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Practicing the Law of the World from New York

NYSBA

PRACTICUM: FORM AND POLICY

The *International Law Practicum* is a semi-annual publication of the International Section of the New York State Bar Association. The *Practicum* welcomes the submission of articles prepared by practicing attorneys. The length of an article, as a general rule, should not exceed 3,500 words, footnotes included. Shorter pieces, notes, reports on current or regional developments, and bibliographies are also welcomed. All manuscripts must be sent either (i) in laser printed triplicate accompanied by a 3½" disk formated in Microsoft Word or WordPerfect to: The *Practicum*, c/o Daniel J. McMahon, Esq., New York State Bar Association, One Elk Street, Albany, N.Y. 12207-1096; or (ii) by e-mail in Microsoft Word or Wordperfect format to either the Editor-in-Chief (david.detjen@alston.com) or the Executive Editor (thomas.backen@alston.com). Both text and endnotes must be double-spaced. Endnotes must appear at the end of the manuscript and should conform to *A Uniform System of Citation* (the Harvard Bluebook). Authors are responsible for the correctness of all citations and quotations. Manuscripts that have been accepted or published elsewhere will not be considered. The *Practicum* is primarily interested in practical issues facing lawyers engaged in international practice in New York. Topics such as international trade, licensing, direct investment, finance, taxation, and litigation and dispute resolution are preferred. Public international topics will be considered to the extent that they involve private international transactions or are of general interest to our readership.

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You Have a Problem Where? —Selecting and Managing International Counsel

[Editor's Note: The following is an edited transcript of the panel discussions which took place on 26 January 2011 as part of the activities of the International Section of the New York State Bar Association (NYSBA) during the annual meeting of the NYSBA at the New York Hilton in New York City.]

I. Introductory Remarks

CARL-OLOF BOUVENG: Good morning everybody. Ladies and gentlemen, I'm glad to see you all here this morning at the opening of the program to the International Section at the Annual Meeting. As the Chair of the International Section, I would like to welcome you here to this program featuring our Chapter Chairs.

This morning we are really featuring some of the jewels of the Section from our chapters overseas. We have close to seventy chapters all around the globe, and we have found a unique network which we use to organize our activities, whether it's here in New York, as today, or whether it is when we go abroad for our seasonal meetings in Europe, Asia or elsewhere. This network is always available to all members of the Section and can be used in daily business through a directory, which is easily available right on the web. Here in New York we also have committees covering all areas of substantive law, which work closely with both our chapters and all our members in New York.

Let me also mention a new program which we are putting on this year. It is a Global Law Week, which is going to be held in May, May 10 to 13th. It's kicked off on Tuesday with a program entitled "The Fundamentals in International Law." We have very successfully held it for two years already, and it is now going to be held for the third year. We have expanded that program into a Global Law Week, which will include a number of seminars throughout the week, which will be independent of each other, sort of a smorgasbord of events during that week. So please note that in your calendars, May 10th to 13th, here in New York.

We also have our sister meeting every year in the fall. This year it will be in Panama in September and the brochure is found outside, so please pick that one up if you haven't already done so.

Of course, if you're not already a member, you are most welcome to become part of this vibrant International Section, covering all our international practices and offering the network of foreign chapters.

But now it's time to get the show on the road. I would like to introduce Gerry Ferguson, and thank you, Timo Karttunen, as well, the Co-Chairs of this program, for the hard work getting us here.

GERALD FERGUSON: We thank Timo for the hard work, and we thank me for getting here. It was a little touch and go flying in last night, but it all worked out.

Let me talk a little bit about the way it's going to work today. This is not going to be people standing up and giving speeches to you. This is going to be a discussion about the practical aspects of identifying, retaining and working effectively with foreign counsel in jurisdictions around the world. What I've got, and the panel is prepared to discuss, is a series of questions that we have outlined that are the sort of questions that would occur to you if you have a legal problem in another jurisdiction, and either you are asked by your client or you're in-house in a company and you need to identify counsel outside the United States.

Carl-Olof referred to the chapters as the jewels of our section, and I can't agree with that enough. To me, one of the most exciting aspects of being a part of this section is the ability and opportunity it has given me to interact with lawyers from around the world who have experience with, commitment to, and interest in New York law. Those are the people that we are going to be highlighting in this part of the presentation today.

I also want to emphasize the value of questions. I suspect many of you are here because there's a particular issue or question that has occurred to you. This format uniquely suits itself to your being able to ask your questions. If at any point during this presentation you've got a follow-up question or something you hear sparks some interest in you, please raise your hand. We have got our list of questions, but our real list of questions are the questions that you have, and we can only know what those are if you tell us what they are. So if at any moment you have a question, don't worry about our agenda; your agenda is what's important to us here.

II. Americas Panel

MR. FERGUSON: The panels are organized roughly regionally. We are calling the first one the Americas, which I guess takes us from the Arctic Circle down to the tip of Argentina. We have an opening question, and I'll ask each of the panelists as I give the opening question to introduce themselves, talk a little bit about their practice and their background, and then we can get into the meat of what we're talking about here today.

The question I would like to start off with, for each of our panelists, is: What are the attorney licensing

requirements for your jurisdiction? What does it mean to be an attorney in your jurisdiction?

I'll start, if I may, with Chris MacLeod, so we'll start with a Canadian, an anglophone Canadian, perspective, and move south.

So Chris, first introduce yourself and then address that question.

CHRIS MacLEOD: Chris MacLeod with the firm Cambridge LLP. We are a boutique international litigation group based in Toronto, Ontario, Canada, focusing on multi-jurisdictional disputes and international arbitrations.

Just to go directly to the question, attorney licensing in Canada is done by province. We have ten provinces and three territories. My colleague from Quebec is from a unique province in Canada, and she'll speak directly to that. I'll give you the licensing requirements in Ontario, but they are very similar among the other common law provinces in Canada: You need a post-secondary law degree from an accredited school; you have to have passed the bar exam. Typically a Canadian law degree is three years. Following that you write a bar exam. You article for ten months. Typically to get into a law school you also have an undergraduate degree beforehand. So we sort of adopt both the English system and the American in that we article and we have an undergraduate degree before you get to law school.

Once you are called to the bar, you've done your articles, you've passed the bar exam, you then pay yearly dues to your law society. Each province has its own law society. You pay insurance: each province is a self-regulated, self-insured profession. You pay yearly dues. You do CLE credit hours ever year, and there's a self-reporting annual survey. These are the requirements to sustain and maintain your license, so that's the licensing requirements. So provided someone is duly called to the bar and pays his or her dues with his or her self-regulating body, he or she is a lawyer you could and should be using in Canada.

EMMANUELLE SAUCIER: Hi, I'm Emmanuelle Saucier. I'm from McMillan. McMillan is a national firm in Canada, and I am situated in Quebec. I am the head of the litigation group in Montreal in the province of Quebec.

So the requirements in Quebec are always different a bit from the rest of the Canada, because we pride ourselves as being different because we are a civil law jurisdiction. So we have two years of university. However, we do not need an undergraduate degree to apply to go in law. We could go directly from college. Then, after law school, we have six months at the bar school, and then six months as an articling student, and the rest of licensing. That's it.

ROSA ERTZE: Good morning, my name is Rosa Ertze; I'm an attorney at Duane Morris in Mexico and New York, working in the corporate practice group of Duane Morris.

In Mexico it is a bit different from Canada. We also go directly from high school to university, but in order to be an attorney you have to fulfill the graduation requirements of a five-year law program in a university law school that is authorized by the Ministry of Education. Once you graduate from law school they give you a law degree. After the law degree, the General Bureau of Professions of Mexico will grant you a professional license number, and that professional license number is required when you have to litigate in court with respect to civil, commercial and criminal matters. It is not strictly required for litigating labor law matters or for providing corporate deal advice. But it is very specific with some authorities, like the Mexican Banking and Securities Commission; if you're going to give your opinion, they require your license number.

So generally it is the license number on the law degree which serves as evidence that you are an attorney admitted to practice law in Mexico. Like in the U.S. at the federal level, once you are an attorney, you can practice in any state of Mexico.

MARCOS ROPPA: My name is Marcos Roppa. I work at Peixoto e Cury Advogados, a law firm in Brazil. We are focused on corporate basically, but we are also a full-service law firm.

To become a lawyer in Brazil it is actually quite simple. You just have your five-years of law school, which is probably roughly a mix of the American high school and the college, the university itself. And then you just have to pass the bar exam. The approval rates are quite low: probably around ten to fifteen percent. This is due to a large amount of law students that have been graduating in Brazil lately, with a lot of, I have to say, bad law schools, but that's the only requirement you have to fulfill. After that you can show up or work in any court or in any jurisdiction inside Brazil, whether it is in the state where you got your bar number or in any other state of Brazil.

GUILLERMO MALM GREEN: Good morning. My name is Guillermo Malm Green. I am a partner from Brons & Salas Abogados. We are also a full-service firm with offices in Buenos Aires, Cordoba and Rosario. After all that I've heard, I just want to focus on a few differences.

We are a country of lawyers, full of lawyers. And probably it's because being a lawyer is not that difficult compared with some of the other professions. Actually, it is a kind of modern Argentina that says you will become whatever your destiny will make of you, and if not, you will become a lawyer. That's why there are

so many lawyers around. So basically you study four, five, or six years, depending on how hard you study at the university. There is no real practice requirement to become a lawyer. However, at the end of law school you have one year of working pro bono under the supervision of another attorney as a kind of assignment to become a lawyer. As part of the course within the university, you don't pass a bar exam; you just apply for the application, and you get your number. There is no CLE requirement to maintain. Once you are a lawyer you may carry on any kind of practice in your jurisdiction.

Different from Canada, we don't have any kind of insurance requirement, which is something of a problem, because sometimes when we're dealing with American clients we are receiving a request or some kind of requirement to show them insurance. And it's hard for them to understand that, first, it is very expensive in Argentina; second, it is not that common to have insurance; and, third, there are no insurance policies available in general.

ZYGMUNT BRETT: Good morning. My name is Zygmunt Brett. I'm a partner at Arias & Munoz, which is our regional law firm. We have offices in El Salvador, Guatemala, Honduras, Nicaragua and Costa Rica. It is a full-service firm, and the attorney licensing requirements in El Salvador are just the same as in Mexico. I would just say that, after you get your law degree, you would also be required to do some preliminary internship practices, and these practices would entail some pro bono work, hearings or public defense in public offices before the courts, the Attorney General's office or DA's office.

