within the U.S.
  - Tangible personal property situated within the U.S. at the time of the gift.
  - U.S. or foreign currency or cash situated within the U.S. at the time of the gift.

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Property of NRNC Subject to Gift Tax (Cont'd.)

- Property which is considered intangible personal property and is therefore not subject to U.S. gift tax for an NRNC:
  - Shares of stock issued by a U.S. or foreign corporation.
  - Debt obligations, including a bank deposit, the primary obligor of which is a U.S. person, the U.S., a State, or any political subdivision thereof, the District of Columbia, or any agency or instrumentality of any such government.
  - Interests in U.S. or foreign partnerships (although there is some debate on whether such interests are intangible personal property).

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Estate and Gift Tax Exemptions

US citizens and residents:

- Gift tax exemption exempts up to $11.18 million (indexed for inflation) of US person's collective lifetime gifts from gift tax.
- Estate tax exemption exempts up to $11.18 million (indexed for inflation) of US person's bequests at death from estate tax (if a portion of the gift tax exemption is used, the estate tax exemption is reduced by an equal amount).
- Portability - any portion of the exemption unused as of the death of a spouse is available for use by the surviving spouse during life or upon death as an addition to his or her exemption, if the estate of the deceased spouse makes an election.
- Note – Above exemption amounts revert to $5.6 million as of 1 January 2026.

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Estate and Gift Tax Exemptions (Cont'd.)

NRNCs

The estate tax exemption for bequests at death for persons who are neither U.S. citizens nor domiciled in the U.S. is $60,000 (such persons do not receive a lifetime gift tax exemption).

Portability provisions do not apply to NRNCs, even if their spouse was a US citizen.

- Gift Tax Annual Exclusion - In addition to the estate and gift tax exemption, each taxpayer, whether or not he or she is a U.S. citizen or resident, can give up to $15,000 (indexed for inflation) a year ($30,000 for a married couple together) to anyone in the world without paying US gift tax or using up any part of his or her exemption.

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Estate and Gift Tax Marital Deduction

- Property passing to a spouse, outright or in certain types of trusts, is generally not subject to U.S. estate or gift tax because of the U.S. estate and gift tax "marital deduction."
- Estate tax marital deduction is generally not allowed for property passing to a spouse who is not a U.S. citizen unless the spouse becomes a U.S. citizen before the estate tax return is filed or the property passes, instead, to a "qualified domestic trust" ("QDOT").
- In addition, the gift tax marital deduction is generally not allowed for property passing to a spouse who is not a U.S. citizen, except that a donor can give his or her non-U.S. citizen spouse up to $152,000 per year (as indexed for inflation) without the imposition of any gift tax.

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Estate Tax Exemption Portability

- Effective for estates of those who die after 12/31/2010, “portability” enables surviving spouse to utilized deceased spousal unused exclusion (“DSUE”) amount if elected on deceased spouse’s estate tax return
- Estate of nonresident surviving spouse who is not a US citizen at the time of his or her death may not take into account the DSUE amount of a pre-deceased spouse, except as allowed under applicable treaty obligations of the US.
- If a surviving spouse becomes a US citizen after the death of his or her last deceased spouse, the DSUE amount of the surviving spouse’s last deceased spouse is available on the date the surviving spouse becomes a US citizen.

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Estate Tax Exemption Portability (cont’d.)

- When property passes from decedent for benefit of non-citizen surviving spouse in a qualified domestic trust (“QDOT”) (which is required to secure the unlimited marital deduction for non-citizen spouse), the estate tax that is due when distributions of principal are made from the QDOT or upon spouse’s death is determined by applying the estate tax rates in effect on the predeceased spouse’s death and any available credits of the predeceased spouse, including his or her unused exemption.
- Consequently, when a QDOT is created, the DSUE amount of the surviving spouse must be recalculated as distributions are made from the QDOT and on termination of the QDOT (usually when the surviving spouse becomes a US citizen or upon his or her death).
- If surviving spouse becomes a US citizen, the QDOT is no longer subject to estate tax and the DSUE amount is not adjusted any longer.

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Domicile of Non-Citizen of US for Estate and Gift Taxes

- For purposes of the US estate and gift taxes, an non-citizen is considered a US resident for if he or she is domiciled in the US at the time of his or her death or at the time of a gift.
- If a non-citizen enters the US for even a brief period of time, with no definite present intention of later leaving the US, he or she is deemed to be domiciled in the US and, therefore, is considered a US resident for estate and gift tax purposes.
- Thus, an alien may be considered an NRNC for estate tax purposes and a US resident for income tax purposes, or vice versa, since the estate tax residency test is the more subjective domicile test just described, while the income tax residency test is met if the alien satisfies the objective day count test of the "substantial presence test" or holds a green card (discussed above).

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Domicile of Non-Citizen of US for Estate and Gift Taxes (Cont'd.)

- The determination of domicile for estate and gift tax purposes is a factual issue that focuses on the following factors. (No one factor is determinative of whether non-citizen is domiciled in the US. In each case all of the facts and circumstances are examined.):
- The length of time spent in the US and abroad and the amount of travel to and from the US and between other countries.
- The value and size of the donor's or decedent's homes and whether he or she owned or rented them.
- The locations of houses and other residences, since a house in a vacation area is less of an indication to remain indefinitely than in other areas.

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Domicile of Non-Citizen of US for Estate and Gift Taxes (Cont'd.)

- The situs of valuable or meaningful tangible personal property.
- Where the non-citizen's close friends and family are situated.
- The locales in which the non-citizen has religious and social affiliations or in which he or she partakes in civic affairs
- The locales in which the non-citizen's business interests are situated
- Visa Status.
- The places where the non-citizen states he or she resides in legal documents.
- Whether the non-citizen spends time in a locale due to poor health, for pleasure, to avoid political problems, etc.

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Domicile of Non-Citizen of US for Estate and Gift Taxes (Cont'd.)

- The jurisdiction where the alien is registered to vote.
- The jurisdiction that issued the alien's driver's license.
- Income tax filing status.

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US Planning Considerations for NRNC

Intangibles Exception to Gift Tax

- An NRNC who owns intangible assets that will be subject to U.S. estate tax because the assets are situated in the U.S., such as shares of stock in U.S. corporations or interests in partnerships that carry on businesses in the U.S., should consider giving the assets away prior to his or her death, since the gift will not be subject to gift tax or estate tax due to the intangibles exception.
- This can be a particularly powerful tool for an NRNC who has a spouse or child who is a U.S. citizen.
- If this spouse or child over which the spouse or child does not have a general power of appointment, the assets in the trust should not be subject to gift tax or with respect to the spouse and child.

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NRNC's Investing in US Business or Real Property through Foreign Corporation

- Shares of stock that are given away or bequeathed at death will avoid US estate tax and gift tax.
- Prior to 2017 tax reform, the downside of this form of business ownership was that the income at the corporate level was subject to a 35% tax rate and then dividends were subject to a 30% rate when distributed (unless a lower treaty rate applies) so the double tax was quite cost prohibitive.
- Subsequent to 2017 tax reform, the income at the corporate level is subject to a 21% tax rate. Dividends are still subject to a 30% tax rate, but the lower corporate rate makes a corporate structure more attractive.
- In addition to US corporate income tax, a foreign corporation engaged (or treated as engaged) in a U.S. trade or business is subject to a 30% branch profits tax on earnings of the U.S. business that are deemed repatriated offshore.
- If a foreign corporation owns U.S. real property and sells that property it is subject to FIRPTA withholding and generally subject to branch profits tax.
- A foreign corporation is more attractive due to tax reform, but the double tax is still not always ideal.

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NRNC Investing in US Business or Real Property through US Sub Corp of Foreign Corp

- Avoids gift and estate tax and the branch profits tax
- Lower 21% rate after tax reform makes the corporation more attractive, but there is still double tax when dividends are distributed.
- In addition, the entity may be considered a "personal holding company" ("PHC"). PHC rules are generally intended to prevent the avoidance of shareholder level taxes by the accumulation of certain types of earnings by certain closely-held corporations (this is beyond the scope of this outline).
- The downside of double taxation must be weighed against the possible estate tax if the underlying assets were owned through a partnership or limited liability company (although as discussed below there is a credible argument that a dual partnership structure will avoid estate tax).

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NRNCs Owning US Residential Real Estate

- Individual ownership – Will result in U.S. estate tax. However, this can be mitigated if the NRNC acquires a life insurance policy that has a face value that will cover the estate tax. Life insurance policy is not included in the decedent NRNC's estate. Another possibility is to obtain a mortgage on the property for which the NRNC is not personally responsible, since, in such a case the entire mortgage is in effect deductible.
- Ownership through a corporation – See above.
- Ownership through a dual partnership structure – See below.

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Owning U.S. Real Estate by NRNC Through Dual Partnership Structure

- Properly structured dual foreign/US partnership (see next slide) may qualify as exempt from US estate tax, although there is some debate on this (owning through a foreign corporation is more certain to shield form estate tax).
- Partnership structure results in one level of income tax, and tax on sale is at capital gains tax rate of 20%.
- Sale subject to U.S. income tax under FIRPTA.
- If taxpayer is willing to take some risk that partnership structure may attract estate tax, understanding that there is a credible argument that no estate tax will apply, this could be an ideal structure.

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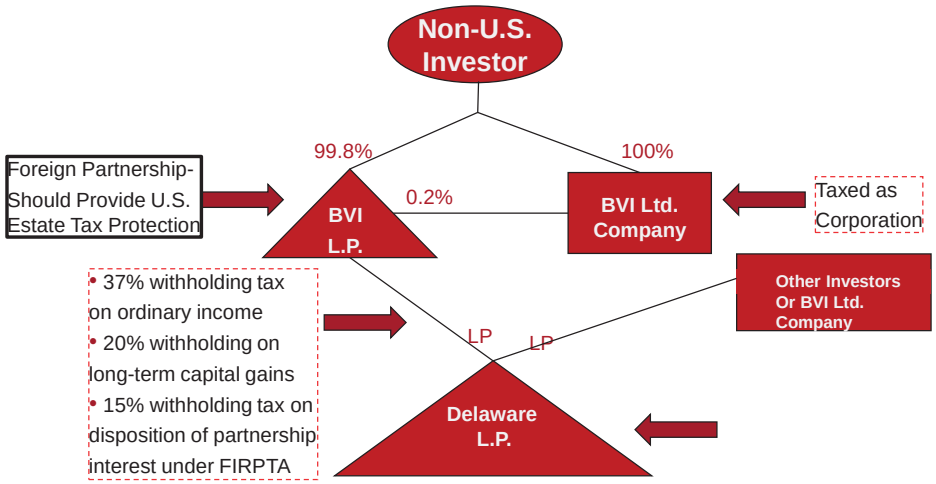
Owning U.S. Real Estate by NRNC – Foreign Partnership Option



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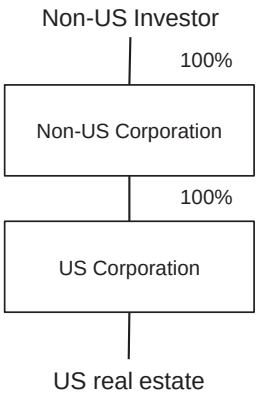
Owning U.S. Real Estate by NRNC – Foreign Corporation Option

- Income tax
  - Corporate rate now 21%
  - Could rate go up if Congress changes hands?
- Highest individual rate 37%
  - With pass-through deduction rate could be 29.6%
- Estate tax
  - Statutory certainty on situs for corporate blocker
- Not ideal structure after US tax reform if shares will pass to US beneficiaries (see next two slides)



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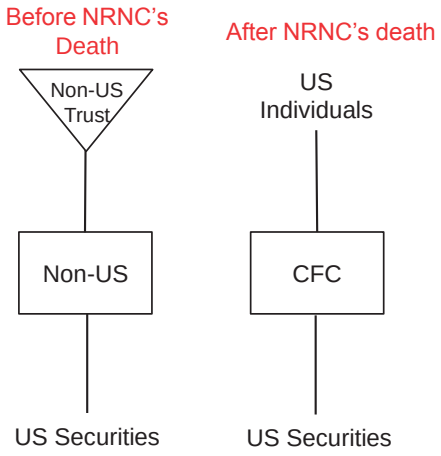
Owning U.S. Marketable Securities by NRNC with US Beneficiary – Foreign Corporation Option Before Tax Reform

- Before repeal of 30-day rule
  - Check-the-box (CTB) election on foreign corporation within 30 days of NRNC's death
  - No income inclusion
  - Preserved estate tax protection on settlor's death
  - US beneficiaries do not have interest in CFC
- After repeal of 30-day rule
  - CTB election results in income inclusion for US beneficiaries
- Now what?
  - CTB on non-US corporation pre-death? Lose corporation protection
  - Manage estate tax exposure
  - What if two shareholders at time of CTB election?



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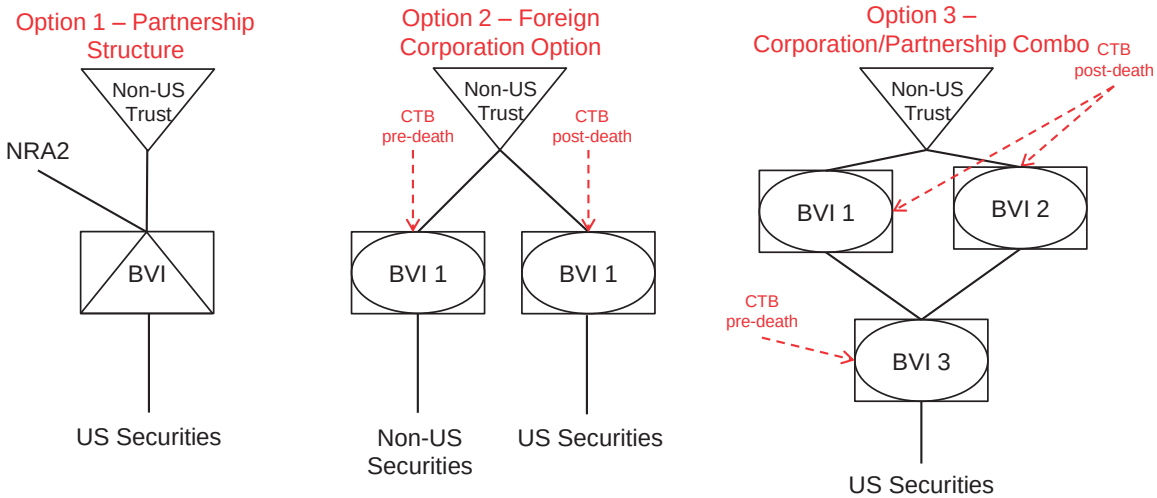
Owning U.S. Marketable Securities by NRNC with US Beneficiary – Options After Tax Reform



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Pre-immigration Planning Considerations

- Type of Visa – Green Card vs. Other
- Accelerate sale of appreciated assets/defer losses
- Step up basis of assets - Pre-immigration, either sell and re-purchase securities, or transferring assets to an offshore company and make a check the box election before becoming US income tax resident, which results in deemed liquidation
- Avoid Anti-Deferral Regimes
- Pre-Immigration Trusts – Self-settle trust in an asset protection jurisdiction (e.g. Delaware) and transfer assets to trust gift tax free; trust assets sheltered from US estate and gift taxes for settlor and future generations
- Put assets in Life Insurance / Deferred Variable Annuity
- Are foreign taxes creditable?
- Preparing for U.S. reporting requirements

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U.S. Expatriation Tax Regime

- Exit tax on expatriation of covered expatriates
- Taxed as if sold assets on date of expatriation
- US recipient taxed on gifts/bequest from Covered Expatriate
- Gifts/bequests to foreign trust
  - Not taxable at time made
  - Tax imposed on distributions to U.S. persons attributable to gift
  - Gifts/bequests subject to reporting even if no tax owed at time of gift

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Definition of Covered Expatriate

- U.S. Citizen or Long-term resident ("LTR")
- LTR: Green card holder for 8 calendar years during 15-year period before expatriation
- Meets one of following:
  - Assets over $2,000,000
  - Average annual income over threshold ($165,000 for 2018)
  - Failure to certify compliant for 5 years preceding expatriation

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US Estate and Gift Tax Treaties

Treaty Countries

- The U.S. has estate tax treaties with the following countries: Australia, Austria, Denmark, Finland, France, Germany, Ireland, Italy, Japan, Netherlands, Norway, South Africa, Sweden, Switzerland, and the United Kingdom.
- Each of these treaties alters in some respect the rules discussed above with respect to the application of the estate and gift taxes to non-US persons who reside in these countries and should, therefore, be reviewed before rendering any estate or gift tax advice for such persons.
- By way of example, this discussion will focus on the estate and gift tax treaties between the U.S. and Austria, France, and Germany.

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Domicile

German Treaty:

- Person is deemed to be domiciled in the U.S. if he or she is a resident or citizen of the U.S., and he or she is deemed to be domiciled in Germany if he or she has domicile or habitual abode in Germany, or if he or she is deemed for other reasons to be subject to unlimited tax liability for the purposes of the German inheritance and gift tax.
- If the individual is deemed to be domiciled in both countries under the above rules, the treaty "tie-breaker" provisions will apply. Under these rules, the individual will be deemed domiciled in country where he or she has a permanent home, or if he or she has a permanent home in both countries or neither country, in country where his or her personal and economic relations are the closest ("center of vital interests"). If it cannot be determined where his or her center of vital interests is the closest, he or she will be deemed domiciled in country in which he or she has a habitual abode and if he or she has habitual abodes in both countries or neither country, he or she will be deemed to be domiciled in the country of which he or she is a citizen.
- Notwithstanding tie-breaker rules, if an individual, at the time of his or her death or at the time of making a gift was a citizen of Germany and not a citizen of the U.S. and is deemed to be domiciled in both countries, but has not been domiciled in the U.S. for more than 10 years, he or she will be deemed to be domiciled in Germany for purposes of the treaty. After 10 years, the tie-breaker rules discussed above become applicable.

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Domicile (cont'd.)

Austria Treaty:

- Person is deemed domiciled in the U.S. if he or she is a resident thereof under U.S. law and is deemed domiciled in Austria if he or she is a resident thereof for Austrian tax purposes.
- The Austrian treaty has tie-breaker rules similar to those of the German treaty.
- Unlike the German treaty, the Austrian treaty does not have a grace period during which a citizen of Austria is deemed to remain an Austrian resident even if he or she is domiciled in the U.S.

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Domicile (cont'd.)

French Treaty:

- Person is deemed domiciled in the U.S. or France according to the law of each country.
- The French treaty has tie-breaker rules similar to those of the German and Austrian treaties.
- Notwithstanding the general tie-breaker rules, if an individual, at the time of his or her death or at the time of making a gift was a citizen of France and not a citizen of the U.S. and is deemed to be domiciled in both countries, but the individual has been domiciled in the U.S. for less than 5 years out of the previous 7 years, he or she will be deemed to be domiciled in France if he or she had a clear intention to retain French domicile.

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Property Subject to Estate Tax

- **German treaty** – Real property and business property situated in the U.S. and owned by a German NRA and an interest owned by a German NRA in a partnership that owns such property may be subjected to U.S. estate and gift tax. Any other property of a German NRA, including cash, tangible personal property, and debt obligations situated in the U.S. and shares of stock in U.S. corporations may only be taxed by Germany.
- **Austrian treaty** - Real property and business property situated in the U.S. and owned by an Austrian NRA may be subjected to U.S. estate and gift tax. Any other property of an Austrian NRA including, perhaps, an interest in a partnership that owns U.S. residential real estate (the treaty is not completely clear on this issue) may only be taxed by Austria.
- **French treaty** – US Real property (including an interest in a partnership or in a corporation if 50% or more of the assets thereof consist of real property), US Business property, and tangible movable property situated in the US, unless for personal use. Any other property of a French NRA may only be taxed by France.

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Deductions

- Debts - Each of the treaties allows for direct deductions of certain debts that relate to the property that may be taxed by the U.S.
- Marital Deduction –
  - Unlike the Austrian treaty, the German and French treaties provide that property of an non-resident/non-citizen decedent or donor which may be taxed by the U.S. under the treaties and which passes to the decedent's or donor's spouse shall only be included in the taxable base to the extent its value exceeds 50% of all property that may be taxed by the U.S.
  - In addition, German and French treaties provide for a marital deduction (in addition to the 50% deduction) equal to the lesser of the property passing to the surviving spouse (after the 50% deduction) or the applicable exclusion amount in effect on the date of the decedent's death ($11.18 million before 2026 and $5.6 million thereafter).
  - For US $11.8 million exemption to apply, at the time of the decedent's death (i) the decedent must have been domiciled in either France/German or the US, or must have been a citizen of the US; (ii) decedent's surviving spouse must have been domiciled in the US or France/Germany; and (iii) if both the decedent and the decedent's surviving spouse were domiciled in the US at the time of the decedent's death, one or both must have been a citizen of France/Germany (key point here is that the couple can live in the US and benefit from this provision).
  - This additional deduction is available only if the estate elects to forego the QDOT election.

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Pro-rata Unified Credit

- German and French treaties provide for an estate tax exemption of up to $11.18 million through the end of 2025, and $5.6 million thereafter, rather than the $60,000 exemption for non-resident/non-citizens who are not covered by the treaties.
- Exemption is based on the ratio of the US situs property (under the treaty) to worldwide property, so overall exemption may be less.
- Based on the marital deduction set forth above and the pro-rata treaty exemption, up to $ 22.36 million can now be left to a French or German citizen spouse by his or her US spouse, even if both reside in France/Germany, without the need for a QDOT.

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VII. Ethics in the International Practice of Law

NEW YORK STATE BAR ASSOCIATION INTERNATIONAL SECTION

ETHICS IN THE INTERNATIONAL PRACTICE OF LAW

June 15, 2018

Presented by: Janis M. Meyer
Lawyers for the Profession ® Practice Group
Hinshaw & Culbertson LLP

Outline

I. Introduction

II. Searching for a Common Language

- Legal Systems
- Discovery
- Privilege
- Conflict Rules

III. Handling Your Client's Documents

IV. Knowing Your Clients

V. Dealing with Governmental Clients

VI. Cybersecurity

NEW YORK STATE BAR ASSOCIATION INTERNATIONAL SECTION

ETHICS IN THE INTERNATIONAL PRACTICE OF LAW

June 15, 2018

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1. NY Rules of Professional Conduct 1.1, 1.2, 1.6, 1.7, 1.10, 8.5

2. Ruud Niesink, "Supreme Court confirms legal privilege for in-house lawyers," www.internationallawoffice.com (May 7, 2013)

3. *In re: Kiobel*, 16 Civ. 7992 (AKH) (SDNY 1/24/17); Appeal filed February 13, 2017

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Directive (EU) 2016/1148 of the European Parliament and the Council of 6 July 2016 concerning measures for a high common level of security of network and information systems across the Union

RULE 1.1.

Competence

(a) A lawyer should provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

(b) A lawyer shall not handle a legal matter that the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it.

(c) lawyer shall not intentionally:

(1) fail to seek the objectives of the client through reasonably available means permitted by law and these Rules; or

(2) prejudice or damage the client during the course of the representation except as permitted or required by these Rules.

RULE 1.2.

Scope of Representation and Allocation of Authority Between Client and Lawyer

(a) Subject to the provisions herein, a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances, the client gives informed consent and where necessary notice is provided to the tribunal and/or opposing counsel.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, except that the lawyer may discuss the legal consequences of any proposed course of conduct with a client.

(e) A lawyer may exercise professional judgment to waive or fail to assert a right or position of the client, or accede to reasonable requests of opposing counsel, when doing so does not prejudice the rights of the client.

(f) A lawyer may refuse to aid or participate in conduct that the lawyer believes to be unlawful, even though there is some support for an argument that the conduct is legal.

(g) A lawyer does not violate these Rules by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, and by treating with courtesy and consideration all persons involved in the legal process.

RULE 1.3.

Diligence

(a) A lawyer shall act with reasonable diligence and promptness in representing a client.

(b) A lawyer shall not neglect a legal matter entrusted to the lawyer.

(c) A lawyer shall not intentionally fail to carry out a contract of employment entered into with a client for professional services, but the lawyer may withdraw as permitted under these Rules.

RULE 1.4.

Communication

(a) A lawyer shall:

(1) promptly inform the client of:

(i) any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(j), is required by these Rules;

(g) A lawyer shall not divide a fee for legal services with another lawyer who is not associated in the same law firm unless:

(1) the division is in proportion to the services performed by each lawyer or, by a writing given to the client, each lawyer assumes joint responsibility for the representation;

(2) the client agrees to employment of the other lawyer after a full disclosure that a division of fees will be made, including the share each lawyer will receive, and the client's agreement is confirmed in writing; and

(3) the total fee is not excessive.

(h) Rule 1.5(g) does not prohibit payment to a lawyer formerly associated in a law firm pursuant to a separation or retirement agreement.

RULE 1.6.

Confidentiality of Information

(a) A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person, unless:

(1) the client gives informed consent, as defined in Rule 1.0(j);

(2) the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community; or

(3) the disclosure is permitted by paragraph (b).

"Confidential information" consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential. "Confidential information" does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates.

(b) A lawyer may reveal or use confidential information to the extent that the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime;

(3) to withdraw a written or oral opinion or representation previously given by the lawyer and reasonably believed by the lawyer still to be relied upon by a third person, where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud;

(4) to secure legal advice about compliance with these Rules or other law by the lawyer, another lawyer associated with the lawyer's firm or the law firm;

(5) (i) to defend the lawyer or the lawyer's employees and associates against an accusation of wrongful conduct; or

(ii) to establish or collect a fee; or

(6) when permitted or required under these Rules or to comply with other law or court order.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure or use of, or unauthorized access to, information protected by Rules 1.6, 1.9(c), or 1.18(b).

RULE 1.7.

Conflict of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that either:

(1) the representation will involve the lawyer in representing differing interests; or

(2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

RULE 1.8.

Current Clients: Specific Conflict of Interest Rules

(a) A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise professional judgment therein for the protection of the client, unless:

(1) the transaction is fair and reasonable to the client and the terms of the transaction are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking, and is given a reasonable opportunity to seek, the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including

which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) Unless the former client gives informed consent, confirmed in writing, a lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 or paragraph (c) of this Rule that is material to the matter.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use confidential information of the former client protected by Rule 1.6 to the disadvantage of the former client, except as these Rules would permit or require with respect to a current client or when the information has become generally known; or

(2) reveal confidential information of the former client protected by Rule 1.6 except as these Rules would permit or require with respect to a current client.

RULE 1.10.

Imputation of Conflicts of Interest

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7, 1.8 or 1.9, except as otherwise provided therein.

(b) When a lawyer has terminated an association with a firm, the firm is prohibited from thereafter representing a person with interests that the firm knows or reasonably should know are materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm if the firm or any lawyer remaining in the firm has information protected by Rule 1.6 or Rule 1.9(c) that is material to the matter.

(c) When a lawyer becomes associated with a firm, the firm may not knowingly represent a client in a matter that is the same as or substantially related to a matter in which the newly associated lawyer, or a firm with which that lawyer was associated, formerly represented a client whose interests are materially adverse to the prospective or current client unless the newly associated lawyer did not acquire any information protected by Rule 1.6 or Rule 1.9(c) that is material to the current matter.

(d) A disqualification prescribed by this Rule may be waived by the affected client or former client under the conditions stated in Rule 1.7.

(e) A law firm shall make a written record of its engagements, at or near the time of each new engagement, and shall implement and maintain a system by which proposed engagements are checked against current and previous engagements when:

(1) the firm agrees to represent a new client;

(2) the firm agrees to represent an existing client in a new matter;

(3) the firm hires or associates with another lawyer; or

(4) an additional party is named or appears in a pending matter.

(f) Substantial failure to keep records or to implement or maintain a conflict-checking system that complies with paragraph (e) shall be a violation thereof regardless of whether there is another violation of these Rules.

(g) Where a violation of paragraph (e) by a law firm is a substantial factor in causing a violation of paragraph (a) by a lawyer, the law firm, as well as the individual lawyer, shall be responsible for the violation of paragraph (a).

(h) A lawyer related to another lawyer as parent, child, sibling or spouse shall not represent in any matter a client whose interests differ from those of another party to the matter who the lawyer knows is represented by the other lawyer unless the client consents to the representation after full disclosure and the lawyer concludes that the lawyer can adequately represent the interests of the client.

copy of a determination by such a tribunal, which has become final and enforceable and as to which the right to judicial or appellate review has been exhausted, finding that the lawyer has engaged in an unlawful discriminatory practice shall constitute prima facie evidence of professional misconduct in a disciplinary proceeding; or

(h) engage in any other conduct that adversely reflects on the lawyer's fitness as a lawyer.

RULE 8.5.

Disciplinary Authority and Choice of Law

(a) A lawyer admitted to practice in this state is subject to the disciplinary authority of this state, regardless of where the lawyer's conduct occurs. A lawyer may be subject to the disciplinary authority of both this state and another jurisdiction where the lawyer is admitted for the same conduct.