MR. FERGUSON: Chris, we are certainly familiar in the United States how England historically had different branches of the profession, namely, barrister and solicitor, and anglophone Canada has adopted much from England. Are there different branches of the profession in anglophone Canada?

MR. MacLEOD: No. A lawyer could be a solicitor or barrister. We still refer to solicitors and barristers, but the distinction is all that's involved, although lawyers do specialize: employment lawyers, criminal lawyers. But there are some general practitioners, particularly in larger firms. In McMillan you'll see different practice groups. We are a boutique firm, litigation boutique. There is a growing number of boutiques.

I know part of your question to come is the role of a notary public.

MR. FERGUSON: We'll go into that. What about the role of a notary public?

(Laughter)

MR. MacLEOD: Well, let me say that notary publics in common law Canada—all but Quebec—are really just for authenticating a document. Many documents, both in the corporate context or as required by government agencies, need a notary seal. Not every lawyer is a notary public, but all lawyers can apply to be a notary public. There is a fee, and there is no extra requirement. You simply then obtain your stamp. Every lawyer is a commissioner for oaths; not every lawyer is a notary public, but every lawyer can become a notary public.

I know that notaries in Quebec—and I'll let my friend from Quebec speak to it—have a greater role, more in tune with a lot of civil code countries.

MR. FERGUSON: Emmanuelle, sounds like Chris teed you up very well. I am curious, first, are there different branches of the profession in Quebec, such as *avocats*, *conseils juridique*, or is it a unified profession? Then you can specifically address the role of a notary.

MS. SAUCIER: There is no barrister or solicitor in Quebec. I think it is inherited from the civil jurisdiction, so we are all attorneys or lawyers and specialize in specific areas of law.

Notaries are really something quite different. We call the commissioner of oath a notary public, so it is exactly the same thing as in common law Canada. But a notary or a real notary for us is more like a notary in France. So they have to follow three years of school and then one year of study in notary studies. And then they can pass on certain specific documents, like deeds, like wills, and registers, which are going to be done by a notary, and specifically things like succession issues are going to be dealt with a notary.

MR. FERGUSON: Rosa, could you address the same questions?

MS. ERTZE: Mexico is the same. No different types of lawyers; there is no difference between solicitors and barristers. It is a unified system.

But the law of the notary, unlike common law Canada and the U.S., is very important. Mexico's legal system is based on a lot of formalities, formalities that have to be complied with in order for an actual contract to be fully binding and enforceable in Mexico. At the end, in our system in Mexico, the form is substance, and the notary is the person in charge of carrying out those formalities and attesting to certain acts in order for those acts to be valid, effective and enforceable in Mexico.

In order to be a notary you have to be a lawyer. You have to be a member of the state bar, which has a school of notaries in each state. Notaries are governed by state law, and the requirements to become a notary vary from state to state. Mexico City, where the school of notaries is in Mexico City, is very important. The requirements are: you have to be a lawyer; you have to have at least one year of experience, and you have to pass two very exhaustive exams, like double of the bar exam here.

That all reflects that the role of a notary is really very important in Mexico.

MR. FERGUSON: Thank you, Rosa. Marcos, what about in Brazil?

MR. ROPPA: I have to say that almost everything that Rosa said for Mexico applies to Brazil. I guess because it has a civil law heritage, but we don't have different classes or types of the legal profession. Of course, if you want to be a prosecutor or a judge, you have to go through a very specific procedure. But except for that, as long as you've passed the bar exam, you are allowed to do basically whatever a lawyer can do.

The notary is basically also the same thing as in Mexico. You have to be a lawyer to be a notary, but when you become a notary, you won't be a lawyer anymore. The notary in Brazil is a separate profession. You have to go through a very hard test as well, and it is very competitive, because the amount of money is very good actually. And that's it. You get permission from the government to hold that responsibility to take care of the signature, authentication and everything. So that's how it goes in Brazil.

MR. GREEN: In Argentina it is the same as what we have heard from the other panelists. However, I would say that it is changing little by little. In general, the education in Argentina is intended to prepare me to litigate. Let's say that, even though it is changing, you will see that most of the attorneys start as litigators. That's because the whole system and the whole education has been basically oriented toward teaching about conflict rather than facilitating deals and business. It is changing little by little, but that was the history when I got sworn in.

On the other side, being a notary is very prestigious. That is so in all Spanish-speaking countries that have the civil code: it comes from the Napoleonic code, and the notary is very, very important, especially in real estate deeds. There are many acts that cannot be done without the participation of the notary. It is a very profitable profession actually, because there are a limited number of notaries that are allowed to have a registry. As a result, you may become a notary after being a lawyer and studying and passing an exam, but if there is still no registry available, you can only work with another one if the other one wants to hire you. So there is just a limited number of notaries in the country, and as a result it is very profitable.

MR. BRETT: In El Salvador it is the same. Only lawyers can become notaries. Different from Brazil, once a lawyer is a notary he can continue to be a lawyer. There is no conflict of interest there, so you can be a lawyer and a notary public. A notary is a commissioner of oaths and a state officer. It is very prestigious and of particular importance.

In regard to lawyers, we do not have different types of lawyers. Someone was saying as a joke before there are good lawyers and bad lawyers. That's it.

MR. FERGUSON: Thank you, Zygmunt. I see that David had a question. There are actually several questions on this topic. David, why don't you start. What I might do is have you ask the question, and I'll repeat it to make sure it is picked up by the recording device.

DAVID DETJEN: Must the transfer of an ownership interest in a limited liability company, as opposed to a stock corporation, be carried out through a notarial transaction in South American countries?

MR. GREEN: In Argentina, the stock, no. However, it is convenient that the signature of the persons participating be certified, because that gives you due date. And eventually in the future, if that date is challenged, you have the date certified by the notary. It is not required to be done.

MR. BRETT: In El Salvador it isn't either. It is a stock or a security, and the endorsement would be enough.

MR. DETJEN: Well, I'm thinking not of a stock corporation but a limited liability company.

MR. BRETT: It would be a participation, which is issued in a paper also. It is a paper.

MS. ERTZE: I will say in Mexico it's the same. There are some cases in the specific requirements in the operating agreement that they provide that the transfer of any equity interest has to be approved by the rest of the partners through a partners meeting. Sometimes the partner meetings have to be notarized. But it depends really if there is a specific problem in the operating agreement, because by law it is not required.

MR. FERGUSON: Would you identify yourself, please?

CAROLINE RYDER: I'm Caroline Ryder. I hate to display my ignorance, but what is a commissioner of oaths?

MR. BRETT: It is someone who may attest to the legitimacy or authenticity of an act or contract. So that person has embedded in him the faculty to say that the signature in the document and the content of the document are authentic.

MS. RYDER: So we say that's what a notary public does in a U.S. system, but I think you said you've got both commissioners of oaths and notaries?

MR. MacLEOD: That's correct. So if someone, for instance, is swearing an affidavit, you would need a commissioner of oaths to take that oath.

MS. RYDER: So that's a jurat.

MR. MacLEOD: A jurat. But it would be in English-speaking Canada a commissioner of oaths, who would then say, "You swear to the document and by signing that it is true," and you would then sign it. A notary public in common law Canada is authenticating documents.

AUDIENCE MEMBER: Thank you.

MR. FERGUSON: One more question.

HERNAN PACHECO: My name is Hernan Pacheco from Costa Rica. I wanted to ask the panelists about notary fees, because it can be a very crucial element in our region.

MR. BRETT: Well, in El Salvador we have a law which is a sort of what I would say is a suggestion that tells notaries that they can charge up to X percent of the amount of act or contract. In El Salvador it is one percent. I know that in Honduras it goes up to three percent. However, no notary will be charging those percentages, because otherwise the transaction will not occur. So it is a suggestion that we have in our regulations, but we generally apply much more favorable fees to permanent clients or eventual clients.

MR. GREEN: In Argentina there's a law that regulates roughly the fees of the notaries. However, a good lawyer will arrange with a notary on the fees beforehand, and, depending on the transaction, the lawyer would agree with the notary on X amount for the transaction, just because, as just noted, it may be expensive. But roughly, it may be one to three percent, depending on the transaction. And actually, some notary fees are just for attesting signatures or something.

MR. ROPPA: In Brazil there is a law that establishes how much the notary should charge, and there is actually a chart. So for each kind of transaction you have a different quotation. They have like a seal or maybe a stamp, so for each kind of act you have a different stamp. You buy the stamps, and you just add it to your document or whatever. But if you're dealing with real estate, most of the time it will be one percent of the value of the transaction.

MS. ERTZE: In Mexico it is similar to Argentina. There is some room for a good lawyer to go and talk to the notary and negotiate the fees to try to cut them so they are not so expensive.

MS. SAUCIER: I mean we don't actually have fees in Quebec as far as a notary goes. But a commissioner of oath cannot charge anything to receive the oath.

MR. FERGUSON: Jim.

JAMES DUFFY: I have a question about technique, and I'll use an example. In France and Monaco you can have more than one notary. And if you do, they divide the statutory fee, and that is often used as a technique to reduce the fee. You say, "Well, if you don't want to give us a reduced fee, we'll probably have to involve another notary to help us out with the transaction along with you," where you automatically then cut the fee in half. Do people do anything like that in your jurisdiction?

MS. SAUCIER: If I may, in Quebec, we do not have such a thing because a notary is the equivalent of a lawyer, so it's not another profession. But it is not as protected as in France where the number is very limited. So if you are a notary you are going to charge reasonable fees—it is not an issue in Quebec.

MS. ERTZE: Yes, in Mexico you couldn't do that because the public deed can only be granted by one notary. You cannot really divide it unless you have separate acts. What you can do to reduce the fee, for example, if you are forming a corporation, you can have a lawyer prepare the bylaws for the company and send it to the notary already formalized, so the notary doesn't have to actually draft the bylaws. That will reduce the fees.

MR. ROPPA: In Brazil basically you don't have competition because the stamps are all the same price, and you don't have this kind of problem.

MR. GREEN: I think it is exactly the same as in Mexico. Probably the only difference, if you are working in a medium or large firm, according to your standards or your jurisdiction, you are used to working with one or two notaries where you refer them a lot of work, because you have corporations, wills and estates of your clients, and you negotiate the deals beforehand just to avoid a problem or burden for the client.

MR. BRETT: Yes, there is one notary in El Salvador as well who grants or authorizes a public deed, so you wouldn't be using more than one notary.