(b) In any exercise of the disciplinary authority of this state, the rules of professional conduct to be applied shall be as follows:

(1) For conduct in connection with a proceeding in a court before which a lawyer has been admitted to practice (either generally or for purposes of that proceeding), the rules to be applied shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise; and

(2) For any other conduct:

(i) If the lawyer is licensed to practice only in this state, the rules to be applied shall be the rules of this state, and

(ii) If the lawyer is licensed to practice in this state and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice,

the rules of that jurisdiction shall be applied to that conduct.

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Litigation - Netherlands

Supreme Court confirms legal privilege for in-house lawyers

May 07 2013

Introduction
Legal privilege
ECJ judgment in *Akzo*
Dutch rulings
Comment

Introduction

The Supreme Court recently ruled that in-house lawyers who are registered as attorneys with the Dutch bar can, in principle, invoke legal professional privilege in the same way as attorneys who work independently or within a law firm.(1)

The ruling is notable because the Supreme Court has disregarded the *Akzo* decision of the European Court of Justice (ECJ) in 2010, in which the ECJ ruled that in-house lawyers cannot rely on attorney-client privilege.

Before turning to the Supreme Court's reasoning in its decision, this update first discusses the nature of legal professional privilege under Dutch law and the findings of the ECJ in *Akzo*.

Legal privilege

Dutch law grants legal professional privilege to a limited number of professionals (eg, clergy, physicians, notaries and attorneys), permitting them to decline to give evidence or to refrain from disclosing information (eg, documents or written correspondence) when so ordered by a court. This privilege is based on the general principle of Dutch law that it is in the general public interest that anybody can speak freely with these professionals without fear of disclosure before a court. This is considered to outweigh another general public interest – that the truth be uncovered in legal proceedings.(2)

Legal professional privilege is extensive and it is for the attorney to decide whether he or she wishes to invoke it. An attorney can even invoke legal professional privilege against his or her client's wishes. A judge can only marginally test whether invoking such privilege is justified.

It is longstanding case law(3) that the nature of legal privilege entails that an attorney need not testify as long as a judge can reasonably believe that answering the questions asked will disclose what ought to remain undisclosed. In other words, a judge must exercise restraint when an attorney invokes his or her legal privilege, and an attorney cannot be denied such right lightly. According to the Supreme Court, a broader margin of appreciation would lead to such an extent of uncertainty about the scope of the legal privilege that it would be affected in an unacceptable way.

ECJ judgment in *Akzo*

In *Akzo* the ECJ ruled that in-house counsel cannot invoke the legal professional privilege. This case concerned a 2003 investigation by European Commission officials into possible anti-competitive practices of Akzo Nobel Chemicals Ltd and Ackros Chemicals Ltd. To this end, the officials carried out an investigation at the UK premises of Akzo and Ackros, during which they took copies of a considerable

number of documents.

In the course of the investigation representatives of Akzo and Acrkos informed the officials that certain documents were likely to be covered by legal professional privilege. The investigating team, after having superficially reviewed the relevant documents, took the view that some of the documents were not privileged. The companies appealed this decision in respect of two particular documents – namely, two emails exchanged between a director of Ackros and Mr S, who at the time was a member of the Netherlands Bar and employed in Akzo's legal department.

In deciding this question, the ECJ referred to its 1982 decision in *AM&S Europe v Commission*,(4) in which it held that the confidentiality of lawyers and clients should be protected. However, the ECJ then stated that this protection was subject to the conditions that:

- the exchange with the lawyer be connected to the client's defence rights; and
- the exchange be with independent lawyers who are not employed by the relevant client.

With respect to this second requirement, in *Akzo* the ECJ ruled that:

> "*[a]n in-house lawyer, despite his enrolment with a bar or law society and the professional ethical obligations to which he is, as a result, subject, does not enjoy the same degree of independence from his employer as a lawyer working in an external law firm does in relation to his client. Consequently, an in-house lawyer is less able to deal effectively with any conflicts between his professional obligations and the aims of his client.*"

According to the ECJ, the professional regime applicable to Dutch in-house lawyers – which aims to ensure that in-house lawyers are able to uphold the professional ethical obligations – is no reason to treat an in-house lawyer in the same way as an external lawyer, because the fact that the former is an employee means that he or she would be unable ignore the commercial strategies pursued by the employer. Therefore, the ECJ found that an in-house lawyer's ability to exercise adequate professional independence may be impaired, and that an in-house lawyer thus cannot invoke legal professional privilege.

Dutch rulings

The recent Supreme Court ruling concerned a cassation appeal against a Groningen District Court decision in a case where an employee (A) of Delta Biovalue and Delta and Delta's in-house lawyer (B) refused to testify in a witness hearing to avoid disclosing information covered by legal privilege. The Groningen District Court decided that A and B could not rely on legal privilege.(5)

Facts

In the first half of 2010 Delta had been engaged in takeover negotiations with Sunoil and H9 Invest. According to Sunoil, the parties had reached agreement on the terms and conditions of the takeover during a meeting on August 5 2010 at which A and B represented Delta. Delta disputed that an agreement had been reached on the grounds that A was not authorised to represent Delta, and that Sunoil knew this. In order to substantiate its argument, Sunoil requested the court to hold a witness hearing and ask A to testify on what had been said by B during the meeting.

A took the view that he was not obliged to answer these questions, as B was present at that meeting in his capacity of Delta's in-house lawyer and the statements which he made at that meeting were thus covered by legal privilege. A argued that he could also invoke legal privilege, derived from that of his employer's in-house lawyer, and as such was under no obligation to answer the questions asked. The court did not agree with this position. It denied A the right to invoke a (derivative) legal privilege and ordered him to disclose what had been said by B during the meeting.

The court based its finding on the *Akzo* judgment. The court considered that the ECJ had confirmed that in order for a communication to be covered by legal privilege, the communication must be with an independent lawyer and must concern the client's rights of defence. Since the ECJ had ruled that in-house lawyers do not meet the independence requirement and thus are not entitled to invoke legal

privilege, the court held that that same reasoning should be applied in this case and that, consequently, A and B should be denied the right to invoke legal privilege.

Supreme Court decision

A and B filed for a cassation appeal with the Dutch Supreme Court, choosing to bypass the appellate court (the normal appeal route). The Supreme Court found that in principle, this 'leapfrog' appeal would have been possible in this case if all interested parties had given their consent to do so. Since it was not apparent that the defendants had consented to the leapfrog appeal, the Supreme Court ruled that the appeal was inadmissible on procedural grounds.

Despite the inadmissibility of the appeal, the Supreme Court deemed it appropriate to elaborate on the question of whether legal privilege applies to in-house lawyers.

The Supreme Court considered that the ECJ's ruling in *Akzo*, on which the Groningen District Court had based its judgment, does not apply outside the scope of EU competition law. The Supreme Court further observed that it has long been accepted in the Netherlands that an attorney can practise his or her profession independently while in an employment relationship. To ensure the independence of such in-house lawyers, the Dutch Bar Association has adopted regulations by which both in-house lawyers and their employers are bound. For example, the employer is obliged to sign a declaration in which it undertakes to ensure that the in-house lawyer will be able to act independently and to enable the in-house lawyer to abide by the professional and ethical standards for attorneys.

Since sufficient safeguards are in place to ensure the independent professional practice of in-house lawyers, there are no grounds, according to the Supreme Court, to deny in-house lawyers legal privilege.

Comment

With this judgment the Supreme Court has established that – at least in Dutch domestic procedures – legal privilege also applies to in-house lawyers, thus removing uncertainty about the scope of legal privilege that had arisen as a consequence of the ECJ's *Akzo* judgment.

The Supreme Court primarily reached its conclusion on the basis of the professional rules that apply to in-house lawyers, including the requirement that employers must sign the relevant declaration. These professional rules apply only to in-house lawyers who are registered as an attorney with the Dutch bar or a bar association in the European Union, the European Economic Area or Switzerland.(6) Therefore, the Supreme Court's findings probably cannot be applied automatically to in-house lawyers who work in the Netherlands, but are registered with a bar association based outside those jurisdictions.

For further information on this topic please contact Ruud Niesink at Clifford Chance LLP by telephone (+31 20 711 9000), fax (+31 20 711 9024) or e-mail (ruud.niesink@cliffordchance.com).

Endnotes

(1) Dutch Supreme Court, March 15 2013, LJN BY6101.

(2) Dutch Supreme Court, August 9 2002, LJN AE6324, NJ 2004, 47.

(3) See, for example, Dutch Supreme Court, June 7 1985, NJ 1986, 174.

(4) *AM & S Europe Limited v Commission of the European Communities*, May 19 1982, Case 155/79.

(5) Groningen District Court, February 28 2012 ,LJN BV7149, JBPR 2012, 4.

(6) Article 1 of the Dutch Bar regulation on professional practice in employment of November 27 1996, read in combination with Article 16h of the Dutch Counsel Act.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE PETITION OF ESTHER KIOBEL, Petitioner, For an Order Granting Leave to Issue Subpoenas to Cravath, Swaine & Moore LLP for Production of Documents Pursuant to 28 U.S.C. § 1782	:	**OPINION AND ORDER GRANTING PETITION** 16 Civ. 7992 (AKH)

ALVIN K. HELLERSTEIN, U.S.D.J.:

On October 12, 2016, Petitioner Esther Kiobel ("Kiobel") filed a petition pursuant to 28 U.S.C. § 1782 seeking leave to issue subpoenas to the law firm Cravath, Swaine & Moore LLP ("Cravath") for the production of documents in Cravath's possession. Kiobel seeks these documents for use in an anticipated civil action that Kiobel intends to file in the Netherlands against Cravath's client, Royal Dutch Shell ("Shell") and related entities. Oral argument was held on December 20, 2016. At the hearing, I advised the parties that Kiobel's petition would be granted upon the parties' submission of a stipulation that addressed Cravath's concerns regarding the confidentiality of the documents sought. On January 13, 2017, the parties submitted a confidentiality stipulation and proposed order. For the reasons stated herein, Kiobel's petition is granted.

BACKGROUND

In the early 1990s, Kiobel and her husband, Dr. Barinem Kiobel, were actively involved in an organization called the Movement for the Survival of the Ogoni People, which opposed Shell's activities in a region of Nigeria known as Ogoni. The Nigerian military

launched a violent campaign to suppress this opposition movement, and in 1995, Kiobel's husband was executed by the Nigerian military.

In 2002, Kiobel filed a class action lawsuit in the Southern District of New York against Shell and related entities under the Alien Tort Statute. 28 U.S.C. § 1350. Kiobel alleged that Shell and its Nigerian subsidiary were liable for gross violations of civil liberties and human rights committed by the Nigerian military against Kiobel, Kiobel's husband, and other Nigerians who opposed Shell's activities in Ogoni. Kiobel alleged that Shell was directly complicit in the execution of her husband and other opposition leaders following a rigged and corrupt criminal trial, and further alleged that she was personally whipped, sexually assaulted, and detained for three weeks when she attempted to bring her husband food during his detention prior to execution. In addition to this action, *Kiobel v. Royal Dutch Petroleum Co.*, No. 02 Civ. 7618, three other lawsuits were filed in the Southern District of New York alleging Shell's complicity in the Nigerian government's campaign against the Ogoni people: *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 Civ. 8386; *Wiwa v. Brian Anderson*, No. 01 Civ. 1909; and *Wiwa v. Shell Petroleum Development Corp. of Nigeria*, No. 04 Civ. 2665. Cravath represented Shell in each of these actions. During the course of these actions, Cravath gathered and produced numerous documents and engaged in other discovery-related activities.

In 2013, the U.S. Supreme Court dismissed the *Kiobel* action on the grounds that the Alien Tort Statute is subject to a "presumption against extraterritorial application." Applying that presumption, the Court held that Kiobel's claim could not proceed in a U.S. court because all relevant conduct had occurred outside of the United States. *See Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013).

Kiobel alleges, in the petition now before me, that she intends to file an action in the Netherlands against Shell alleging the same tortious conduct, namely, Shell's alleged involvement in the execution of her husband, as well as Shell's alleged complicity in violations of civil liberties and human rights against the Kiobels and other Nigerians who opposed Shell's activities in Nigeria in the 1990s. In anticipation of this Dutch proceeding, Kiobel seeks to obtain the documents and other discovery materials (for example, deposition transcripts) that Cravath produced on behalf of Shell and related entities in the *Kiobel* and *Wiwa* actions. Kiobel believes this discovery would advance the foreign proceeding that she intends to initiate, and that she cannot obtain such discovery in the Netherlands because Cravath is outside the jurisdictional reach of the Dutch judiciary. Kiobel contends that 28 U.S.C. § 1782 is therefore the proper mechanism to obtain this discovery.

DISCUSSION

I. Statutory Requirements

To prevail in a Section 1782 petition, a petitioner must first satisfy three statutory requirements: "(1) that the person from whom discovery is sought reside (or be found) in the district of the district court to which the application is made, (2) that the discovery be for use in a proceeding before a foreign tribunal, and (3) that the application be made by a foreign or international tribunal or 'any interested person.'" *In re Application of Esses*, 101 F.3d 873, 875 (2d Cir. 1996). Cravath concedes that the third requirement has been satisfied, but contends that Kiobel has failed to satisfy the first two requirements.

a. The First Statutory Requirement is Satisfied

Under the first statutory requirement, the person from whom discovery is sought must reside in the district where the application is made. There is no dispute that Kiobel seeks discovery from Cravath, and that Cravath resides in the Southern District of New York. Cravath, however, argues that it is not the real "person from whom discovery is sought" because it is

merely a custodian of documents that belong to Shell. Cravath suggests that the "real" person from whom discovery is sought is Shell, an entity that does not reside in this district. Consequently, Cravath argues, the first statutory element has not been met.

No authority supports this argument. To credit Cravath's argument would effectively exempt many law firms from having to respond to Section 1782 petitions. Cravath has made this argument before, without success. In *In re Application of Schmitz*, 259 F. Supp. 2d 294 (S.D.N.Y. 2003), Cravath argued that the first statutory requirement had not been satisfied because it was the custodian of documents "solely for the purposes of the U.S. Litigation," and that the true owner of the documents was its foreign client. The district court rejected the argument: "That argument is creative, but sails far wide of the mark. Application of section 1782 does not involve an analysis of ... why a respondent has the documents. It is sufficient that respondents reside in this district, as they concededly do." *Id.* at 296. The Second Circuit did not disturb this ruling. *See Schmitz v. Bernstein Liebhard & Lifshitz, LLP.*, 376 F.3d 79, 83 (2d Cir. 2004).[1] Other courts are in accord. *See In re Mare Shipping Inc.*, 2013 WL 5761104, at *3 (S.D.N.Y. Oct. 23, 2013) ("Courts in this district have found that for purposes of a section 1782 claim, it is sufficient that a respondent law firm resides in this district, even if the real party in interest, the client, resides elsewhere."); *In re Republic of Kazakhstan,* 110 F. Supp. 3d 512, 514 (S.D.N.Y. 2015) (granting Section 1782 petition seeking documents from law firm representing international client).