MR. FERGUSON: One more question.

AUDIENCE MEMBER: Can you give us some examples of what type of transactions are mandatory for notarization?

MR. FERGUSON: That's actually one of the things we are going to be coming to. I apologize, and I don't want to in any way discourage anyone from asking questions, but that is a specific topic that we are going to get to. Clearly, this is a topic with a lot of interest, and the questions we'll be asking will bring us back to the notarization issues.

Having laid a little bit of foundation of what the legal profession looks like in these different jurisdictions, I want to now really focus on the practical question, and I'll shift up the order a little bit and go with you first, Zygmunt.

I'm a New York lawyer. A client comes to me, and they have got issues in El Salvador. I don't know anyone in El Salvador; I don't have any basis for a personal reference, which is always the best way of getting an

attorney reference. How do you recommend I go about selecting counsel in El Salvador? Are there resources available to help me select counsel in El Salvador?

MR. BRETT: Right. Well, I would say, Gerry, first of all, word of mouth is almost every time the best source of referral or your best presentation card. Well, it depends on the mouth's credibility, right.

(Laughter.)

But that's an important thing. Then, there are local and domestic directories who will tell you which are the lawyers and the law firms in the country and how we are ranked. But I would suggest you go to the international directories to see how lawyers and law firms in the country or in the region are seen and ranked. Again, I think it is important to assess objectivity of those law directories: Not all of them are fully objective in the sense that they go out and seek information from clients and peers to see what is each lawyer's standing in the country. So, yes, I think in the international directories—there are Chambers and Partners, International Financial Law Review and others—that I think do a good professional job.

MR. FERGUSON: I won't put you on the spot and ask you what you think the bad ones are, but I appreciate you giving us some names of what you think might be valuable to look at.

MR. GREEN: I personally do not pay that much attention to ratings, but that's my personal position obviously. I think that word of mouth and personal references are preferred. Ratings may give you an idea of what the firm looks like, but even then it depends on the person within that firm that you are working with. Obviously, all those companies and firms that appear in the ratings have a good level of experience, but then I would follow the recommendation of somebody that has worked with them. But the first question that I would ask you if you asked me and said, "I'm looking for a lawyer in Argentina," I would ask, "What is the matter?" Because if it is a criminal issue, the only thing I would say is that there is a known universe, and those lawyers won't show up in any kind of rating. It depends on what you need. And probably you would need a corporate lawyer assisting you also on the dealings with criminal lawyers because it is a different matter. In general, criminal lawyers do not speak English. They do not have that exposure to international transactions, and probably they would need a corporate lawyer—who is familiar with the language and with the business of the client—to kind of baby-sit the criminal attorney on those aspects, and they can work directly.

MR. ROPPA: I believe the considerations of my colleagues are also true for Brazil. I would just like to add—and I don't know if it is also true in other jurisdictions—that when an international or multinational company or in-house counsel is looking for someone in Brazil, they tend to go to three or four big law firms—maybe huge firms by Brazilian standards. That may be a good idea if you're dealing with some very specific law issues, but sometimes that's not really the best strategy. Big, big law firms in Brazil heavily rely on the work of junior, maybe very junior, lawyers. Sometimes the client won't have the same care as a mid-size law firm or even a small specialized law firm. So I think word of mouth is the best way. If not, you have the big ones, the big international rated companies. And you also have some local firms—I will mention one, which is the most important one in Brazil, it's called Analysis Advocacia, but that's the best one we have in Brazil.

MR. FERGUSON: Why do you think that service is better than some of the others?

MR. ROPPA: Basically because it is more local. Their list is very extensive. They analyze a lot of different factors, so they go really deep inside a law firm, so that will be a good resource.

MR. FERGUSON: Rosa for Mexico.

MS. ERTZE: In my opinion the best resource for selecting legal counsel in Mexico is a referral—whether you're a U.S. attorney who knows a law firm in Mexico or one of your colleagues or friends has any contacts with Mexico. That will be the best way to find the specific legal counsel that you seek and to guarantee a very satisfactory work product.

There are no official web sites or ratings in Mexico. There are the international ones that everybody knows, like Martindale-Hubbell and Latin Lawyer. But those do not guarantee that, if you're not there, they are a good law firm or you can guarantee good work.

MS. SAUCIER: I would say in Quebec it is really referral, the same as everywhere. It's the best way. Directories are not very often consulted or people don't apply to go on those lists. But one of the things that I think is very useful to do, when you have the name of someone, is to Google this person. I find that you can get to know someone by reading communications about that someone, and you also can see what area of law this person specializes in. So I think a simple Google search would give you a good idea. And the websites of all of the law firms are all saying they are the best, so I think you have to look at the other publications to see if the person is really good or specializes in your area of law.

MR. FERGUSON: Thank you. Chris?

MR. MacLEOD: In English-speaking Canada, in the common law jurisdictions, it is very similar. Word of mouth and referral is the ideal route to obtaining counsel. There is no specific web site. There are numerous web sites, such as Martindale-Hubbell, Ask a Lawyer, and there are numerous different techniques. But I would just

point out that the International Section and its seventy chapters around the world, should be able to assist you in finding a lawyer I would think for every jurisdiction in the world by contacting your local chapter or the International Section.

MR. FERGUSON: Jim, Oliver had a question

OLIVER ARMAS: In your respective jurisdictions is it lawful to receive a referral fee if you refer a matter like from one law firm to another? And I guess the related question is, if so, is it common?

MR. GREEN: In Argentina not only is it legal, but actually it is the only kind of referral fee you may pay—a referral by a lawyer. If you are charging or sharing your fees with a person that sends you a client and that person is not a lawyer, that is forbidden by the bar rules.

Is it common? No, actually it is not that common. It depends on whether you are working in a large firm or a small firm. It is much more common in smaller firms than in large firms.

MR. MacLEOD: In Ontario (I can speak specifically for Ontario—it is different in the various provinces in Canada), referral fees are allowed to lawyers, but not to non-lawyers. Common? It is not uncommon. It depends. In personal injury, for instance, you see quite a bit of referral fees for referrals made, but across the board it's done.

MS. SAUCIER: In Quebec there are no referral fees.

MR. ROPPA: In Brazil it is lawful and quite common.

MR. BRETT: In El Salvador it is legal and more common every day.

MS. ERTZE: Yes, and Mexico the same.

MR. FERGUSON: Jim Duffy.

MR. DUFFY: I just wanted to add a comment following up on Mr. MacLeod's comments. I guess in over forty years of engaging foreign counsel all over the world, I found the least satisfactory way of doing it is by referring to any service, because you have no way of knowing, no matter how good that firm appears on paper, whether they are going to treat you and your client as a top tier client or just somebody that we have to provide some services to. I think the most important way to do it is to deal with somebody you know you're going to see on a regular basis, such as a chapter chair or members of this Section—someone that you're going to see at meetings. Or if you have a legal network, you're going to see them. Because they have to look you in the eye at some point and explain why they didn't do a good job, if they didn't.

So I think that is an extremely important ingredient in making a referral, because you want to make sure that that client is going to receive the type of service that you would look for to be giving them. I think the face-to-face relationship is extremely important.

MR. FERGUSON: And NYSBA.org, that's where you can get the list of all chapter chairs.

AUDIENCE MEMBER: Just to follow up, the chapter chairs are well vetted before they are designated. That's the important thing. It is quite a process.

MR. FERGUSON: Absolutely.

Just to follow up on a point that Marcos made, which I thought was interesting: the distinction between the large firms—and there are a couple large firms in every jurisdiction that everybody has heard of—and the specialty firms. I'd be interested in getting the reaction of some of the others to the point that Marcos made.

Maybe I'll frame the question this way: Are there matters where it makes sense to go to one of the large best-known firms, and are there matters where you really should be looking for a specialist, say employment or something like that.

Zygmunt, do you want to start with that?

MR. BRETT: Sure. I think for criminal matters, family matters and probably labor matters—in the region of El Salvador at least—you would try to go to a specialist to deal with those matters.

In other areas of law, corporate law, tax law and commercial law in general, large to medium-sized firms might be able to take care of all those issues altogether. Actually in the region in El Salvador our law firms are very small in comparison to New York law firms. And I think that in the mid '90s firms began to expand, and because of the expansion they began to become more specialized—having attorneys specializing in certain industries and areas of the legal profession. So for specific matters like criminal law, family law and labor law you would like to go to a specialist.

MR. FERGUSON: Guillermo again.

MR. GREEN: I would think that in general for international matters you could go with a medium to large firm, because those are the firms that will have a broader picture of the whole situation your client is facing, like taxes, customs, international relations, even labor reasons, rather than going to a boutique firm that maybe will not have the resources to take all the questions and have a single picture and a single opinion that covers all the aspects.

However, there might be some areas where you may choose going to a large firm or a boutique firm, like international arbitration or litigation. Depending on the persons you will be dealing with, it may not make that big a difference in going to one or another. As I said, with criminal lawyers, obviously and trademark or patent

attorneys, you may go to a smaller firm just focused on that.

MS. ERTZE: Mexico is very similar also. If you have an international matter it is best go to a mid-size to large law firm. But for criminal matters, labor, tax, environmental and agricultural matters in Mexico, it is always better to go to a specialist. Some large firms have specialists in some of those areas, like labor or tax. But generally it is boutique firms that specialize in criminal litigation. And also environmental and agricultural: those are very specific areas where you truly need a specialist.

MS. SAUCIER: In the province of Quebec you have criminal lawyers that are in the smaller boutiques. And you have probably seven or nine—the nine sisters, depending on the survey—that are the national firms. Usually you would go, as the other panelists explained, to see a specialist in those firms. In labor law, the major firms always have a labor law department. And family lawyers are really in smaller boutiques. There are very good litigation firms that you could consult as well.

MR. GREEN: Just a comment. I think many of us are talking about medium and large firms, and probably it is good for you to have an idea what we consider medium to large firms, because it is obviously not the same when compared to the U.S. For us a medium firm would be a firm that would have thirty attorneys probably, maybe forty attorneys. A large firm would have more than sixty attorneys, that would be the case at least in Argentina.

MR. BRETT: In El Salvador a firm with thirty lawyers is a large firm, and a mid-sized firm would have eight or ten lawyers.

MR. ROPPA: And in Brazil a mid-size would be thirty to fifty. We have law firms with five hundred lawyers, but there are only a few of them of that size, probably the top five.

MS. ERTZE: In Mexico the biggest firms approach maybe one hundred lawyers, but there are very few firms that are of that size. A mid-size firm will have from sixty to eighty lawyers; it's a little bit bigger than in other jurisdictions. But our boutique small firms will have fifteen to twenty lawyers.

MS. SAUCIER: In Quebec I would say that the big firm would be one hundred lawyers, mid-size would be fifty to one hundred, and smaller boutiques would be maybe ten, twelve lawyers maximum.

MR. MacLEOD: And it is the same in Ontario as in Quebec. In Canada there are nine national firms, and not as many international firms. It is Norton Rose now and since its merger with Ogilvy, and Baker McKenzie obviously. But unlike New York and London, which have firms with offices in twenty of thirty cities around the world, we see that less.

Can I just touch on the specialists? In Ontario we have certified specialists, which is a designation you can apply for and obtain, so there could be a certified specialist in estates and trusts. One of our partners in Cambridge is a certified specialist in that. You can have a certified specialist in criminal law. It is not done through the bar association, but through the governing body, so you would apply and be given that designation in Ontario by The Law Society of Upper Canada.

MS. SAUCIER: We don't have these specialist requirements in Quebec.

MR. FERGUSON: You've touched on the topic of the multinational firm. Rosa, you're the representative of a multinational firm on our panel. What is the trend in Mexico in terms of the presence of multinational firms, and I'd be curious to hear from some of the other panelists.

MS. ERTZE: The legal market in Mexico is still dominated by local independent firms, although in the past few years there has been a tendency for international firms to have a presence in Mexico. White & Case and Baker and McKenzie have been there for some years. Last year Jones Day also acquired a Mexican firm. And I'm actually happy to announce that our firm, Duane Morris, is currently in the process of negotiating an association with a prestigious Mexican firm in order for Duane Morris to have a presence in Mexico City and a platform to Latin America.

So even though it is local independent firms, some international firms are starting to expand there. Also in Mexico, the specific types of law firms are two-tiered. One is Mexico City; there's a lot of centralization in Mexico City. So all the big and mid-sized firms are located there. Then there are the rest of the states: most of the big firms are not in the other states, and the states have boutique and small law firms.

MR. ROPPA: In Brazil it's very localized too. It is basically in Rio and Sao Paulo that one sees larger firms. The rest of the states have more like a boutique law firm type. The thing is that our bar association in Brazil is really strong and very active in defending the Brazilian lawyers' rights. So we do have some international offices there, the most prestigious ones, but they are not allowed to really go to court and do what we usually understand as a lawyer's work. They play a role more in the advisory area, especially international deals.

MR. GREEN: I can speak to this for Argentina, Chile, Bolivia, Peru (I think) and Paraguay: we don't have any presence of the large U.S. firms or large UK firms.

MR. BRETT: We don't have that presence either in Central America.

MR. FERGUSON: Canada?

MR. MacLEOD: The international firms, as I said, Norton Rose.

MR. FERGUSON: I'm sorry, you did.

Okay, we have gone on NYSBA.org; we've gone to the chapter chair, and we got a good local recommendation, and we have retained the attorney. What I would like to talk about with our panel now are the formalities, if any, in terms of retaining an attorney, with specific focus on the conflict of interest rules, if there are any: how those rules operate in your jurisdiction, how they are enforced, and what I should be sensitive to in terms of conflict of interest rules in your jurisdiction. We'll start with Chris.

MR. MacLEOD: First I'll speak to the attorney / client relationship. In common law Canada controlling is the intention of the parties: it doesn't have to be in writing. Obviously as lawyers we want a written retainer agreement: It helps ensure the terms of how the client is going to pay as set out on paper.

Conflict of interest rules are quite strict, and there is much case law on it. Clearly, you can't have a conflict as between the party you're representing and the others. So you have very strict conflict of interest guidelines, and you can be removed as solicitor of record if there's a conflict, and that can be by a court decision.

MS. SAUCIER: The same applies in Quebec I would say. One of the important factors to take into consideration when you retain someone is to make sure that you check for conflicts before you commit any information. The other thing is that, in certain special circumstances, you can establish, I think as in the U.S., a Chinese Wall, where the party agrees that you can act and you make sure the Chinese Wall is initiated very early in the process.

The privilege is very highly respected by the court. So the only thing that we have to take into consideration and be very cautious about is whether, when you communicate with your attorney, it is going to be covered by the privilege. But if you include a third party, then this communication could not be subject to the privilege. So you have to be very careful when you communicate with the attorney that you communicate only with the attorney and you don't copy all kinds of third parties with your communication.

MS. ERTZE: Well, in Mexico the attorney / client relationship is strictly speaking a contractual relationship that arises from a contract, whether written or oral. It doesn't have to be written. It is not common to have engagement letters, like we have in the U.S. It really depends on the type of clients. There are some clients reluctant to sign engagement letters. Or there are clients, like some governmental entities, who have their own engagement letter when they hire lawyers. And you have to enter into those letters.

But generally, what we have are just descriptions of billing arrangements on how much are we going to charge and for what specific type of work, but not like the standard engagement letters that we have in the U.S.

The conflict of interest rules are very similar to the U.S. Conflict checks are very common. And it's also a crime in Mexico to represent opposed parties, representing the plaintiff and defendant. And the General Bureau of Professions can take away your professional license number if a court finds you guilty of that crime. Or if there is a civil litigation and your client sues you because you were acting as a lawyer when you were really not admitted to practice as such.

The attorney / client privilege rules are also very similar in Mexico to the U.S. You are covered not only when you enter into the attorney / client relationship but before that. If you go to an attorney seeking legal advice, even if that attorney at the end doesn't agree to represent you, the information you provide is covered. There are specific exceptions, like if the client is suing you, if the client tells you that they are going to commit a crime and you have to protect people or if someone is in danger.

MR. ROPPA: In Brazil, although the contract does not have to be written, the usual course is to have a written contract. That's when the attorney / client relationship is formed.

We have a very strict code of ethics; actually we have two of them. And we have an ethics committee, before which any citizen or any client who thinks that they have some kind of problem with his lawyer can personally start a process—I wouldn't say sue—and the committee can cancel the lawyer's registration, if the lawyer does something really serious. In addition, the injured citizen or client can also file a lawsuit and go for personal liability in court. So in Brazil the lawyers have a lot of responsibility. And sometimes it is not really clear to the lawyer what is and what is not covered by the attorney / client privilege information. Sometimes it's a tough call.

MR. GREEN: A shortcoming of this, in terms of formalities, is that engagement letters are not required. It is convenient to have them. Especially if one is in Argentina and one is doing litigation, it is highly convenient to have an agreement on fees in order to avoid having a bad relationship with lawyers. Thus you can go to court and ask the court to fix their fees—usually valued by the court in a rate of the percentage of the claim that has been filed. So is it required? No. Is it convenient? Yes.

In terms of the attorney / client privilege, the right to go to an attorney is guaranteed by the constitution. Not even the court may allow the attorney to reveal what has come from the client. That is the theory. In practice, if you want something to be very confidential and to keep it confidential, put enough signs—, "Attorney-client privilege," for example—in all of the letters and all of the

things that you are referring to the client. Be very careful with that, just in case.

What is not that clear is what happens with corporate counsel, the in-house counsel, when they are asked for comments or opinions within the company. I'm not quite sure what will happen on that: we don't have a lot of case law. We received some questions on that, and we answered unclear as to how that will be treated. We have to find some ways to avoid that.

Third, on conflict of interest, our rules are very clear and simple: you can't represent both parties in the case. It is as simple as that. But in the end, what you may expect from your lawyer in Argentina is the observation that it depends on whether you would value experience in a certain area or industry and whether you would like to have advice from an attorney who is also advising some of your competitors—and that would depend on you. What you could really expect from the lawyer is that you go to a firm and he will tell you, "We represent XY and Z,"—then it would depend on the client whether to choose that firm or not.

MR. BRETT: Regarding attorney / client privilege, I think in El Salvador you really do not need to have any magical language in any document or contract. It is covered by the constitution. We have these constitutional principles of the right of privacy and communication and confidentiality. In our criminal code we have professional secrecy. So even if you do not use any magical words in your communications with your clients, you will be covered by the constitution.

Regarding conflict of interest, we also have a regulation, which is a law for professional conduct, which states that lawyers have to act with loyalty, in good faith and with professional integrity. So here again, you are covered by written law. You can have in the document the attorney / client lingo there, but again, that helps the client feel better: you can do it, but you don't really need it.

MR. FERGUSON: If we were going to get a question on this, I would have suspected it would have come from Jim Duffy, because I know you've given a lot of thought to these issues over the years.

MR. DUFFY: Just a general question. In your jurisdiction do you act for or do you require a power of attorney from the client? And if you do, would you accept that power of attorney from the referring law firm on behalf of the client?

MR. GREEN: In certain cases you definitely need a power of attorney from the client. For instance for litigation, you need it. There is no way otherwise. For incorporating a company you need that too, unless you want the client to be there, and usually the client would not travel for that purpose, so basically you need it for that.

How would we act on that? Except on litigation, where the client knows what we are doing, if you're granted a power of attorney for voting reasons, we would not use it unless asking the client for its confirmation of what we are going to do, even though the power is open to use it the way we want, because otherwise you would be granting powers all the time and that would be difficult for the client.

We can not ask the referring firm to provide the power of attorney, because we must know the person is empowered, and that would not be the case in such a situation.

MR. ROPPA: I have a question for your question. You were specifically asking regarding the possibility to get the power of attorney to be subscribed from the recommending law firm, is that it?

MR. DUFFY: Well, the second part of the question was, if you were in a situation that required a power of attorney, would you accept the power of attorney from the referring law firm on behalf of the client?

MR. ROPPA: Well, for the first part, I guess it's almost the same as in Argentina. For the second part, I believe the answer is yes, as long as we have some kind of writing—even in an e-mail from the client—saying that the lawyer is allowed to subscribe and just forward that to me.

MS. ERTZE: In Mexico it is the same as in Argentina. For specific acts, like for forming corporations or signing a contract on behalf of the client to avoid the client traveling, it is fine, and it is very common for attorneys to accept those kinds of powers of attorney. For powers of attorney that are very broad and general, like to take over the entire management of a corporation or something, lawyers are reluctant to do so. This is so because we don't want to be liable under the civil code for any loose ends—where the client can could go back and say, "You didn't do specifically what I said," or "I didn't want you to do that." So you are sometimes careful with respect to what type of powers of attorney you accept from clients.