The question is whether Cravath is in possession of the documents, not whom the documents "belong" to. Unless a court instructs otherwise, document productions made in

[1] As the Second Circuit has recognized, the fact that a respondent represents a foreign client that is a party to the foreign proceeding is certainly a fact worth considering. *See Schmitz*, 376 F.3d at 85. Here, it is appropriate to consider that Cravath possesses these documents as a result of its prior representation of Shell, and that Shell will be named as a defendant in the foreign proceeding. However, as the Second Circuit's analysis in *Schmitz* makes clear, these facts are relevant to the first discretionary factor, not the first statutory requirement. *Id.*

response to a Section 1782 petition are governed by the Federal Rules of Civil Procedure. *See* 28 U.S.C. § 1782(a). Under those rules, relevant documents within the "possession, custody, or control" of the recipient of a discovery request are generally discoverable, regardless of who owns or created those documents. *See, e.g.*, Fed. R. Civ. P. 34(a)(1); 45(1)(A)(iii). This is true notwithstanding Cravath's attorney-client relationship with Shell. "[D]ocuments held by an attorney in the United States on behalf of a foreign client, absent privilege, are as susceptible to subpoena as those stored in a warehouse within the district court's jurisdiction. Documents obtain no special protection because they are housed in a law firm; '[a]ny other rule would permit a person to prevent disclosure of any of his papers by the simple expedient of keeping them in the possession of his attorney.'" *Ratliff v. Davis Polk & Wardwell*, 354 F.3d 165, 170–71 (2d Cir. 2003) (quoting *Colton v. United States*, 306 F.2d 633, 639 (2d Cir. 1962)). Here, there is no concern that privileged materials will be disclosed because Kiobel seeks only documents that Cravath has previously produced, which therefore have already been vetted for privilege.

Thus, the first statutory requirement has been satisfied.

b. The Second Statutory Requirement is Satisfied

Under the second statutory requirement, the discovery sought must be "for use" in a foreign proceeding. "A § 1782 applicant satisfies the statute's 'for use' requirement by showing that the materials she seeks are to be used at some stage of a foreign proceeding." *Mees v. Buiter*, 793 F.3d 291, 295 (2d Cir. 2015). Cravath argues that Kiobel has failed to satisfy this element because she has yet to commence an action against Shell in the Netherlands, and the representation that she "expects" to file the action shortly is too speculative to warrant discovery pursuant to Section 1782.

In situations such as this, where there is no pending foreign proceeding, the "for use" requirement is still satisfied if the foreign proceeding is within "reasonable contemplation."

Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 259 (2004) (foreign proceeding must "be within reasonable contemplation," but need not be "pending" or "imminent."). To demonstrate that the action is within reasonable contemplation, a petitioner "must provide some objective indicium that the action is being contemplated. ... At a minimum, a § 1782 applicant must present to the district court some concrete basis from which it can determine that the contemplated proceeding is more than just a twinkle in counsel's eye." *Certain Funds, Accounts and/or Inv. Vehicles v. KPMG LLP*, 798 F.3d 113, 123-24 (2d Cir. 2015).

Kiobel has provided objective indicia demonstrating that the Dutch proceeding is within reasonable contemplation. Dutch counsel has (1) drafted a writ of summons, which is the initiating document in Dutch proceedings; (2) applied for and obtained legal aid on behalf of Kiobel from the Dutch Legal Aid Board, which required a showing that meaningful steps had been taken to prepare for the action; and (3) sent "liability letters" to Shell, which had the effect of tolling the statute of limitations. *See* Samkalden Reply Decl. ¶¶ 3-6. This case is therefore distinguishable from *Certain Funds*, in which the petitioner had done nothing more than retain counsel and discuss "the possibility of initiating litigation." 798 F.3d at 124.

Kiobel further emphasizes that in the Netherlands, a plaintiff must present a certain amount of evidence at the outset of the action in order to proceed. Given that Kiobel seeks discovery from Cravath in order to collect evidence that may be necessary for the Dutch action to survive, the fact that Kiobel has yet to commence the action is both defensible and logical. In this sense, Kiobel's filing of this petition is itself an important step in preparing for the Dutch action, and helps to show that the action is within reasonable contemplation. In *Application of Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc.*, 747 F.3d 1262 (11th Cir. 2014), the Eleventh Circuit held that the "for use" requirement was met in light of petitioner's "facially legitimate and detailed explanation of its ongoing investigation, its intent to commence a civil action against its former employees, and the valid

reasons for [petitioner] to obtain the requested discovery under the instant section 1782 application before commencing suit." *Id.* at 1271. Here, Kiobel has offered valid reasons for delaying the Dutch proceeding until after it obtains discovery from Cravath.

Thus, the second statutory requirement has also been satisfied.

II. Discretionary Factors

Once the statutory requirements are met, as they are here, "a district court may grant discovery under § 1782 in its discretion." Mees, 793 F.3d at 297.

In assessing whether or not to exercise that discretion, a court must consider four discretionary factors: "(1) whether 'the person from whom discovery is sought is a participant in the foreign proceeding,' in which case 'the need for § 1782(a) aid generally is not as apparent'; (2) 'the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court judicial assistance'; (3) 'whether the § 1782(a) request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States'; and (4) whether the request is 'unduly intrusive or burdensome.'" *Id.* at 298 (2d Cir. 2015) (quoting *Intel*, 542 U.S. at 264–265). A court must also consider the "twin aims of the statute: providing efficient means of assistance to participants in international litigation in our federal courts and encouraging foreign countries by example to provide similar means of assistance to our courts." *Id.* at 297–98 (internal quotation marks and citation omitted).

a. The First Discretionary Factor Weighs in Favor of Granting the Petition

Under the first discretionary factor, a court is to consider whether "the person from whom discovery is sought is a participant in the foreign proceeding." *Intel*, 542 U.S. at 264. On a technical level, the discovery is sought from Cravath, which is not, and is not expected to become, a party to the Dutch proceeding. However, Cravath again argues that

Kiobel is "effectively" seeking discovery from Shell, which will be a defendant in the anticipated Dutch litigation. For all intents and purposes, Cravath argues, Kiobel seeks discovery from a Dutch entity for use against that same Dutch entity in a Dutch proceeding. In such situations, the need for assistance via Section 1782 "is not as apparent as it ordinarily is when evidence is sought from a nonparticipant in the matter arising abroad." *Id.*

Although courts have rejected this argument with respect to the first *statutory* factor, courts have been more receptive to it when considered in the context of the first *discretionary* factor. For example, in *Schmitz v. Bernstein Liebhard & Lifshitz, LLP.*, 376 F.3d 79 (2d Cir. 2004), a German petitioner sought discovery from Cravath, which represented a German client in U.S. litigation, for use in a German proceeding against that same German client. The Second Circuit noted that "although technically the respondent in the district court was Cravath, for all intents and purposes petitioners are seeking discovery from DT, their opponent in the German litigation. *Intel* suggests that because DT is a participant in the German litigation subject to German court jurisdiction, petitioner's need for § 1782 help 'is not as apparent as it ordinarily is when evidence is sought from a nonparticipant in the matter arising abroad.'" *Schmitz*, 376 F.3d at 85 (quoting *Intel*, 542 U.S. at 264). Similarly, in *Mare Shipping*, the court reasoned that the "first factor … does not weigh in favor of granting the application" because although "the named Respondents are not party to a foreign action, Spain, respondent's client, is a participant in the foreign proceeding." 2013 WL 5761104, at *4. *See also In re Kreke Immobilien KG*, 2013 WL 5966916, at *5 (S.D.N.Y. Nov. 8, 2013) (denying petition on discretionary grounds where respondent was parent company of foreign defendant because "discovery is fundamentally being sought from a participant in the [foreign] proceeding.").

Cravath contends that these cases show that the first factor weighs against granting this petition because the documents are best obtained directly from Shell in the Dutch proceeding. However, the question of whether the respondent is a party to the foreign proceeding is not the only relevant consideration. Rather, the respondent's connection to the foreign proceeding is part of a broader inquiry: whether the discovery is "outside the foreign tribunal's jurisdictional reach," and thus "unobtainable absent § 1782(a) aid." *Intel*, 542 U.S. at 264. In *In re Microsoft Corp.*, 428 F. Supp. 2d 188, 192 (S.D.N.Y. 2006), for example, the court described the first *Intel* prong as "whether the documents or testimony sought are within the foreign tribunal's jurisdictional reach, and thus accessible absent § 1782 aid." If a law firm's client is party to the foreign proceeding, then the documents are presumably within the foreign tribunal's reach, and assistance via Section 1782 is presumably unnecessary. But as this case illustrates, that is not always the case. Thus, "[i]t is the foreign tribunal's ability to control the evidence and order production, not the nominal target of the Section 1782 application, on which the district court should focus." *In re Application of OOO Promnefstroy*, 2009 WL 3335608, at *5 (S.D.N.Y. Oct. 15, 2009).

Here, Shell may be in possession of some of the documents Kiobel seeks, but there are several reasons why the discovery may not be obtainable "absent § 1782 aid." First, as discussed above, the Dutch action cannot proceed unless Kiobel presents sufficient evidence at the outset. Kiobel seeks documents from Cravath in order to collect evidence prior to filing suit. Absent that discovery, Kiobel's contemplated action may be foreclosed before there is any opportunity to obtain this discovery directly from Shell in the Dutch proceeding. Second, even if Kiobel was able to obtain discovery from Shell in the Dutch proceeding, not all of the materials that Kiobel seeks are likely to be in Shell's possession. For example, Kiobel is particularly

interested in obtaining deposition transcripts, which Shell may not possess. Kiobel has also represented that in other litigation Kiobel's Dutch counsel has brought against Shell arising out of Shell's activities in Nigeria during the 2000s, Shell has represented that it is no longer in possession of many requested documents. Samkalden Reply Decl. ¶ 9. Since Kiobel's action arises out of conduct that occurred in the 1990s, Kiobel believes Cravath may be the only source for some of these documents.

Section 1782 assistance may not be warranted in all situations where the respondent is a law firm representing a foreign client that is a defendant in the foreign proceeding. However, on balance, under the particular circumstances of this case, this factor weighs in favor of granting the petition because these documents may be unobtainable absent Section 1782 aid.

b. The Second Discretionary Factor Weighs in Favor of Granting the Petition

Under the second discretionary factor, a court is to consider "the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court judicial assistance." *Intel*, 542 U.S. at 264. In evaluating this factor, courts "should consider only *authoritative proof* that a foreign tribunal would reject evidence obtained with the aid of section 1782." *Euromepa S.A. v. R. Esmerian, Inc.*, 51 F.3d 1095, 1100 (2d Cir. 1995) (emphasis added). Cravath, as the party opposing the application, "bears the burden of proving the non-receptivity of the foreign tribunal." *In re Application of Gorsoan Ltd*, 2014 WL 7232262, at *7 (S.D.N.Y. Dec. 10, 2014) (citing *In re Esses*, 101 F.3d 873, 876 (2d Cir. 1996)).

Cravath offers no authoritative proof that the Dutch courts are unreceptive to receiving assistance pursuant to Section 1782. Cravath points out that when the *Kiobel* case was

before the U.S. Supreme Court, the Government of the Netherlands submitted an amicus brief in which it argued that U.S. courts should not interfere with its right to adjudicate disputes among its own nationals. In so arguing, the Netherlands expressed concern over American "plaintiff-favoring rules," including "the generally broader discovery available to plaintiffs in the U.S." Moskowitz Decl., Ex. A at 27. This is not authoritative proof that the Netherlands is unreceptive to Section 1782 discovery. Such proof is typically "embodied in a forum country's judicial, executive or legislative declarations that specifically address the use of evidence gathered under foreign procedures." *Euromepa S.A. v. R. Esmerian, Inc.*, 51 F.3d 1095, 1100 (2d Cir. 1995) (internal quotations omitted). The amicus brief referenced by Cravath addressed whether Kiobel's claim should be heard in a U.S. court, but it did not discuss Section 1782 or otherwise address whether Dutch courts accept evidence "gathered under foreign procedures." It is therefore not an authoritative declaration that Dutch courts are hostile to receiving discovery pursuant to statutes such as Section 1782.

The other cases relied upon by Cravath only further illustrate that "where courts have found that analysis of the second *Intel* factor weighs against a Section 1782 discovery request, evidence demonstrating the non-receptiveness of the foreign tribunals to U.S. discovery has been explicit." *Gorsoan*, 2014 WL 7232262, at *7. In *In re Microsoft Corp.*, 428 F. Supp. 2d 188, 194 (S.D.N.Y. 2006), for example, the court denied the petition because the European Commission had "explicitly stated that it opposes the discovery sought by Microsoft and is not receptive to U.S. judicial assistance." Similarly, in *Schmitz*, 376 F.3d 79, 84 (2d Cir. 2004), the German Ministry of Justice sent "specific requests" to the district judge that the petition be denied.

The Netherlands has done nothing of the sort here. On the contrary, in *Mees v. Buiter*, a fairly recent case in which the petitioner sought documents for use in a Dutch proceeding, the Second Circuit noted that the respondent did "not contend that Dutch courts reject the use in litigation of materials obtained through § 1782." 793 F.3d at 303 n.20.

Thus, this factor also weighs in favor of granting the petition.

c. The Third Discretionary Factor Weighs in Favor of Granting the Petition

Under the third discretionary factor, courts must consider "whether the § 1782(a) request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States." *Intel*, 542 U.S. at 264. Importantly, this factor does not impose a "foreign-discoverability requirement." *Mees v. Buiter*, 793 F.3d 291, 303 (2d Cir. 2015). As the Second Circuit recently summarized, "there is no requirement that evidence sought in the United States pursuant to § 1782(a) be discoverable under the laws of the foreign country that is the locus of the underlying proceeding." *Gorsoan Ltd. v. Bullock*, 652 F. App'x 7, 9 (2d Cir. 2016). Imposing a "foreign-discoverability rule" would "serve only to thwart § 1782(a)'s objective to assist foreign tribunals in obtaining relevant information that the tribunals may find useful but, for reasons having no bearing on international comity, they cannot obtain under their own laws." *Intel*, 542 U.S. at 261–62.