MS. SAUCIER: In Quebec we always work with specific instructions, so a broad power of attorney wouldn't work. Why? Because there is a Latin sentence that we hear from day one at law school, "*Delegatus non potest delegare*"—which means you cannot delegate the power that is given to you. So for that reason also a power of attorney coming from another attorney wouldn't suffice. And what we always do in our firm and in many other firms in Quebec is that we always ask the people to sign personally the documents in front of a commissioner of oath and in front of a person authorized to receive oaths in the jurisdiction wherever this person is. We also have an accommodation mode of production of documents in court: even if the document is not an original, if there is an emergency. So I think the courts

really prefer lawyers to obtain the signature of their clients and not use a power of attorney.

MR. MacLEOD: On this point we're similar to Quebec. If I could also just add two other points. We also have rules of professional conduct in each of the jurisdictions in Canada that govern how lawyers conduct themselves vis-à-vis their relationship with others in the profession and their clients and their conduct before the court. They are rigorously adhered to and there are strict penalties if you breach the rules of professional conduct.

In addition, in Ontario law we also have client verification rules, where you're required to produce identification or have the clients produce an I.D. to say who they are as you move to take on that retainer. That arose I think as of 2010; it's very recent. I don't remember what year it came in, but very recent. That in large part flows from mortgage frauds that were arising and other fraudulent activities.

FRANCOIS BERBINEAU: Francois Berbineau from Paris.

I have a question which is in relation to this privilege relationship and communications. We were talking about the client's lawyer communications, but what about the confidentiality of lawyer-to-lawyer communications, especially when we are talking about internationally? In France if attorneys discuss with each other, it is by law privileged; it is confidential. They can't disclose it, unless they specifically state that their communication is official, otherwise it is by law confidential—which is very useful and very much used in order to exchange documents and things like that. When you get into a referral, our bar association always tells us that if you discuss matters with referring attorneys, just make sure what their rules are, because otherwise you may end up providing information mistakingly thinking that it's the same as in France and it is automatically confidential, whereas it's not because locally there is a different rule.

So in such situations I assume that we need confidentiality agreements to be signed, and I wanted to know how it works.

MR. BRETT: In El Salvador it is the same as in France. Local law does not specify that the confidentiality is vis-à-vis your client. It is vis-à-vis any other person with whom you are communicating, so it would be covered.

MR. GREEN: I'm not quite sure, honestly. I think that if the referring firm is acting as the client, then you can consider that as privileged, and I would agree with that. But that also has an impact on whom are you protecting. Because our rules of discovery, which we will discuss later, are a bit different than in the U.S. But in the end, it is impossible: you will not be forced to show in court that first communication, so I wouldn't be that concerned.

MR. ROPPA: In Brazil we are a civil law country, and although we have been building up a national jurisprudence and a very Brazilian way to do law lately, our civil code is based on the Napoleonic code, so yes, we have the same grounds and defenses.

MS. ERTZE: Yes, in Mexico our professional ethics code covers communications between attorneys and between colleagues, and can also cover foreign attorneys that are consulting with you.

MS. SAUCIER: In Quebec law the answer is not that clear, I guess because we are in the middle of a common law world. So communication with our clients and with the referral lawyer would be covered. But to be very certain, I would certainly ask an authorization from the client that I can communicate with this attorney and that my communications are going to be covered by my professional secret. So I would not feel comfortable not having this authorization, because the law is not as clear as we would hope it to be.

Insofar as communications between lawyers go, when we speak to an attorney of the opposing side it is not a confidential information, so unless we say, "I'm now talking to you under confidential privilege," the information that is provided to me can be asked for by the court.

MR. MacLEOD: My view is very similar to my colleague in Quebec. For a referring lawyer, is that communication privileged? I would want something papered on that, and I would argue it is. I'm not sure how clear that is. Obviously, there is in-house counsel privilege. With referring law firms, I would think it is, but I would want to paper it.

MS. ERTZE: If I may add something. It is very common practice in Mexico, when we are starting to engage in confidential discussions with a client or another lawyer, to actually say so, and explain to the client, you know, that "Everything that we communicate from now on is confidential," and so everything is kept under professional secret here in Mexico. I also tell foreign lawyers that it is covered under the professional secrecy law.

MR. FERGUSON: Axel Heck.

AXEL HECK: Thank you, Gerry. Have you under your respective professional obligations something that obligates you to send a copy to your client of everything you're sending out, including a letter to another lawyer?

MR. GREEN: No.

MR. ROPPA: No.

MS. ERTZE: No.

MS. SAUCIER: Not very clear in Quebec. I would say that we usually do to make sure; we do actually send everything out to the client.

MR. HECK: There are many countries where that is so.

MS. SAUCIER: It is not a rule but in fact we do.

MR. MacLEOD: The practice is to do it.

AUDIENCE MEMBER: I wanted to go back to Jim's question and powers of attorney and the recommendation to our Anglo-Saxon buddies, which is to observe formality. Somebody mentioned in the conversation that formality is very important. Validity of a document by foreign authorities is crucial and may or may not have an impact on enforcement. Some countries in Latin America are party to the Hague Convention; therefore, they accept Apostilles. Or if there is not, you have to go through a very complex consular process of legalization of documents: You have to demonstrate the authority of the person granting the power, so on and so forth. So my recommendation is that, if powers of attorney are required, foreign attorneys should investigate and research what are the formalities for those powers of attorney to be valid in the receiving jurisdiction.

MR. FERGUSON: That's an excellent segue to the next topic we wanted to talk about, formalities and formation.

One last question on these topics, and then we'll move onto those issues of formation. Larry.

LARRY DARBY: At least in New York, if not in the rest of the United States, the attorney/client privilege can be waived by the client. Can it be waived in your jurisdiction?

MS. ERTZE: Yes.

MS. SAUCIER: Yes.

MS. ERTZE: It has to be in writing that waiver, preferably.

MR. ROPPA: Yes.

MR. FERGUSON: One more question.

CALVIN HAMILTON: I'm in Spain. The interesting thing about the attorney/client privilege in Spain is that it is not the attorney's nor is it the client's to dispose of. It's against the bar association rules if you breach confidentiality and what you call secret professional. So even if the client is in agreement that you as his attorney can speak to somebody else about a particular matter, unless you receive dispensation from the bar, you're breaching the ethical rules of conduct. So it's something that you also need to take into consideration when you deal with these issues.

MR. FERGUSON: That's an excellent point, Calvin. We'll have a chance to chew that more in the European panel.

I want to get back to John's question earlier, because I did want to address that and drill down a little bit more on these issues. I'm a New York attorney, and I am supervising foreign counsel who is engaging in the negotiation and entering into contracts in your jurisdiction. What are the formalities I need to be aware of?

And I think, John, the specific question you were asking is what are the categories of transaction where you need to make sure to involve a notary. Was that your question?

AUDIENCE MEMBER: Yes.

MR. BRETT: And going back to a point also about formalities to enter into a power of attorney or a contract in general, civil law systems are formality driven and Anglo-Saxon law systems are not; they are formality absent. You may enter into a contract sometimes by just smiling to your counterparts.

(Laughter.) I think that's an important point.

When do you need a notary? I would say that in any agreement where you want to have effective enforceability, vis-a-vis your counterpart, you would want to involve a notary. Why? Because the notary will provide authenticity to that document, and you will be able to go to court through an expeditious proceeding. If not, then you may have to go through other proceedings that may take forever. So you would like to involve a notary in basically any contract where you have a bilateral situation with a counterpart.

Regarding the documents that are entered into abroad or that are in a foreign language, yes, if those documents have been subscribed abroad, you would want those documents to be legalized by the Apostille if the country where you're taking the document is a party to the Hague Convention. If not, you will need to go through a consular process that, as in Costa Rica, takes forever. So yes, you need to do that.

Another point that is important here is where you have contracts that have foreign law as the law governing the agreement: you have to watch out that that law that governs the agreement is consistent with local law. Because you may think, well, the document is covered by New York law and this clause which allows for prepayment charges in this loan agreement, it should be enforceable in El Salvador. We have substantive law in El Salvador that says that a borrower can prepay and you cannot impose prepayment charges. So you have to see how to legally circumvent that provision.

MR. GREEN: I'm not going to get into international private law, because that would be a whole other subject.

A few comments. Regarding the use of a notary, our civil code, I believe it is Section 1981, specifically provides all the acts for which a notary is required. So, as an example, all acts relating to real estate—transfer of title or setting up a collateral or pledges or mortgages on real estate—would require a notary, as would powers of attorney. And then because we are a civil law system, you will have certain acts that can only be made through a notary. Then, as my colleague said, in certain cases, even though it's not a requirement, you would use a notary just to attest the date and the signature in order to avoid disputes if all of us would die or that person died. You also want in some cases a certified date when the contract or the act took place.

The second comment is on language. You don't need a language translation for a contract to be valid in Argentina. You may execute it even between local parties. There is no requirement to be in Spanish; it may be in English. However, if you go to court and litigate on the contract, obviously you would require a Spanish translation.

And the third one is on formalities of forming a contract. You should be careful, because sometimes in certain relationships you may have a contract without having a written contract. Some of the most common mistakes you see with American companies is that you may have someone acting as a distributor, a supplier, and then you build the relationship for so many years even though you don't have a written contract.

MR. ROPPA: I would say that the view of my Argentine colleague is also valid for Brazil.

It may be a little frustrating for American lawyers dealing with lawyers in Brazil, and I guess in the rest of Latin America, but we have a lot of registration procedures, and so I guess the rule of thumb is, if you are going to do any kind of act, it would likely need to have some kind of registration or procedure in one or another kind of registry office. If you have a simple contract with someone, and it's just binding you and the other party, then probably you don't need anything. However, if you want that to be binding against third parties, then it would be a good idea for you to register it.

Regarding foreign documents: Brazil didn't sign the Apostille treaty, so we don't have this procedure. Although most of the jurisprudence in Brazil has been building up on this, and this document has been accepted, we have a different procedure. It is not really hard; it takes probably three, four days to do it. But we also need a translation, a certified translation, and that would be the second part.

MS. ERTZE: In Mexico it is exactly same as in Argentina. Our civil codes have specific formalities that each contract transaction has to have. I would just add that in Mexico, as long as you have those formalities and you have consent, legal purpose and capacity, the freedom of the parties to enter into a contract, whether it has consideration or not, is really broad. One of the main principles in most civil law systems and in Mexico is that the will of the parties is law. So as long as you comply with those formalities, you can agree on almost every topic.

With respect to language, it is the same. If you have a stock purchase agreement in English, that doesn't mean it is not binding or enforceable. It is, but in order to take it into a Mexican court it has to be translated into Spanish. Mexico is a party to the Hague Convention for Legalization of Foreign Public Documents, so we have the Apostille process. Countries like Brazil are not party to that convention.

MS. SAUCIER: In Quebec the will of the parties is a contract. I would say, though, that the notary is authorized to perform some special acts on the land registry, transfer of real estate. So there are specific deeds that I'm going to receive that can only be effected before a notary.

The only other thing you have to bear in mind when dealing in Quebec is that French is the official language in the province of Quebec. All of the legal contracts, the invoices, have to be in French; the labeling on the product is to be in French. And you can draft or add a clause on the contract that the parties requested that the contract be prepared in English, and this sometimes has to be translated into French. So that's the only exception.

The Hague Convention does not apply in Quebec, because it's a civil law jurisdiction, and Hague Convention is a federal convention. So in Quebec we receive proceedings from document service, so there is an authority to receive proceedings for all defendants. But we are not using the Hague Service Convention to serve proceedings to defendants outside Quebec. So what we can do, we ask the permission to serve. We can serve proceedings by telecopier, by bailiff, but also by e-mail when necessary. When there were challenges on the service of the proceedings, the courts refused to grant those motions.

So French is really something that you have to bear in mind when you deal in Quebec.

MR. MacLEOD: In the common law jurisdiction, freedom of contract is almost absolute—unless it is illegal or there are strict regulations around a certain activity.

Just on the point of language: obviously Quebec is a unilingual Francophone province. But New Brunswick and Manitoba are two provinces that are bilingual, and we still have federally two official languages, French and English.

MS. SAUCIER: Just one point, the laws in Quebec are in French and English, and the court can be in both

languages, and the proceedings can be drafted in both languages. The only specification is that when you are served with the proceedings that are in French, it is up to you or your lawyer to translate it. There is no requirement to prepare the proceeding in English.

MR. FERGUSON: I would like to give a parting shot to our panelists. You've all worked with attorneys from New York in the past. Could you share with our group what you see as the most significant differences between your system and New York's? What should New York lawyers be aware of when they are working with you and the court to work with you effectively?

Zygmunt, start us off.

MR. BRETT: Probably the misconceptions regarding the formality, that's important. We are going back to language. I'm sure now most law firms have developed contracts or powers of attorney that have double column language, and that helps a lot in respect to language.

In respect to formality, I think it is important to bring up front with your client and with your colleagues what are the formalities involved in a contract and not to wait until closing, because that will affect the client, the law firm and the transaction in general.

MR. GREEN: I'm sorry, Gerry, you're asking about communication or just in general?

MR. FERGUSON: Whatever you want to address, kind of a final comment in terms of when New York lawyers hire you, how they can work with you most effectively.

MR. GREEN: Okay. I think that there are some dos and don'ts when dealing with an attorney in Argentina. I think the dos are: do ask; do explain your legal environment to search for analogies. That is good, and it helps your local attorney to understand what you are looking for. Do show the whole picture. Do ask for confirmations. And especially in civil countries, do ask for non-legal terminology: You don't want to read these Latin words and you want just to be specific.

Don't assume that you are in the same legal environment. We are talking about community votes, powers of attorneys, stamp taxes, registrations. Don't be overwhelmed by formalities, and don't get surprised. Sometimes you will realize that, when dealing with other parties, on every transaction there will be a lot of times when your attorney will be babysitting the other party on what a word means. For example, that this means you're a legal company, and have all the powers to enter into an agreement. The other party would say, "Why are you asking me that? It is obvious." Okay, but it is common to have that in the contract.

What are the most common mistakes I see in dealing with U.S. attorneys? In litigation, there are a lot of differences between litigation in Argentina and litigation in the U.S., as well as in regard to labor claims, central bank regulations, and termination of dealers.

MR. ROPPA: I believe our Argentine colleague should write down those dos and don'ts, because I think they apply to every foreign jurisdiction.

Specifically for Brazil I would like to add something about the employment law issue and also the consumer loans issue. Although most contracts and most deals are valid, in these two specific areas there are some statutory limitations. Maybe because Brazil is a relatively new country, we have this concern about employees and consumers being—or they may be considered to be—weaker than the companies in which they work or from which they buy products. So if there is a contract and there is any kind of problem in Brazil, the interpretation—and it is a legal principle—will tend to favor the employee and it will tend to favor the consumer. Some may think it is fair; some may not. But that's just the way it is. The amounts involved are usually quite high, at least compared to the U.S., especially in the employment law area. So that's something that you should be attentive to.

MS. ERTZE: What my colleagues said is very true and also applicable to Mexico.

I would like to add that one also should keep in mind, as a U.S. attorney or U.S. client engaging for the first time Mexican counsel, to have a lot of patience, because of all the formalities. Ask about whatever you don't understand. Such as if your attorney is asking you to sign a hundred thousand papers. Ask about the process.

Also be open and have an open mind with respect to any other areas that foreign counsel may advise you about. There are some clients that go, "I want to form a company in Mexico," and then you just start explaining to them that it's not only corporate law that's involved but labor issues that need to be considered as well. They say, "No, I'm not hiring you to advise me on labor law; I'm hiring you to advise me in corporate law." Keep an open mind that, in order to give full and very good advice, there are, for example, some labor issues that are involved in setting up a corporation in Mexico. Because labor law is very favorable to the employee, and you have to protect against any liabilities, as also in connection with tax or environmental law.

So just keep an open mind that it's not that we are getting your money, but that we are doing our job, and that many areas in our system, due to the formalities that they entail, are very related.

MS. SAUCIER: I agree as to keeping your mind open. Don't try to apply common law to Quebec civil law, because it is quite different, and to do so is going to lead you to major mistakes.

A second thing would be that litigation in Quebec is quite different, so be prepared. We have a very short delay of one hundred eighty days from the beginning to the inscription for trial, so it is a fast process. This can be extended with leave of the court, but you have to be prepared to work very hard when the proceedings are instituted.

Also, discovery rights are very different. We don't have affidavits of disclosure or documents; we proceed in a different way. If you want to learn more about litigation in Quebec, there is a book that I wrote that will be published at the end of January, called *Litigation in Quebec*. It is bilingual, in French and English. And if you would like to obtain a copy, give me your card, and I will send you a copy. It is Thomson Reuters.

MR. MacLEOD: Common law jurisdictions in Canada are linguistically and professionally very similar to the United States. There is great deference given by the courts in Canada to decisions of the U.S. courts. For instance, if you have a default judgment in the States against a Canadian, it is enforceable, and the defenses are very limited. You can't defend it in Canada on the merits of the action.

As an example of the dissimilarities in the alignment between common law Canada and the States, there are significant differences in the litigation process and procedures. We have limited discovery compared to the States. There are depositions, but we can't depose experts. You're given the expert report a very short period of time before trial, and we can't examine the other side's expert. I could go on and on, but there are significant differences, and it's important to consult and have a relationship early on with Canadian counsel. A quick example would be if you find you need to obtain evidence for use in a U.S. trial from a non-party in Canada, talk to Canadian counsel early on, because there are discretionary factors that judges take into account that go right to the root of the pleadings in the U.S. action, questions asked at your deposition. So consult early and often with Canadian counsel.

MR. FERGUSON: Thank you very much to all the members of the panel who have come from all over the hemisphere to be with us this morning.

III. The European Panel

MR. FERGUSON: I was thrilled at the participation we received in terms of questions. I know the panel we have sitting at the dais now is just as lively as the Americas panel was. This is the panel focused on different jurisdictions in Europe.

I'll start in the same way we started last time: I'll ask each of the panelists to introduce themselves, talk a little bit about their practice and then ask each of them to describe how one becomes a lawyer in your jurisdiction and what it means to be a lawyer there.

Jonathan Armstrong, would you like to start us off?

JONATHAN P. ARMSTRONG: I'm Jonathan Armstrong. I'm with Duane Morris as well, like Rosa before.

In the U.K.—and I'm talking about England and Wales here—we have a split profession in terms of numbers. Around about one hundred thousand lawyers are solicitors. The admission process to become a solicitor takes six years for most people. This is broken down into three years for a degree, normally straight from school—and most of the profession do a law degree as entry into the profession; one year for a legal practice course; and then a two-year training, like an apprenticeship. And then there are twenty days of training that you can normally fit in during the apprenticeship that are mandatory. About twenty percent of solicitors do not have a law degree; instead they have to complete a conversion course in addition to the degree that they already have.

Eighty-nine thousand of the roughly one hundred thousand solicitors are in private practice. The number of barristers is currently around about twelve thousand in England and Wales, and entry for that is similar to the solicitor's profession, but slightly shorter. It consists of a three-year law degree, one year for a bar-professional course, and then a one-year apprenticeship called "pupilage."

The regime in the U.K. changes on 4 October 2011. We have very interesting developments, including the ability to take external investment into law firms. We are still not exactly sure how that is going to pan out, but a number of major corporations, including what might be considered the U.K. equivalent of Wal-Mart, have said that they will be setting up a law firm after October. So that is going to be very different, and I'm happy to give more detail about that. So, that should be a good introduction.

MR. FERGUSON: Let me just ask you, since you touched on the topic, what is the difference between a solicitor and a barrister in practice right now?

MR. ARMSTRONG: About a hundred pounds an hour.

(Laughter.)

The whole thing is changing, like most of the legal profession in the U.K. Traditionally a solicitor would instruct a barrister on certain types of core proceedings, with the advocacy reserved for barristers. That has blurred a bit recently. Many law firms employ barristers, who can now, and certainly even more so after October, be part of the same partnership. You can have a certain type of professional partnership that can include barristers.

I think the professions are really merging, although the distinctions are still clearer in family law and criminal law cases, where, as a general rule, barristers

do more of the advocacy and solicitors do more of the case preparation and negotiations. But the barriers are blurring. Generally speaking again, barristers are self-employed; and solicitors tend to be in firms, either as employees or as partners, but again, some of that is changing. Barristers can have strange forms of alternative business structures, which can be by contract, acting as a chambers: it is fast moving and changing rapidly.