Similarly, a petitioner need not demonstrate that it attempted to obtain the discovery in the foreign tribunal before filing a Section 1782 petition. *See Mees*, 793 F.3d at 303 (there is "no support in the plain language of the statute" for a "quasi-exhaustion requirement.") (quoting *In re Metallgesellschaft*, 121 F.3d 77, 79 (2d Cir. 1997)); *In re Application of Bloomfield Inv. Res. Corp.*, 315 F.R.D. 165, 167 (S.D.N.Y. 2016) ("Bloomfield's failure to exhaust discovery procedures in the Netherlands Action is not a basis on which to reject

Bloomfield's discovery request."); *Gorsoan*, 2014 WL 7232262, at *9 (a "§ 1782 applicant need not exhaust foreign discovery remedies. Requiring Petitioner to wait for the outcome of the ... discovery proceedings would amount to enforcing such an 'exhaustion' requirement.").

Cravath argues that Kiobel filed this petition in order to avoid a potentially unfavorable discovery ruling from the Dutch court. However, accepting this argument would require Kiobel to refrain from filing this petition until after it first tried to obtain this discovery in the Netherlands. This effectively imposes an exhaustion requirement, which the Second Circuit has rejected. *Mees*, 793 F.3d at 303.

The proper inquiry is not whether a Dutch court would grant the discovery Kiobel seeks here, but whether the Dutch judiciary imposes a proof-gathering restriction or some other prohibition that precludes use of these materials in the Dutch proceeding. As the Second Circuit explained in *Mees*, that "a country does not enable broad discovery within a litigation does not mean that it has a policy that restricts parties from obtaining evidence through other lawful means. 'Proof-gathering restrictions' are best understood as rules akin to privileges that *prohibit* the acquisition or use of certain materials, rather than as rules that *fail to facilitate* investigation of claims by empowering parties to require their adversarial and non-party witnesses to provide information." 793 F.3d at 303 n.20. Thus, a foreign tribunal may "limit discovery within its domain for reasons peculiar to its own legal practices," but this does "not necessarily signal objection to aid from United States federal courts." *Intel*, 542 U.S. at 261.

Here, Cravath has provided no evidence that the Netherlands prohibits or otherwise restricts parties from gathering evidence via Section 1782. Thus, this factor weighs in favor of granting the petition.

d. The Fourth Discretionary Factor Weighs in Favor of Granting the Petition

The final discretionary factor to consider is whether the request is "unduly intrusive or burdensome." *Intel*, 542 U.S. at 245. Cravath's burden is extremely minimal because it has previously produced all of the documents currently sought, and probably retained separately bundled copies of the productions it made. No additional collection or review is likely to be required.

Many of the arguments that Cravath initially raised with respect to burden have since been amicably resolved by the parties. Regarding the scope of the production, which Cravath argued was overbroad, Kiobel has agreed to limit its request to: (a) documents produced by the defendants in the *Kiobel* and *Wiwa* actions; and (b) deposition transcripts of the defendants' witnesses in those same actions. Cravath also initially argued that providing the documents would be unduly intrusive absent a mechanism to ensure that the documents' confidentiality is maintained. However, the parties have since stipulated to a confidentiality agreement, which renders this issue moot.

Cravath's remaining argument with respect to burden is unpersuasive. Cravath argues that the documents might be subject to "other privileges governed by Dutch law," and that if the petition is granted, Cravath would have to conduct a "substantial and complex review" of the documents to ensure compliance with applicable foreign privileges. This argument is speculative. Absent "authoritative proof" of a "violation of the alleged privilege," a court should not refrain from granting a petition. *In re Metallgesellschaft*, 121 F.3d 77, 80 (2d Cir. 1997). Here, Cravath identifies no specific foreign privilege, let alone authoritative proof that production of the documents would violate that privilege, necessitating additional review prior to production.

Thus, the fourth and final discretionary factor weighs in favor of granting the petition.

CONCLUSION

For the foregoing reasons, and upon entry of the Stipulation and Order Regarding Confidentiality of Discovery Materials dated January 13, 2017, it is hereby:

ORDERED that the Petition of Esther Kiobel, Pursuant to 28 U.S.C. § 1782, for Leave to Issue Subpoenas to Cravath, Swaine & Moore LLP for the Production of Documents for Use in a Foreign Proceeding is granted;

ORDERED that Kiobel is authorized to issue a subpoena consistent with her submissions and counsel's and the Court's statements at the December 20, 2016, oral argument;

ORDERED that Kiobel shall serve the subpoena by January 27, 2017, and Cravath shall produce the responsive documents by February 27, 2017.

The Clerk shall mark the case closed.

SO ORDERED.

Dated: January 24, 2017
New York, New York

ALVIN K. HELLERSTEIN
United States District Judge

Illustration by Arthur Jones

By The International Consortium of Investigative Journalists

Apr 3, 2016

Reading time: 23 minutes

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In this story

- Files reveal the offshore holdings of 140 politicians and public officials from around the world
- Current and former world leaders in the data include the prime minister of Iceland, the

president of Ukraine, and the king of Saudi Arabia

- More than 214,000 offshore entities appear in the leak, connected to people in more than 200 countries and territories
- Major banks have driven the creation of hard-to-trace companies in offshore havens

A massive leak of documents exposes the offshore holdings of 12 current and former world leaders and reveals how associates of Russian President Vladimir Putin secretly shuffled as much as $2 billion through banks and shadow companies.

The leak also provides details of the hidden financial dealings of 128 more politicians and public officials around the world.

The cache of 11.5 million records shows how a global industry of law firms and big banks sells financial secrecy to politicians, fraudsters and drug traffickers as well as billionaires, celebrities and sports stars.

These are among the findings of a yearlong investigation by the International Consortium of Investigative Journalists, German newspaper Süddeutsche Zeitung and more than 100 other news organizations.

The files expose offshore companies controlled by the prime minister of Iceland, the king of Saudi Arabia and the children of the president of Azerbaijan and the prime minister of Pakistan.

They also include at least 33 people and companies blacklisted by the U.S. government because of evidence that they'd been involved in wrongdoing, such as doing business with Mexican drug lords, terrorist organizations like Hezbollah or rogue nations like North Korea and Iran.

One of those companies supplied fuel for the aircraft that the Syrian government used to bomb and kill thousands of its own citizens, U.S. authorities have charged.

"These findings show how deeply ingrained harmful practices and criminality are in the offshore world," said Gabriel Zucman, an economist at the University of California, Berkeley and author of "The Hidden Wealth of Nations: The Scourge of Tax Havens." Zucman, who was briefed on the media partners' investigation, said the release of the leaked documents should prompt governments to seek "concrete sanctions" against jurisdictions and institutions that peddle offshore secrecy.

Chinese President Xi Jinping and British Prime Minister David Cameron. Photo: UK Government / Georgina Coupe

World leaders who have embraced anti-corruption platforms feature in the leaked documents. The files reveal offshore companies linked to the family of China's top leader, Xi Jinping, who has vowed to fight "armies of

corruption," as well as Ukrainian President Petro Poroshenko, who has positioned himself as a reformer in a country shaken by corruption scandals. The files also contain new details of offshore dealings by the late father of British Prime Minister David Cameron, a leader in the push for tax-haven reform.

The leaked data covers nearly 40 years, from 1977 through the end of 2015. It allows a never-before-seen view inside the offshore world — providing a day-to-day, decade-by-decade look at how dark money flows through the global financial system, breeding crime and stripping national treasuries of tax revenues.

Most of the services the offshore industry provides are legal if used by the law abiding. But the documents show that banks, law firms and other offshore players have often failed to follow legal requirements that they make sure their clients are not involved in criminal enterprises, tax dodging or political corruption. In some instances, the files show, offshore middlemen have protected themselves and their clients by concealing suspect transactions or manipulating official records.

The documents make it clear that major banks are big drivers behind the creation of hard-to-trace companies in the British Virgin Islands, Panama and other offshore havens. The files list nearly 15,600 paper companies that banks set up for clients who want keep their finances under wraps, including thousands created by international giants UBS and HSBC.

The records reveal a pattern of covert maneuvers by banks, companies and people tied to Russian leader Putin. The records show offshore companies linked to this network moving money in transactions as large as $200 million at a time. Putin associates disguised payments, backdated documents and gained hidden influence within the country's media and automotive industries, the leaked files show.

A Kremlin spokesman did not answer questions for this story, but instead went public March 28 with charges that ICIJ and its media partners were preparing a misleading "information attack" on Putin and people close to him.

The leaked records — which were reviewed by a team of more than 370 journalists from 76 countries — come from a little-known but powerful law firm based in Panama, Mossack Fonseca, that has branches in Hong Kong, Miami, Zurich and more than 35 other places around the globe.

The firm is one of the world's top creators of shell companies, corporate structures that can be used to hide ownership of assets. The law firm's leaked internal files contain information on 214,488 offshore entities connected to people in more than 200 countries and territories. ICIJ will release the full list of companies and people linked to them in early May.

The data includes emails, financial spreadsheets, passports and corporate records revealing the secret owners of bank accounts and companies in

21 offshore jurisdictions, from Nevada to Singapore to the British Virgin Islands.

Files show a number of luxury yachts bought and sold through offshore companies. Photo: Twiga269 / Flickr

Mossack Fonseca's fingers are in Africa's diamond trade, the international art market and other businesses that thrive on secrecy. The firm has serviced enough Middle East royalty to fill a palace. It's helped two kings, Mohammed VI of Morocco and King Salman of Saudi Arabia, take to the sea on luxury yachts.

In Iceland, the leaked files show how Prime Minister Sigmundur David Gunnlaugsson and his wife secretly owned an offshore firm that held millions of dollars in Icelandic bank bonds during that country's financial crisis.

The files include a convicted money launderer who claimed he'd arranged a $50,000 illegal campaign contribution used to pay the Watergate burglars, 29 billionaires featured in Forbes Magazine's list of the world's 500 richest people and movie star Jackie Chan, who has at least six companies managed through the law firm.

As with many of Mossack Fonseca's clients, there is no evidence that Chan used his companies for improper purposes. Having an offshore company

isn't illegal. For some international business transactions, it's a logical choice.

The Mossack Fonseca documents indicate, however, that the firm's customers have included Ponzi schemers, drug kingpins, tax evaders and at least one jailed sex offender. A U.S. businessman convicted of traveling to Russia to have sex with underage orphans signed papers for an offshore company while he was serving his prison sentence in New Jersey, the records show.

The files contain new details about major scandals ranging from England's most infamous gold heist to the bribery allegations convulsing FIFA, the body that rules international soccer.

The leaked documents reveal that the law firm of Juan Pedro Damiani, a member of FIFA's ethics committee, had business relationships with three men who have been indicted in the FIFA scandal — former FIFA vice president Eugenio Figueredo and Hugo and Mariano Jinkis, the father-son team accused of paying bribes to win broadcast rights to Latin American soccer events. The records show that Damiani's law firm in Uruguay represented an offshore company linked to the Jinkises and seven companies linked to Figueredo.

In response to the reporting by ICIJ and its media partners, FIFA's ethics panel has launched a preliminary investigation into Damiani's relationship to Figueredo. A spokesman for the committee said Damiani first informed the panel about his business ties to Figueredo on March 18.

That was one day after the reporting team sent questions to Damiani about his law firm's work for companies tied to the former FIFA vice president.

Argentine soccer player Lionel Messi. Photo: Shutterstock / CP DC Press

The world's best soccer player, Lionel Messi, is also found in the documents. The records show Messi and his father were owners of a Panama company: Mega Star Enterprises Inc. This adds a new name to the list of shell companies known to be linked to Messi. His offshore dealings are currently the target of a tax evasion case in Spain.

Whether they're famous or unknown, Mossack Fonseca works aggressively to protect its clients' secrets. In Nevada, the records show, the law firm tried to shield itself and its clients from the fallout from a legal action in U.S. District Court by removing paper records from its Las Vegas branch and having its tech gurus wipe electronic records from phones and computers.

The leaked files show the firm regularly offered to backdate documents to help its clients gain advantage in their financial affairs. It was so common that in 2007 an email exchange shows firm employees talking about establishing a price structure — clients would pay $8.75 for each month farther back in time that a corporate document would be backdated.

In a written response to questions from ICIJ and its media partners, the firm said it "does not foster or promote illegal acts. Your allegations that we provide shareholders with structures supposedly designed to hide the identity of the real owners are completely unsupported and false."

The firm added that the backdating of documents "is a well-founded and accepted practice" that is "common in our industry and its aim is not to cover up or hide unlawful acts."

The firm said it couldn't answer questions about specific customers because of its obligation to maintain client confidentiality.

The law firm's co-founder, Ramón Fonseca, said in a recent interview on Panamanian television that the firm has no responsibility for what clients do with the offshore companies that the firm sells. He compared the firm to a "car factory" whose liability ends once the car is produced. Blaming Mossack Fonseca for what people do with their companies would be like blaming a carmaker "if the car was used in a robbery," he said.

Under scrutiny

Until recently, Mossack Fonseca has largely operated in the shadows. But it has come under growing scrutiny as governments have obtained partial leaks of the firm's files and authorities in Germany and Brazil began probing its practices.

In February 2015, Süddeutsche Zeitung reported that German law-enforcement agencies had

launched a series of raids targeting one of the country's biggest banks, Commerzbank, in a tax-fraud investigation that authorities said could lead to criminal charges against Mossack Fonseca employees.

In Brazil, the law firm has become a target in a bribery and money laundering investigation dubbed "Operation Car Wash" ("Lava Jato," in Portuguese), which has led to criminal charges against leading politicians and an investigation of popular former president Luiz Inacio Lula da Silva. The scandal threatens to unseat current President Dilma Rousseff.

In January, Brazilian prosecutors labeled Mossack Fonseca as a "big money launderer" and announced they had filed criminal charges against five employees of the firm's Brazilian office for their role in the scandal.

Employees of Mossack Fonseca were among those arrested by Brazilian police as part of Operation Car Wash. Image: RedeTV

Mossack Fonseca denies any wrongdoing in Brazil.

The disclosures found inside the law firm's leaked files dramatically expand on previous leaks of offshore records that ICIJ and its reporting partners have revealed in the past four years.

In the largest media collaboration ever undertaken, journalists working in more than 25 languages dug into Mossack Fonseca's inner workings and traced the secret dealings of the law firm's customers around the world. They shared information and hunted down leads generated by the leaked files using corporate filings, property records, financial disclosures, court documents and interviews with money laundering experts and law-enforcement officials.

Reporters at Süddeutsche Zeitung obtained millions of records from a confidential source and shared them with ICIJ and other media partners. The news outlets involved in the collaboration did not pay for the documents.

Before Süddeutsche Zeitung obtained the leak, German tax authorities bought a smaller set of Mossack Fonseca documents from a whistleblower, a move that triggered the raids in Germany in early 2015. This smaller set of files has since been offered to tax authorities in the United Kingdom, the United States and other countries, according to sources with knowledge of the matter.

The larger set of files obtained by the news organizations offers more than a snapshot of one law firm's business methods or a catalog of its more unsavory customers. It allows a far-reaching view into an industry that has worked to keep its practices hidden — and offers clues as to why efforts to reform the system have faltered.

The story of Mossack Fonseca is, in many ways, the story of the offshore system itself.

Crime of the century

Before dawn on Nov. 26, 1983, six robbers slipped into the Brink's-Mat warehouse at London's Heathrow Airport. The thugs tied up the security guards, doused them in gasoline, lit a match and threatened to set them afire unless they opened the warehouse's vault. Inside, the thieves found nearly 7,000 gold bars, diamonds and cash.

"Thanks ever so much for your help. Have a nice Christmas," one of the crooks said as they departed.

British media dubbed the heist the "Crime of the Century." Much of the loot — including the cash reaped by melting the gold and selling it — was never recovered. Where the missing money went is a mystery that continues to fascinate students of England's underworld.

Mossack Fonseca co-founder Jürgen Mossack.

Now documents within Mossack Fonseca's files reveal that the law firm and its co-founder, Jürgen Mossack, may have helped the conspirators keep the spoils out of the hands of authorities by protecting a company tied to

Gordon Parry, a London wheeler-dealer who laundered money for the Brink's-Mat plotters.

Sixteen months after the robbery, the records show, Mossack Fonseca set up a Panama shell company called Feberion Inc. Jürgen Mossack was one the company's three "nominee" directors, a term used in the business for stand-ins who control a company on paper but exercise no real authority over its activities.

An internal memo written by Mossack shows he was aware in 1986 that the company was "apparently involved in the management of money from the famous theft from Brink's-Mat in London. The company itself has not been used illegally, but it could be that the company invested money through bank accounts and properties that was illegitimately sourced."

Mossack Fonseca records from 1987 make it clear that Parry was behind Feberion. Rather than help authorities gain access to Feberion's assets, the law firm took steps that prevented U.K. police from gaining control of the company, the records show.

After police obtained the two certificates that controlled the company's ownership, Mossack Fonseca arranged for Feberion to issue 98 new shares, a move that appears to have effectively wrested control away from investigators, the leaked records show.

It was not until 1995 — three years after Parry was sent to prison for his role in the gold caper — that

Mossack Fonseca ended its business relationship with Feberion.

A spokesman for the law firm said any allegations the firm helped shield the proceeds of the Brink's-Mat robbery "are entirely false." The spokesman said Jürgen Mossack "never had any dealings" with Parry and was never contacted by police about the case.

Mossack Fonseca's defense of the dodgy company illustrates how far many offshore operatives will go to serve their customers' interests.

The offshore system relies on a sprawling global industry of bankers, lawyers, accountants and these go-betweens who work together to protect their clients' secrets. These secrecy experts use anonymous companies, trusts and other paper entities to create complex structures that can be used to disguise the origins of dirty money.

"They are the gasoline that runs the engine," says Robert Mazur, a former U.S. drug agent and author of The Infiltrator: My Secret Life Inside the Dirty Banks Behind Pablo Escobar's Medellín Cartel. "They're an extraordinarily important piece of the formula of success for criminal organizations."

Mossack Fonseca told ICIJ that it follows "both the letter and spirit of the law. Because we do, we have not once in nearly 40 years of operation been charged with criminal wrongdoing."

The men who founded the firm decades ago — and continue today as its main partners — are well-known figures in Panamanian society and politics.

Mossack Fonseca co-founder Ramón Fonseca.

Jürgen Mossack is a German immigrant whose father sought a new life in Panama for his family after serving in Hitler's Waffen-SS during World War II. Ramón Fonseca is an award-winning novelist who has worked in recent years as an adviser to Panama's president. He took a leave of absence as presidential adviser in March after his firm was implicated in the Brazil scandal and ICIJ and its partners began to ask questions about the law firm's practices.

From its base in Panama, one of the world's top financial secrecy zones, Mossack Fonseca seeds anonymous companies in Panama, the British Virgin Islands and other financial havens.

The law firm has worked closely with big banks and big law firms in places like The Netherlands, Mexico, the United States and Switzerland, helping clients move money or slash their tax bills, the secret records show.

An ICIJ analysis of the leaked files found that more than 500 banks, their subsidiaries and branches have worked with Mossack Fonseca since the 1970s to help clients manage offshore companies.

UBS set up more than 1,100 offshore companies through Mossack Fonseca. HSBC and its affiliates created more than 2,300.

In all, the files indicate Mossack Fonseca worked with more than 14,000 banks, law firms, company incorporators and other middlemen to set up companies, foundations and trusts for customers, the records show.

Mossack Fonseca says these middlemen are its true clients, not the eventual customers who use offshore companies. The firm says these middlemen provide additional layers of oversight for reviewing new customers. As for its own procedures, Mossack Fonseca says they often exceed "the existing rules and standards to which we and others are bound."

In its efforts to protect Feberion Inc., the shell company linked to the Brink's-Mat gold heist, Mossack Fonseca used the services of a Panama-based firm, Chartered Management Company, run by Gilbert R.J. Straub, an American expatriate who played a cameo role in the Watergate scandal.

In 1987, as U.K. police were investigating the shell company, Jürgen Mossack and Feberion's other paper directors resigned, with the understanding they'd be replaced by new directors appointed by Straub's Chartered Management, the secret files show.

Straub was eventually caught in a U.S. Drug Enforcement Administration sting that was unrelated to the Brink's-Mat case, according to

Mazur, the former undercover agent. During one of his deep-cover stints, Mazur built the case that led Straub to plead guilty to money laundering in 1995. Believing Mazur was a well-connected money launderer, Straub tried to establish his own criminal bona fides, Mazur says, by describing how he'd illegally channeled cash to President Nixon's 1972 re-election campaign.

Secrets and victims

Nick Kgopa's father died when Nick was 14. His father's workmates at a gold mine in northern South Africa said Nick's dad had been killed by chemical exposure.

Nick and his mother and his younger brother, who is deaf, survived thanks to monthly checks from a fund for widows and orphans of mineworkers.

One day the payments stopped.

Gold miners in South Africa. Photo: AP Photo / Themba Hadebe

His family was one of many that lost out because of a $60 million investment fraud pulled off by South African businessmen. Prosecutors alleged that a group of individuals connected to an asset management company, Fidentia, had schemed to loot millions from investment funds — including the mineworkers' death benefits pool

that was supporting some 46,000 widows and orphans.

Mossack Fonseca's leaked documents show that at least two of the men involved in the fraud used the Panama-based law firm to create offshore companies — and that Mossack Fonseca was willing to help one of the fraudsters protect his money even after authorities publicly linked him to the scandal.

Ponzi schemers and other fraudsters who bilk large numbers of victims often use offshore structures to pull of their schemes or hide the proceeds. The Fidentia case isn't the only big-ticket fraud that appears in the files of Mossack Fonseca's clients.

In Indonesia, for example, small investors claim a company incorporated by Mossack Fonseca in the British Virgin Islands was used to scam 3,500 people out of at least $150 million.

"We really need that money for our son's education fee this April," one Indonesian investor emailed Mossack Fonseca in April 2007 after payouts had stopped.

"You can give us any suggestion something we can do," the investor asked in broken English after seeing Mossack Fonseca's name on the investment fund's advertising leaflet.

In the Fidentia case, Mossack Fonseca's records show that one of the men later jailed in South Africa for his role in the fraud, Graham Maddock, paid Mossack Fonseca $59,000 in 2005 and 2006 to

create two sets of offshore companies, including one called Fidentia North America. The law firm's records say it gave him "the VIP service."

Mossack Fonseca also created offshore structures for Steven Goodwin, a man that prosecutors later claimed had played an "instrumental role" within the Fidentia swindle. As the scandal broke in 2007, Goodwin flew to Australia, then to the U.S., where a Mossack Fonseca lawyer met with him at a luxury hotel in Manhattan to discuss his offshore holdings, the firm's internal records show.

The firm official later wrote that he and Goodwin "spoke deeply" about the Fidentia scandal and that he had "convinced Goodwin to better protect" his offshore company's assets by passing them to a third party.

In his memo, the firm official told colleagues that Goodwin wasn't involved in the scandal "in any way whatsoever" — he was just "a victim of the circumstances."

In April 2008, the FBI arrested Goodwin in Los Angeles and sent him back to South Africa, where he pleaded guilty to fraud and money laundering. He was sentenced to 10 years in prison.

A month after Goodwin's sentencing, an employee at Mossack Fonseca suggested a plan for frustrating South African prosecutors who were expected to start digging into assets linked to Goodwin's offshore company, Hamlyn Property LLP, which had been set up to buy real estate in South Africa.

The employee proposed having an accountant "prepare" audits for 2006 and 2007 "to try to prevent the prosecutor from taking actions against the entities behind Hamlyn." He set off "prepare" in quote marks in his email.

It's unclear whether the proposal was adopted.

Mossack Fonseca did not answer questions from ICIJ about its relationship with Goodwin. A representative for Goodwin told ICIJ that Goodwin "had nothing whatsoever" to do Fidentia's collapse "or anything directly or indirectly to do with the 46,000 widows and orphans."

Politically exposed

On Feb. 10, 2011, an anonymous company in the British Virgin Islands named Sandalwood Continental Ltd. loaned $200 million to an equally shadowy firm based in Cyprus called Horwich Trading Ltd.

The following day, Sandalwood assigned the rights to collect payments on the loan — including interest — to Ove Financial Corp., a mysterious company in the British Virgin Islands.

For those rights, Ove paid $1.

But the money trail didn't end there.

The same day, Ove reassigned its rights to collect on the loan to a Panama company called International Media Overseas.

It too paid $1.

In the space of 24 hours the loan had, on paper, traversed three countries, two banks and four companies, making the money all but untraceable in the process.

Close allies of Russian President Vladimir Putin make extensive use of offshore holdings to shuffle large sums of money. Photo: AP Photo / Krill Kudryavtsev

There were plenty of reasons why the men behind the transaction might want it disguised, not least of all because the money trail came uncomfortably close to Russian leader Vladimir Putin.

St. Petersburg-based Bank Rossiya, an institution whose majority owner and chairman has been called one of Putin's "cashiers," established Sandalwood Continental and directed the money flow.

International Media Overseas, where rights to the interest payments from the $200 million appear to have landed, was controlled, on paper, by one of Putin's oldest friends, Sergey Roldugin, a classical cellist who is godfather to Putin's eldest daughter.

The $200 million loan was one of dozens of transactions totaling at least $2 billion found in the Mossack Fonseca files involving people or companies linked to Putin. They formed part of a

Bank Rossiya enterprise that gained indirect influence over a major shareholder in Russia's biggest truck maker and amassed secret stakes in a key Russian media property.

Suspicious payments made by Putin's cronies may have in some cases been designed as payoffs, possibly in exchange for Russian government aid or contracts. The secret documents suggest that much of the loan money originally came from a bank in Cyprus that at the time was majority owned by the Russian state-controlled VTB Bank.

In a media conference call last week, Putin spokesman Dmitry Peskov said the government wouldn't reply to "honey-worded queries" from ICIJ or its reporting partners, because they contain questions that "have been asked hundreds of times and answered hundreds of times."

Peskov added that Russia has "available the full arsenal of legal means in the national and international arena to protect the honor and dignity of our president."

Under national laws and international agreements, firms like Mossack Fonseca that help create companies and bank accounts are supposed to be on the lookout for clients who may be involved in money laundering, tax evasion or other wrongdoing. They are required to pay special attention to "politically exposed persons" — government officials or their family members or associates. If someone is a "PEP," the middlemen creating their companies are expected to review

their activities carefully to make sure they are not engaging in corruption.

Mossack Fonseca told ICIJ that it has "duly established policies and procedures to identify and handle those cases where individuals" qualify as PEPs.

Often, Mossack Fonseca appeared not to realize who its customers were. A 2015 internal audit found that the law firm knew the identities of the real owners of just 204 of 14,086 companies it had incorporated in Seychelles, a tax haven in the Indian Ocean.

British Virgin Islands authorities fined Mossack Fonseca $37,500 for violating anti-money-laundering rules because the firm incorporated a company for the son of former Egyptian President Hosni Mubarak but failed to identify the connection, even after the father and son were charged with corruption in Egypt. An internal review by the law firm concluded, "our risk assessment formula is seriously flawed."

In all, an ICIJ analysis of the Mossack Fonseca files identified 61 family members and associates of prime ministers, presidents or kings.

The records show, for example, that the family of Azerbaijan President Ilham Aliyev used foundations and companies in Panama to hold secret stakes in

gold mines and London real estate. The children of Pakistani Prime Minister Nawaz Sharif also owned London real estate through companies created by Mossack Fonseca, the law firm's records show.

Family members of at least eight current or former members of China's Politburo Standing Committee, the country's main ruling body, have offshore companies arranged though Mossack Fonseca. They include President Xi's brother-in-law, who set up two British Virgin Islands companies in 2009.

Representatives for the Azeri, Pakistani and Chinese leaders did not respond to requests for comment.

The list of world leaders who used Mossack Fonseca to set up offshore entities includes the current president of Argentina, Mauricio Macri, who was director and vice president of a Bahamas company managed by Mossack Fonseca when he was a businessman and the mayor of Argentina's capital, Buenos Aires. A spokesman for Macri said the president never personally owned shares in the firm, which was part of his family's business.

During the bloodiest days of Russia's 2014 invasion of the Ukraine's Donbas region, the documents show, representatives of Ukrainian leader Petro Poroshenko scrambled to find a copy of a home utility bill for him to complete the paperwork to create a holding company in the British Virgin Islands.

A spokesperson for Poroshenko said the creation of the company had nothing to do with "any political and military events in Ukraine." Poroshenko's financial advisers said the president didn't include the BVI firm in his 2014 financial disclosures because neither the holding company nor two related companies in Cyprus and the Netherlands have any assets. They said that the companies were part of a corporate restructuring to help sell Poroshenko's confectionery business.

When Sigmundur David Gunnlaugsson became Iceland's prime minister in 2013 he concealed a secret that could have damaged his political career. He and his wife shared ownership in an offshore company in the British Virgin Islands when he entered parliament in 2009. He sold his stake in the company months later to his wife for $1.

The company held bonds originally worth millions of dollars in three giant Icelandic banks that failed during the 2008 global financial crash, making it a creditor in their bankruptcies. Gunnlaugsson's government negotiated a deal with creditors last year without disclosing his family's financial stake in the outcome.

Gunnlaugsson has denied in recent days that his family's financial interests influenced his stances. The leaked records do not make it clear whether Gunnlaugsson's political positions benefited or hurt the value of the bonds held through the offshore company.