Maybe one thing that's highly topical to raise is that the changes do cause conflicts between the professions. Although I don't know the full details, I believe that a trial in a professional negligence case has just been halted in the U.K. after the judge had disclosed to both of the parties that, as a barrister, one of the law firms being sued had been his client. Thus, difficulties can arise and should not be underestimated.

Generally speaking, barristers have commonly gone to the judiciary, where obviously they have tried cases that involved solicitors who had instructed them. That's one thing to be especially careful about, because the conflict rules applicable to the barrister and the solicitor professions differ from each other.

MR. FERGUSON: And we will get back to that. Thank you, Jonathan.

Marco, why don't you introduce yourself please and then tell us about what it means to be a lawyer in Italy.

MARCO AMORESE: I am Marco Amorese from Studio Legale Amorese. We work in the Milan area, and we specialize in corporate law and international transaction work.

Becoming a lawyer in Italy is a long process: you need to obtain a degree in law that takes five years, and then you have to complete a two-year mandatory practice apprenticeship. After that you have to take an exam, which is quite selective. After more or less one year, if you've passed the written exam, you take an oral exam. So the whole process usually takes about nine years. Notwithstanding this, Italy is a very competitive market for lawyers, because there are many of us. I believe that we'll speak about how to select counsel, especially in the case of Italy, which has a large market probably comparable to the one here in the U.S.

MR. FERGUSON: Yvon, please introduce yourself, and tell us a bit about becoming a lawyer in France.

YVON DREANO: My name is Yvon Dreano, I am a partner at Jeantet Associes, a French law firm, and I specialize in corporate law and M&A.

To become an attorney in France, you need to complete a four-year legal program at the university, and then, as in Italy, you must pass an exam to get admitted to a bar program. Prospective lawyers have another eighteen months' training in that program before obtaining their certificate as an attorney and before being able to take oaths.

In France, it's a competitive market as well, but maybe not for the same reasons as in Italy, since, in France, there are not so many attorneys as in other European jurisdictions. For instance, in Germany and in the U.K. there would be three times as many attorneys per inhabitant as in France. So in France we still have some way to go before reaching the number of attorneys that our neighbors have.

MR. FERGUSON: Axel, please introduce yourself, and tell us about becoming a lawyer in Germany.

AXEL HECK: I am Axel Heck from Berlin, Germany, but I'm sort of a false German lawyer due to the fact that I have been practicing out of Berlin only for a few years. I spent the first thirty-one years of my practice working out of New York and Paris.

As far as the legal education in Germany is concerned, it is similar to what we just heard is the case in Italy. We have in total about eight to nine years of education, comprising about four years of law school, about a year of examinations including an oral exam. And then you have a two-year apprenticeship. Of course, you have the administration, a free period of five months: in my case I clerked in the office of the Antitrust Division of the European Commission, for example. And after these two years of apprenticeship, you have yet another year of examinations including an oral one. But at the end of it all, you can immediately become an attorney, a judge, or a prosecutor.

As far as the profession itself is concerned, there is simply only one, that of attorney, to which one might also add the profession of notary. But depending on where Napoleon went, the notary has to be just a notary or a can be a lawyer as well.

MR. FERGUSON: Cliff, please introduce yourself, and talk a bit about becoming a lawyer in Spain..

CLIFFORD J. HENDEL: My name is Clifford Hendel. I, like Axel, have developed a large part of my career outside of my home jurisdiction, which is New York. I was sent many years ago to spend a year in Europe, and I've never returned. My firm is a Madrid firm that has been known as an M&A and private-equity boutique, and in the last few years we have also done some litigation and arbitration work.

The question of legal education and admission in Spain is in fact proof of the old saw that Spain is different. I think Spain is the only country in the EU, or at least in western Europe, in which to date there is no requirement of either practical training or a bar exam of any sort. You become a lawyer by going to law school, by going to university and by getting a law degree. And that's it. There have been proposals kicked around for many years,

and sooner or later one of them will be implemented, under which there will be requirements of practical training of some sort and a kind of bar exam. But any change of this sort meets with suspicion and legislative difficulties. To date it has not been implemented.

Since there is no custom or practice neither of summer associate programs in Spain nor of part-time work there, largely because of labor law matters, the hiring of lawyers is really very much a hit-or-miss proposition, because you're hiring young lawyers who have no experience, who have not been through a bar exam, and who simply have presumably been good students. But being good students, as we know, doesn't cut the mustard. It is not clearly an indication of anything in law practice.

MR. FERGUSON: Thank you, Cliff. Jiri, please introduce yourself and give a description of the legal profession in the Czech Republic.

JIRI HORNIK: My name is Jiri Hornik. I work for Kocian Solc Balastik Advocates, one of the leading law firms in the Czech Republic.

In terms of the number of lawyers, we are considered to be a large law firm, the number of lawyers being between 50 and 70. And, we are a full-service law firm.

As concerns the legal education, we have a five-year program. Once you graduate, you have a number of directions in which to go. One of them is, of course, to become an attorney. If you want to proceed in that way, you must undergo three years of a sort of training program, and at the end of the program you must pass a bar exam. There are similar rules that apply for prospective notaries: schooling that is also a five-year legal or graduate program and then a three-year training program, at the end of which there is a notary exam. And more or less the process is identical for prospective judges and prosecutors, except that the training programs will, of course, be different.

MR. FERGUSON: Peter, introduce yourself and tell us what it means to be a lawyer in Sweden.

PETER UTTERSTROM: I am Peter Utterstrom of Advokatfirman Delphi in Stockholm. It is a national law firm, and we have four offices and some one-hundred-fifty lawyers, with ninety-nine percent of our work dealing with corporate and commercial transactions.

Personally, I'm a tax lawyer by background. I started as a tax lawyer in the 1970s, and since then I've been doing tax work, but I have run into various types of other things. Today I am the senior or managing partner of the firm.

The legal business in Sweden is interesting. Probably stemming from the Vikings, we have had the notion that anybody can represent anyone, so one does not even have to be a lawyer to represent someone in court. The court may find that a person is not behaving properly in representing his or her client's interest in court and can "disbar" him from that court. But technically, in that sense, anyone can be a lawyer.

On the other hand, being a lawyer in the sense of being a member of the bar is a legally protected title. A person may not say that he or she is a member of the bar when that is not the case.

To become a member of the bar you first have to have a law degree. There are a couple of universities and schools in Sweden. It takes roughly four-and-a-half to five years to reach the exam stage. Then you must have five years' experience, three of which have to have been spent providing legal services to the public. This can be done in a number of different ways, but usually after the exam you go to court for a couple of years, and then you go to a law firm. After that, you have to pass an exam. It takes rather a long time, but it's quite worthwhile. You get good lawyers.

Size-wise, Swedish firms used to be rather small. I think we heard earlier that a medium-sized firm has about thirty to forty lawyers, which would be the case for a medium-sized firm in Sweden. We have about five thousand members of the bar. I think the guesstimate is that there must be some one thousand law firms, but the ten biggest law firms probably house somewhere around fifteen hundred to two thousand lawyers. So there are a lot of solo practitioners out there, mainly doing the family law, criminal work and that type of thing.

MR. FERGUSON: Thank you, Peter.

Peter and Jiri, both of you addressed the question, which our prior panel addressed, of what it means to be a small-, medium- or large sized law firm. Starting with Spain, let's now have the rest of you address that question. What's large, what's small, and what's mid-size in Spain, and what are the roles of the European and international firms?

MR. HENDEL: Well, starting with the second question, Madrid is very much part of western Europe and the English city firms, solicitor firms. Most of them in the magic circle at least have Spanish operations and very substantial operations providing global legal services, and they compete rather well at the high end of the global market.

As for size, really Spanish firms are all over the lot. Traditionally they tend to be smallish, and the large majority of firms are certainly very small. On the other hand, there are a number of enormous firms, and I think the largest European firm of all is the Spanish Garrigues firm. One of the reasons for that is that it had essentially merged with Arthur Andersen in Spain many years ago and took on all the lawyers from that firm, who were general business lawyers as well as tax lawyers. And this

was around the time of Arthur Andersen's untimely demise. The firm has some two thousand lawyers.

On the other hand, my own firm has barely twenty lawyers, and we are able to compete at levels which a firm of twenty, fifty, one hundred or more could not do in jurisdictions like New York, London or perhaps even Paris. So Spain tends to be on the smaller side, with a number of very large firms being the exception.

MR. FERGUSON: Axel.

MR. HECK: In Germany you have a different phenomenon due to the fact that some twenty years ago or so when the rules concerning law firm branches were changed to allow law firms to branch out. There was a sort of sellout to U.K. and U.S. law firms, so all of a sudden there were just a few large firms left that were still just German. And one can observe certain trends, as I think you can in New York as well, back to becoming small again and setting up one's own shop. But unlike France, where the law firms by and large remain independent, you had really what I would call a sellout at one point.

MR. HENDEL: Gerry, if I may, I'd like to respond to your other question, about cross-European practice or admission. It is an area that I'm intimately familiar with, because for one reason or another over the many years I've been in Europe I've managed to get myself admitted in a number of jurisdictions.

Essentially, foreign European lawyers essentially have a kind of free license to practice across borders or within host states by using their home country license. It is not exactly the same as waiving in, as the custom is in the United States, but it is not dissimilar. And this is really an accomplishment and a kind of freedom of movement of services under the EU, which is actually more significant than what it is here in the States. Here in the States, if you're a New York lawyer and you need to do something in court in California, you get waived in. The procedures are similar, the substantive law is similar, and you can study the differences and somebody can help educate you. But if you are a Polish lawyer, your law may be very different from English law. But you are entitled, after one year of residence in London, or if you are an English lawyer, one year of residence in Warsaw, to hold out your shingle to practice local law.

MR. DREANO: In France the size of the law firms varies greatly. You have small structures, which focus on an area of general practice, such as criminal law, family law, and in addition, you have larger firms that focus on business law. The latter are either French firms or international firms.

Paris has been quite open to foreign firms and particularly to Anglo-Saxon firms for many, many years. You may recall that before 1990 we had two separate professions in France: advocates, who are attorneys basically, and *conseillers juridiques*, and both were allowed to practice as *conseillers juridiques* in France. And in 1990 those two legal professions merged, and now we have only one profession, which is the profession of attorney. Many foreign attorneys took an oath of office to become an attorney in France. As a result, we have U.S. and other foreign firms that have been in Paris since the 1940s. I'm thinking of Cleary Gottlieb or White & Case. And then we have the wave of U.K. firms coming into Paris, and more recently, at the beginning of 2000, some additional U.S. firms came into Paris. Right now U.S. and especially U.K. firms constitute the larger firms in Paris. By "large," I mean about two or three hundred lawyers. On the other hand, French firms, with the exception of three large French firms of the same size, would be more in the range of fifty to one hundred lawyers. Thus, French firms tend to be smaller than those international firms.