Iceland Prime Minister Sigmundur David Gunnlaugsson and his wife Anna Sigurlaug Pálsdóttir.

In an interview with an ICIJ media partners, Reykjavik Media and SVT, Gunnlaugsson denied hiding assets. When he was confronted with the name of the offshore company linked to him — Wintris Inc. — the prime minister said "I'm starting to feel a bit strange about these questions because it's like you are accusing me of something."

Soon after, he ended the interview.

Four days later, his wife took the matter public, posting a note on Facebook asserting that the company was hers, not his, and that she had paid all taxes on it.

Since then, members of Iceland's parliament have questioned why Gunnlaugsson never disclosed the offshore company, with one lawmaker calling for the prime minister and his government to resign.

The prime minister has fought back, putting out an eight-page statement arguing he wasn't required to publicly report his connection to Wintris because it was really owned by his wife and because it was "merely a holding company, not a company engaged in commercial activities."

Offshore cover-ups

In 2005, a tour boat called the Ethan Allen sank in New York's Lake George, drowning 20 elderly tourists. After the survivors and families of the dead sued, they learned the tour company had no insurance because fraudsters had sold it a fake policy.

Malchus Irvin Boncamper, an accountant on the Caribbean island of St. Kitts, pleaded guilty in a U.S. court in 2011 to helping the con artists launder proceeds of their frauds.

The Ethan Allen tour boat brought to the surface after sinking in Lake George, New York. Photo: AP Photo / Mary Altaffer

This created a problem for Mossack Fonseca, because Boncamper had served as the front man — a "nominee" director — for 30 companies created by the law firm.

Once it learned of Boncamper's criminal conviction, Mossack Fonseca took quick action. It told its offices to replace Boncamper as director of the companies — and to backdate the records in a way that made it appear the changes had taken place, in some cases, a decade earlier.

The Boncamper case is one of the examples in the leaked files showing the law firm using

questionable tactics to hide its own methods or its customers' activities from legal authorities.

In the "Operation Car Wash" case in Brazil, prosecutors allege that Mossack Fonseca employees destroyed and hid documents to mask the law firm's involvement in money laundering. A police document says that, in one instance, an employee of the firm's Brazil branch sent an email instructing co-workers to hide records involving a client who may have been the target of a police investigation: "Do not leave anything. I will save them in my car or at my house."

In Nevada, the leaked files show, Mossack Fonseca employees worked in late 2014 to obscure the links between the law firm's Las Vegas branch and its headquarters in Panama in anticipation of a U.S. court order requiring it to turn over information on 123 companies incorporated by the law firm. Argentine prosecutors had linked those Nevada-based companies to a corruption scandal involving an associate of former presidents Néstor Kirchner and Cristina Fernández de Kirchner.

In an effort to free itself from the American court's jurisdiction, Mossack Fonseca claimed that its Las Vegas office, MF Nevada, wasn't in fact a branch office at all. It said it had no control over the office.

The firm's internal records show the opposite. They indicate that the firm controlled MF Nevada's bank account and the firm's co-founders and another Mossack Fonseca official owned 100 percent of MF Nevada.

To erase evidence of the connection, the law firm arranged to remove paper documents from the branch and worked to delete computer traces of the link between the Nevada and the Panama operations, internal emails show. One big worry, an internal email said, was that the branch's manager might be too "nervous" to carry out the effort, making it easy for investigators to discover "that we are hiding something."

Mossack Fonseca declined to answer questions about the Brazil and Nevada affairs, but denied generally that it had obstructed investigations or covered up improper activities.

A sign for MF Corporate Services outside a buisness complex in Las Vegas, Nevada. Photo: McClatchy / Ronda Churchill

"It is not our policy to hide or destroy documentation that may be of use in any ongoing investigation or proceeding," the firm said.

Reforming the secret world

In 2013, U.K. leader David Cameron urged his country's overseas territories — including the British Virgin Islands — to work with him to "get our own houses in order" and join the fight against tax evasion and offshore secrecy.

He could have looked no further than his late father to see how challenging that would be.

Ian Cameron, a stockbroker and multimillionaire, was a Mossack Fonseca client who used the law firm to shield his investment fund, Blairmore Holdings, Inc., from U.K. taxes.

The fund's name came from Blairmore House, his family's ancestral country estate. Mossack Fonseca registered the investment fund in Panama even though many of its key investors were British. Ian Cameron controlled the fund from its birth in 1982 until his death in 2010.

A prospectus for investors said the fund "should be managed and conducted so that it does not become resident in the United Kingdom for United Kingdom taxation purposes."

The fund did this by using untraceable certificates of ownership known as "bearer shares" and by employing "nominee" company officers based in the Bahamas, the law firm's leaked records show.

Ian Cameron's tax-haven history is an example of how deeply offshore secrecy is woven into the lives of political and financial elites around the world. It's also an important economic engine for many countries. The weight of that self-interest has made reform difficult.

In the U.S., for example, states like Delaware and Nevada, which have allowed company owners to remain anonymous, continue to fight against efforts to require greater corporate transparency.

Mossack Fonseca's home country, Panama, has refused to embrace a plan for worldwide exchange of information about bank accounts — out of concern that its offshore industry could be left at a competitive disadvantage. Panama officials say they will exchange information, but on a more modest scale.

The challenge that reformers and law enforcers face is how to find and stop criminal behavior when it's buried beneath layers of secrecy. The most effective tool for breaking through this secrecy has been leaks of offshore documents that have dragged hidden dealings into the open.

Document leaks uncovered by ICIJ and its media partners have prompted legislation and official investigations in dozens of countries — and fanned fears among offshore customers who worry their secrets will be revealed.

In April 2013, after ICIJ released its "Offshore Leaks" stories based on confidential documents from the British Virgin Islands and Singapore, some Mossack Fonseca customers emailed the firm looking for reassurance that their offshore holdings were safe from scrutiny.

Mossack Fonseca told customers not to worry. It said its commitment to its clients' privacy "has always been paramount, and in this regard your confidential information is stored in our state-of-the-art data center, and any communication within our global network is handled through an

encryption algorithm that complies with the highest world-class standards."

This story was reported and written by Bastian Obermayer , Gerard Ryle, Marina Walker Guevara, Michael Hudson, Jake Bernstein, Will Fitzgibbon, Mar Cabra, Martha M. Hamilton, Frederik Obermaier, Ryan Chittum, Emilia Diaz-Struck, Rigoberto Carvajal, Cécile Schilis-Gallego, Marcos Garcia Rey, Delphine Reuter, Matthew Caruana Galizia, Hamish Boland-Rudder, Miguel Fiandor and Mago Torres.

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Clarification: Due to an editing error, a sentence in an earlier version of this story implied that the prime minister of Pakistan controlled an offshore company that appeared in the Panama Papers files. It is his children who control the offshore companies.

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The Panama Papers-An Incentive for 'Spring Cleaning'; Outside Counsel

New York Law Journal (Online)

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Body

The release by the International Consortium of Investigative Journalists (ICIJ) in early April of documents from the files of the Panamanian law firm Mossack Fonseca and additional releases of details of offshore transactions involving well-known public figures, corporations and law firms (the Panama Papers) have shone a light on the use of offshore accounts and shell entities to shield the identities of the real parties to a variety of transactions.

https://panamapapers.icij.org. The names of individuals and entities as diverse as the Prime Minister of Iceland, soccer's world governing body, FIFA, and Pablo Picasso's granddaughter have appeared in connection with the releases. The releases have resulted in a flurry of articles concerning tax avoidance, U.S. and non-U.S. tax loopholes, and the role of the legal profession in these transactions. The commentary and speculation will in all likelihood continue as more information is released.

An additional, and perhaps as important, concern raised by the release of the Panama Papers is the manner in which the information was obtained. The ICIJ (along with the German newspaper Suddeutsche Zeitung) received the documents, numbering in the millions, through a cyber-leak at Mossack Fonseca. Regardless of whether the leak originated inside the firm or was the work of an outside hacker, it focuses attention on the vulnerability of law firms that are responsible for maintaining the confidentiality of their clients' files.

A number of articles discussing the Panama Papers have included the allegation that the legal profession has been complicit-and even supportive-in assisting the wealthy in hiding their gains, ill-gotten or otherwise, in secrecy jurisdictions. Similar concerns have been raised about the use of offshore vehicles to hide the proceeds of money laundering and to finance terrorism.

The issue was highlighted earlier this year when Global Witness, an international investigative group, released videos of its meetings with a number of U.S. lawyers purportedly seeking advice and representation for a West African minister of mining who wanted to use what were clearly ill-gotten funds for a number of extravagant investments in the United States. Whether out of ignorance of the law, an overly active business development gene, or a lawyer's inbred courtesy to any potential client, the lawyers, with one exception, appeared eager to assist in suggesting ways the transaction could be structured. Many of the suggestions involved use of offshore accounts or entities. https://youtube.com/globalwitness.

None of the law firms whose names have been mentioned in the Panama Papers or those who were featured in the Global Witness videos have been accused of wrongdoing. As many, including President Barack Obama, have pointed out, "a lot of this stuff is legal." Rupert Neate and David Smith, "Obama Calls for International Tax Reform Amid Panama Papers Revelations," The Guardian, April 5, 2016. Thus, an initial inquiry may be whether there should be reform of the tax laws that permit these types of transactions. Whether the laws should be reformed is an issue for Congress and the Executive Branch to grapple with in the coming months and years.

Meanwhile, it is questionable whether lawyers should be criticized for advising their clients concerning tax strategies that are legal. Even if a lawyer may find a particular tax strategy distasteful, it is not difficult to foresee a malpractice suit against a lawyer who fails to advise her client of that strategy simply because she does not like it. See ABA Model Rule of Professional Conduct 1.2(a) (adopted in most states in varying forms) ("a lawyer shall abide by a client's decisions concerning the objectives of representation and...shall consult with the client as to the means by which they are to be pursued."). The lawyer can recommend against it or, in certain circumstances, resign, but, provided the conduct is legal, it is up to the client to decide whether to pursue it.

The vast majority of lawyers abide by applicable law and by ABA Model Rule 1.2(d) that "[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent....," and, as noted above, the fact that the name of a lawyer or law firm appeared in the Panama Papers does not mean it has broken the law.

Nevertheless, there will in all likelihood be a continued discussion of whether the United States should adopt a lawyer regulatory scheme that could mandate "know your customer" procedures similar to those used in the United Kingdom and a number of other non-U.S. jurisdictions. Such procedures could include mandatory due diligence at the outset of engagements and on a continuing basis requiring lawyers to have a reasonable belief as to the true identity of the client, the nature or origin of any funds being used for a transaction, and the true nature of the matter they are being asked to undertake.

Although a number of U.S. law firms, particularly those with offices outside the United States, conduct some form of such due diligence as part of their client intake procedures, it is not mandatory here. It is likely, however, that the legal profession will be under increased scrutiny as the Panama Papers revelations continue.

Accordingly, lawyers and law firms should view the Panama Papers as an opportunity to do some internal review to (1) determine whether they have procedures in place to avoid running afoul of the law and the applicable ethical rules, and (2) develop or enhance those procedures where needed to ensure that they are protected against a Panama Papers or Global Witness-type incident.

1. Review Client/Matter Intake Procedures. Firms should review their client intake and screening procedures to ensure that they know who their clients are. Most large firms, particularly those with offices outside the United States, utilize software to check not only for those individuals and entities in embargoed jurisdictions but also for those that may raise questions about the origin of the funds involved or the purpose of the transactions.

The same screening should be done on the type of matter proposed. Is this a transaction that will involve work in a jurisdiction known for having weak controls, financial or otherwise? Is this a client the firm should take on? The best way to deal with a problem client is not to take on the representation in the first place.

Ideally, the procedures should include a periodic review of current clients as well. To conserve resources, firms may choose to limit this review to those practice areas that are particularly vulnerable to the potential for abuse, such as real estate, tax, estate planning, representation of public figures, and any other areas where concealing one's identity may be appealing. This is not intended to suggest that clients in those areas are law-breakers but rather that these matters should receive additional scrutiny.

As noted above, the use of offshore accounts and shell entities is relevant not only to tax avoidance but also to money laundering and terrorist financing as well. In 2010, the American Bar Association issued a paper entitled "Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing." The Guidance sets forth suggested, not mandatory, procedures, but it provides a road map for lawyers to determine what procedures may be right for their firm. See also ABA Formal Op. No. 463 (2013) (Client Due Diligence, Money Laundering, and Terrorist Financing). Some firms have also looked to the anti-money laundering regimes in the United Kingdom and other non-U.S. jurisdictions for guidance.

2. Know Your Local Counsel. To state the obvious, most, if not all, offshore transactions need the involvement of local counsel. Lawyers should establish a policy of "knowing their local counsel." Firms should take pains to ensure

that the local counsel they hire for their clients adhere to the same standards they do. This should be true for all local counsel, not just those outside the United States. Developing a list of dependable and trustworthy local counsel, standardized procedures for retaining local counsel, and a standard retention letter will help in this effort.

3. Plug Those Leaks. Every law firm is struggling with cybersecurity issues. The release of the Panama Papers illustrates with clarity how client confidences can be breached when there is a leak. Although some may argue that the leak in this instance performed a public service, the fact remains that the majority of lawyers have been charged with safekeeping records of clients who have sought legal services for legitimate purposes and have a right to expect that their confidences will be preserved.

There is no 100 percent foolproof way to avoid leaking or hacking, but firms need to have procedures in place to minimize such events and any damage that may be caused. An increasing number of clients are requiring their outside counsel to have robust security systems in place. Firms may wish to review their policies and procedures with respect to whether all lawyers in the firm should be allowed access to all client information or just that of the clients they are working for, how much access to the firm's systems outside vendors should have, how lawyers and staff access the firm's systems from remote sites, and whether and how lawyers and staff should be allowed to use flash drives, to name just a few areas of concern. The release of the Panama Papers underscores the importance of this effort.

The same is true for local counsel. Law firms should require local counsel to certify that their systems are up to the standards the firms establish for themselves and reserve the right to audit local counsel's procedures.

4. Train Your Lawyers-and Staff. The firm's lawyers, and its staff, need to understand the significance of the issues raised by the Panama Papers. If they do not already have them, firms should develop training programs, for both lawyers and non-lawyers, on proper client intake procedures, local counsel selection, and, of course, cybersecurity. Members of staff are often on the front line, and training may enable them to spot something that "does not look right." The "if you see something, say something" approach may prevent a potential problem the lawyers missed. Some firms have commenced training programs or have enhanced those already in place to cover these points.

This is not an exhaustive list of measures firms can or should take, but a little "spring cleaning" provides a good starting place for firms to avoid, at the least, an embarrassing incident or prevent a more serious charge of wrongdoing.

Load-Date: June 10, 2016

End of Document

HINSHAW

& CULBERTSON LLP

MEMORANDUM

NEW YORK OFFICE

HINSHAW BRIEFING (as of August 25, 2016)

Adoption of EU Market Abuse Regulations

Background:

The EU created a revised regulatory framework called the European Market Abuse Regulation ("MAR") effective July 3, 2016 with the purpose of fighting market abuse throughout the EU. The updated rulebook strengthens and replaces the existing Market Abuse Directive ("MAD") on market integrity and investor protection, first adopted in 2003.

The MAR prescribes rules relating to, inter alia, the disclosure of or dealing in inside information, the maintenance of insider lists of persons with access to insider information, and dealing in securities by persons discharging managerial responsibility ("PDMRs").

The new MAR is complemented by the Directive on Criminal Sanctions for Market Abuse. The Directive requires Member States to introduce common definitions of criminal offences of insider dealing and market manipulation, and to impose maximum criminal penalties for the most serious market abuse offences. Member States have to make sure that such behavior, including the manipulation of benchmarks, is a criminal offence, punishable with effective sanctions everywhere in Europe.

In 2003 the general objective to introduce EU regulations regarding market abuse was to create a level playing field for all economic operators in the EU Member States as part of the effort to combat market abuse by reinforcing market integrity, contributing to the harmonization of the rules for market abuse throughout Europe, establishing a strong commitment to transparency and equal treatment of market participants, and requiring closer co-operation and a higher degree of exchange of information between national authorities, thus ensuring the same framework for enforcement throughout the EU and reducing potential inconsistencies, confusion and loopholes.

Purpose of the MAR:

The purpose of the new MAR and Directive on Criminal Sanctions for Market Abuse is to enhance market integrity and investor protection. To this end, the MAR updates and strengthens the existing MAD framework by extending its scope to new markets and trading strategies and by introducing new technical requirements.

The scope of the MAR:

There are significant new extraterritorial aspects of the MAR. The MAR expands the scope to financial instruments traded on multilateral trading facilities ("MTF") and brings in a large number of securities that previously fell outside of the regime.

Specifically, the MAR adds several new requirements for covered issuers, including requiring issuers to

- create and maintain records evidencing compliance with rules for delaying disclosure of inside information (Article 7 and 17 of MAR),
- create and maintain records for disclosure of inside information as part of a market sounding (Article 11 of MAR),
- create and maintain expanded and more detailed lists of individuals possessing inside information in a new format(Article 18 of MAR),
- and provide "effective systems and controls" to require persons discharging managerial responsibility to seek consent to deal in securities at all times.

The requirements extend to, among others, an issuer's advisors acting on its behalf, including law firms.

Furthermore, Article 19 of the MAR requires PDMRs and persons closely associated with them to disclose to the issuer and the national regulator transactions in the issuer's financial instruments with a de minimis threshold of €5,000 per year within three business days. The PDMRs also have to ensure that this notification is disclosed to the market as well. Finally, PDMRs are prohibited to deal when possessing inside information or when in a "closed period".

To allow an effective implementation of the new rules, Article 4 of MAR empowered the European Securities and Markets Authority ("ESMA") to develop draft regulatory technical standards (RTS) and implementing technical standards (ITS) which all issuers should apply in order to comply with MAR. (Latest version of the standards: https://www.esma.europa.eu/sites/default/files/library/2015/11/2015-esma-1455_-_final_report_mar_ts.pdf).

In the Annex to the Implementing Regulation to the MAR (EU) 2016/347 forms are set out regarding the insider lists. (See standards for insider lists here: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0347&from=EN)

The MAR also imposes minimum remedies and maximum penalties for violation of the MAR that all EU Member States must have available as part of their enforcement regimes. These civil remedies work in conjunction with the Directive on Criminal Sanctions for Market Abuse.

Application of the new MAR:

In contrast to the MAD, the MAR directly applies throughout the EU by its own without requiring the EU Member States to introduce new national laws. It also replaces all existing national market abuse rules. This means that all issuers and persons acting on their behalf have to meet the new requirements, regardless of differing national regulations.

However, the new Directive on Criminal Sanctions for Market Abuse does not apply directly throughout the EU but requires the EU Member States to introduce common definitions of criminal offences of insider dealing and market manipulation, and to impose maximum criminal penalties for the most serious market abuse offences.

According to Article 2 (1) of the Regulation, the MAR applies to issuers with financial instruments admitted to trading (or for which a request for admission has been made) on an EU regulated market and to issuers with financial instruments, such as debt securities, admitted to trading (or for which a request for admission has been made) on a MTF. It is important to understand that this means that transactions in relation to financial instruments issued by non-EU issuers might be subject to the MAR when they are capable of being traded in an EU trading venue. For example, if two US fund managers (A and B) are trading in the shares of a third US issuer (C) and those shares are admitted to be traded on an MTF in Europe, the two US fund managers A and B will be subject to MAR, even when the trade takes place in the US.

By January 2018, the ESMA will publish a final list of all financial instruments subject to the MAR. It is expected that this list will also introduce financial instruments traded on an organized trading facility and derivative instruments whose price or value depends on or has an effect on the price of a financial instrument, as further categories subject to the MAR.

Until the final list is published the instruments below are regarded as financial instruments under the MAR (Listed here as well: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32014L0065 Annex I, Section C):

- Transferable securities;
- Money-market instruments;
- Units in collective investment undertakings;
- Options, futures, swaps, forward rate agreements and any other derivative contracts relating to securities, currencies, interest rates or yields, emission allowances or other derivatives instruments, financial indices or financial measures that may be settled physically or in cash;
- Options, futures, swaps, forwards and any other derivative contracts relating to commodities that must be settled in cash or may be settled in cash at the option of one of the parties other than by reason of default or other termination event;
- Options, futures, swaps, and any other derivative contract relating to commodities that can be physically settled provided that they are traded on a regulated market, a MTF, or

an organized trading facilities ("OTF"), except for wholesale energy products traded on an OTF that must be physically settled;

- Options, futures, swaps, forwards and any other derivative contracts relating to commodities, that can be physically settled not otherwise mentioned in point 6 of this Section and not being for commercial purposes, which have the characteristics of other derivative financial instruments;

- Derivative instruments for the transfer of credit risk;

- Financial contracts for differences;

- Options, futures, swaps, forward rate agreements and any other derivative contracts relating to climatic variables, freight rates or inflation rates or other official economic statistics that must be settled in cash or may be settled in cash at the option of one of the parties other than by reason of default or other termination event, as well as any other derivative contracts relating to assets, rights, obligations, indices and measures not otherwise mentioned in this Section, which have the characteristics of other derivative financial instruments, having regard to whether, inter alia, they are traded on a regulated market, OTF, or an MTF;

- Emission allowances consisting of any units recognized for compliance with the requirements of Directive 2003/87/EC (Emissions Trading Scheme).

Question Presented

This memorandum addresses the following questions:

1. *What measures should US law firms take to comply with MAR?*

2. *Should they proactively create and maintain insider lists for all of their clients subject to MAR with respect to which they have inside information?*

3. *Should they do so only if a client requests them to do so and identifies the information the firm has that is non-public?*

Analysis:

1. What measures should US law firms take to comply with MAR?

First, US law firms that act on behalf or on account of issuers should advise their clients to **review and regularly monitor the full range of financial instruments** that they trade and where they are traded because all issuers, including non-EU issuers, will need to ensure that they have policies and procedures that cover all in-scope instruments of MAR and that they notify the competent authority of the trading venue of any financial instrument for which a request for admission to trading on their trading venue is made, which is admitted to trading, or which is traded for the first time.

In order for these clients to observe these measures, US law firms also need to explain the new rules and their implications to their clients.

US law firms should also advise their clients to **consider implementing new technical systems and controls** to ensure that the client's compliance departments are aware of any trading that falls within the scope of MAR.

ESMA delivered a first set of technical standards in September 2015. The latest draft of the set can be downloaded on the ESMA website (https://www.esma.europa.eu/sites/default/files/library/2015/11/2015-esma-1455_-_final_report_mar_ts.pdf) and should be used as a guideline for all issuers.

As MAR specifies significantly more detailed rules, US law firms should also **review and update their own and their clients' compliance policies**.

Furthermore, US law firms should **be aware of the key prohibited behaviors under MAR** such as (a) insider dealing (Article 8 of MAR); (b) unlawful disclosure of inside information (Article 10 of MAR); and (c) market manipulation (Article 12 of MAR), in order to be able to explain and counsel their clients and their employers about these prohibited behaviors and possible proactive measures. This is important because the definitions may vary from US regulations. For example, according to Article 8 of the MAR "Insider dealing" means that the person concerned has inside information and uses it when buying or selling financial instruments to which the information relates, and it is not required that the person dealing, or the tipper, to have been in breach of duty of confidence, nor does it require a mental element.

They should also be **aware of the definitions** of 'insider information' and the latest list of 'financial instruments'. According to Article 7 (1) (a) of the MAR, 'insider information' is "information of a precise nature, which has not been made public, relating, directly or indirectly, to one or more issuers or to one or more financial instruments, and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments". The term is further specified in paragraphs (b) to (d) in relation to commodity derivatives, to emission allowances or auctioned products based thereon, and for persons charged with the execution of orders concerning financial instruments. See the latest list of 'financial instruments' above.

Finally, US law firms that act on behalf or on account of an issuer should **create, maintain and update insider lists** of all persons who have access to inside information and who are working for them under a contract of employment, or otherwise performing tasks through which they have access to inside information, such as advisors, accountants or credit rating agencies, promptly update the insider list when it is required and provide the insider list to the competent authority as soon as possible upon its request. They should also advise their clients to do the same.

Issuers or any person acting on their behalf or on their account, shall also take all reasonable steps to ensure that **any person on the insider list acknowledges in writing the legal and regulatory duties** entailed and is aware of the sanctions applicable to insider dealing and unlawful disclosure of inside information.

2. *Should they proactively create and maintain insider lists for all of their clients subject to MAR with respect to which they have inside information?*

Article 18 (I) of MAR states: "Issuers or any person acting on their behalf or on their account, shall: (a) draw up a list of all persons who have access to inside information and who are working for them under a contract of employment, or otherwise performing tasks **through which they have access to inside information**, such as advisors, accountants or credit rating agencies (insider list); (b) promptly update the insider list in accordance with paragraph 4; and (c) provide the insider list to the competent authority as soon as possible upon its request."

We believe that this means that issuers or any person acting on their behalf only need to create insider lists event-specifically and when a third person actually has access to the inside information. The rule does not state that an issuer or a person on behalf of the issuer needs to create insider lists proactively for future access to insider information.

However, MAR will require a list to be drawn up and kept up to date in electronic format for a period of at least five years after it is drawn up or updated to ensure an immediate disclosure of the list to the authorities when they request it.

In addition, the insider lists need to be more detailed than the previous ones. Now, the birth name of the specific insider, his professional telephone numbers (direct dial and mobile), his date of birth and his national identification number (if applicable) needs to be provided.

However, issuers or US law firms acting on their behalf are able (but do not need) to split their insider lists into two parts: one for "permanent insiders" such as directors and other staff who, by nature of their position, have (or are permitted to have) access to all inside information within the issuer and the other for those persons within the issuer who have access to transaction or event-specific inside information.

The ESMA insider list format shall be used for this purpose (Forms may be found here: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0347&from=EN).

3. *Should they do so only if a client requests them to do so and identifies the information the firm has that is non-public?*

Regarding this question, a distinction must be made between a situation where a law firm creates, maintains and updates client's insider lists, and where a law firm creates, maintains and updates insider lists within its own sphere of obligation.

On the one hand, the MAR allows issuers to make arrangements with their advisors (e.g. law firms) for them to create, update and maintain a list of persons with access to inside information rather than require the issuer to create, update and maintain such lists itself. However, a law firm may only be aware of any information a client provides to the firm. As a result, law firms may only be able to create, update and maintain insider lists for their clients if they receive information about certain insiders from their clients. This usually occurs when a client asks the firm to create or update an insider list. Article 18 (2) of the MAR further states: "Where another person acting on behalf or on the account of the issuer assumes the task of drawing up and updating the insider list, the issuer remains fully responsible for complying with this Article." This means that the issuer, and not the person acting on his behalf, is responsible for creating, updating and maintaining the list in compliance with the MAR. Consequently, there is no need for US law firms to create or maintain lists without a client's request.

On the other hand, Article 18 (1) requires that a law firm acting on behalf or on account of an issuer who is subject to MAR shall draw up a list of all persons who have access to inside information received from that client, and who are working for the law firm under a contract of employment, or otherwise performing tasks through which they have access to a client's inside information. This action needs to be taken even without a client's request because it is a general duty to every person who is in possession of insider information and acting on behalf or on account of an issuer. Although it is not explicitly stated in Article 18, it may be recommended to provide a copy of an insider list to the client to enable the client to meet any request by the Financial Conduct Authority pursuant to the MAR.

Regulations:

REGULATION (EU) No 596/2014 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 16 April 2014 on market abuse (market abuse regulation)

http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32014R0596

Sample of insider list:

ANNEX I

TEMPLATE 1

Insider list: section related to [Name of the deal-specific or event-based inside information]

Date and time (of creation of this section of the insider list, i.e. when this inside information was identified): [*yyyy-mm-dd; hh:mm UTC (Coordinated Universal Time)*]

Date and time (last update): [*yyyy-mm-dd, hh:mm UTC (Coordinated Universal Time)*]

Date of transmission to the competent authority: [*yyyy-mm-dd*]

First name(s) of the insider	**Surname(s)** of the insider	**Birth surname(s)** of the insider (if different)	**Professional telephone number(s)** (work direct telephone line and work mobile numbers)	**Company name and address**	**Function and reason for being insider**	**Obtained** (the date and time at which a person obtained access to inside information)	**Ceased** (the date and time at which a person ceased to have access to inside information)	**Date of birth**	**National Identification Number** (if applicable)	**Personal telephone numbers** (home and personal mobile telephone numbers)	**Personal full home address:** street name; street number; city; post/zip code; country)
[Text]	[Text]	[Text]	[Numbers (no space)]	[Address of issuer/emission allowance market participant/auction platform/auctioneer/auction monitor or third party of insider]	[Text describing role, function and reason for being on this list]	[yyyy-mm-dd, hh:mm UTC]	[yyyy-mm-dd, hh:mm UTC]	[yyyy-mm-dd]	[Number and/or text]	[Numbers (no space)]	[Text: detailed personal address of the insider — Street name and street number — City — Post/zip code — Country]

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