MR. AMORESE: In Italy you can basically find firms of any size, including big American law firms and big Italian law firms that have more than two hundred lawyers. I will say that this topic is somewhat difficult to address, because as a legal tradition, Italy—like many other civil law countries—has had a long-standing tradition of boutique law firms that are highly qualified and that emerged over the years. The process of creating large law firms stems from the 1990s when American and British law firms entered the market, and many Italian law firms tried to merge to compete with them. But there is still a strong boutique law firm market that is very highly qualified.

MR. ARMSTRONG: I believe that the biggest law firm in the U.K., based on the last figures in the *Lawyer*, which compiles these ratings, is Clifford Chance with just north of twenty-five hundred lawyers. But bear in mind that they've just announced that they reduced head count since those figures by twelve percent, and that's common across the London firms particularly. Many have shrunk in head-count terms by percentages in the low teens to the twenties in the last two years.

London tends to be a melting pot really. There are more than a hundred U.S. firms in London. Some of them have largely qualified people, some not. Some just have U.S. qualified people. We had an incident last year, which sounds incredible to me, where a case got to trial, and the U.S. lawyer, who was based in the London office, seemingly then realized, after talking to the judge, that he wasn't actually entitled to run the case, so the case had to be adjourned while he found effective co-counsel. It seems incredible that a relatively senior U.S. litigation lawyer could think he can practice in an English court and have rights of audience. But it does happen.

A bit more than four hundred lawyers will get you into the top twenty-five firms in terms of head count in the U.K., but as I said, the profession as a whole, including the bar and solicitors in England and Wales, consists of about one hundred twenty thousand, which

is a number, I believe, still less than the entire number of lawyers in New York State.

MR. HECK: I think it is useful to also know that, in addition to what Cliff said earlier regarding the status of the European lawyer (that a lawyer admitted in any of the European jurisdictions may set up shop anywhere else in the EU), any EU lawyer can also, without moving, appear before any other court in the EU. There is of course a requirement that he or she have himself accompanied by a local lawyer for reasons of procedure and often also language. But you can have a lawyer you trust, as long as he or she appears together with local counsel at the bar.

MR. HENDEL: And just to clarify, these rules are available for the benefit of European citizens. If you're a New York lawyer and you happen to be admitted in a European jurisdiction, you do not enjoy any of these rights.

MR. ARMSTRONG: I was just going to emphasize that, and it is the case in regard to recognition of other EU lawyers in the U.K. The position for U.S. lawyers in this mix is somewhat muddled, and the procedure regarding them is suspended at the moment, since the U.K. is transitioning from one system to another, and there is a queue of U.S. lawyers trying to become admitted in England and Wales at the moment.

MR. AMORESE: Just to clarify a bit, an EU lawyer could render services in France, such as Axel was mentioning, but he or she would do it under his or her own national title and not, for instance, under the title of France advocate.

MR. FERGUSON: I wanted to ask you to speak about something that we had talked about in the earlier panel, namely, the role of the notary. Could you talk a little bit about the role of the notary in the French system?

MR. DREANO: Notaries are actually a particular type of lawyer. They are appointed by the state, and they even purchase their office from the state. They enjoy a monopoly in regard to certain legal matters, and it is very similar to what has been said, for instance, about Quebec or some of the civil law jurisdictions in the Americas. They enjoy, for example, a monopoly in regard to real estate transactions, in perfecting mortgages on real estate, and gifts between persons. A notary is a lawyer, and a notarial deed is particularly strong from a legal point of view. A notarial deed is enforceable per se; in other words, a court decision is not needed to enforce it. Furthermore, the content and the existence of the notarial deed can only be challenged before a court through a particular procedure, which is not the case for other, private agreements that are not notarial deeds. This is at least the case in France, but I believe it is quite similar to what happens in other civil jurisdictions.

MR. FERGUSON: Thank you.

Marco, what about in Italy?

MR. AMORESE: Well, in Italy, it is more or less the same as in France.

What I want to add is the effect of these mandatory roles. First of all, notaries enjoy a monopoly and monopoly profits as well. But more than that, the effect in the practice is that they tend to be very conservative. Thus, if their role is mandatory in incorporating a company, lawyers trying to structure a company in a more tailor-made fashion would have to struggle with the cautious notary who typically would prefer to stick to standard models.

MR. FERGUSON: What about in other jurisdictions in Europe, does the notary have a similar role?

MR. HECK: Yes.

MR. UTTERSTROM: Notaries have no significant function in the Swedish context. Sometimes we need to "up the scale" of documents intended for other jurisdictions. Lawyers who have the position of notary charge you an amount for doing it, but it's not part of the legal system in Sweden.

MR. HECK: With respect to Germany, there are a few practical considerations worth mentioning. As I said earlier, depending on where Napoleon went, the notary is just a notary or can be both a lawyer and a notary. If you go to a region or state where a notary can be also a lawyer and you use him or his firm as a notary, then that lawyer-notary may not advise you on the deal. That is one practical consideration to be kept in mind. And the other is, indeed, as Yvon said, a notary title is directly enforceable, and you can use that, for example, for an acknowledgment of debt. Therefore, if someone is willing to acknowledge a debt, there's a difference whether you have that in a simple agreement, which the debtor might renege on the next day, requiring you to sue the debtor, or whether you have the acknowledgment in a notarial deed, in which case you can take it to court for immediate enforcement.

MR. HENDEL: Well, Napoleon did go to Spain, and it was probably one of his biggest mistakes. The role of the Spanish notary is enormous; I would venture to say that it is much more pervasive than in any of the European jurisdictions that we have spoken about, including France and Italy, and very similar to what you heard earlier today with regard to the Latin American jurisdictions. Particularly I think the speaker from El Salvador gave a rather detailed description of what the El Salvador notary does, and I don't think it is useful for me to repeat that.

This topic reminds me of one general morsel that might be useful to mention in the context of this discussion about dealing with foreign lawyers. That is to say, be careful, to the extent you can, with the use of terminology, and be careful about thinking that words

that sound similar to concepts that we are familiar with have similar meanings in other jurisdictions. And the question of notaries is a very good one. Our American notary really certifies the signatures of people that he or she works with, and that's about it. When I was in New York many years ago, I remember there was a rule that notaries were entitled to charge up to twenty-five cents for a notarization. Perhaps with inflation that may be up to one dollar. But the Spanish notary, believe me, as you heard this morning and as Marcos just mentioned in the case of Italy, is extremely highly remunerated and is an extremely highly trained legal professional, much more highly trained than the average lawyer and, regrettably for us, much more highly remunerated.

MR. FERGUSON: Jiri, the Czech Republic?

MR. HORNIK: Yes, the situation in the Czech Republic is quite similar to France and Germany. There are some exceptions, as with France, where the notary does not have a monopoly with respect to the estate tax. A notary or an attorney can be used in that case. The typical notary is very strong in the area of corporate law, because, for example, some corporate decisions made at the general meeting must be made before a notary or take the form of a notarial deed.

MR. ARMSTRONG: In the U.K. it is similar but different. We do have notaries public and we have commissioners for oaths. Most of the things that other jurisdictions might want a notary for are actually performed by commissioners for oath. For example, an affidavit would be taken before a commissioner for oaths. Every solicitor is now automatically a commissioner for oaths. Thus, we have more than one-hundred-twenty thousand of those and about one thousand notaries public. As Cliff said, they generally are doing things for other jurisdictions. So if it's a foreign jurisdiction that requires a notary to sign off on something, they're doing that.

It's been twenty years since I qualified, and I can't remember a case where I needed a notary public to do something.

DAVID W. DETJEN, AUDIENCE MEMBER: Are some large business transactions in Germany requiring notarization still being carried out in the Canton of Zurich to save on notarial fees?

MR. HECK: I think so, yes. As far as saving on notary fees is concerned, in some jurisdictions when you have a situation, such as a large real estate transaction involving a foreign client, where the lawyers prepare all the documentation and the notary just has to rubber stamp them, the notary must charge his statutory fee: that is, he cannot charge less than his statutory fee. In that case it might be possible for the lawyers to charge the notary for their legal services, thereby indirectly recouping the fees paid to the notary. It doesn't work everywhere, but in some jurisdictions it does.

MR. FERGUSON: Please introduce yourself and ask your question.

FRANK HELMAN, AUDIENCE MEMBER: Frank Helman, Boothbay Harbor, Maine. I realize that this is of peripheral interest to most of the people here, but I would appreciate a few words about the role of the notary in decedent's estates.

MR. FERGUSON: Would it be fair to say that's an area of specialization, in that most of you are commercial lawyers, that you don't necessarily have the experience with it, is that why everyone is looking over their shoulder?

AUDIENCE MEMBER: The question is basically what is the role of the notaire or the notary in decedent's estates typically referred to, let's say, in many civil law jurisdictions as successions.

MR. AMORESE: I can say in Italy, where there is an interest in succession, even if it is customary to go to a notary, it probably is not really necessary. In any other case, such as if there is a will, the notary public is fundamental. He is the only legal figure who can manage that in Italian law.

MR. DREANO: And in France whenever you want to give some certainty to your will, you would prepare that will with a notary. That gives certainty to the date of the will.

MR. FERGUSON: Another question. Please introduce yourself.

RONNEN GAITO, AUDIENCE MEMBER: I'm Ronnen Gaito, an attorney practicing in Luxembourg and New York. I have a question for Mr. Heck and Mr. Hendel. I myself practice both civil and common law, and I'm just wondering if you don't view the notary—when compared with common law practice—a bit obsolete as a profession or kind of a hindrance in some way, or do you view it as a protection for the public, i.e., do you think that it is still a very relevant profession in today's modern corporate and real estate practice?

MR. HECK: Well, I think, if I may go first, so far we have no choice, because the role of the notary is mandatory; it's just a matter of law. So you would have to change that. Whether there's any use in doing that, maybe. But as Cliff just said, you know, if you have complex real estate matters or family matters where you need great know-how, you find that more with a notary, and I think there's a use to having one.

MR. HENDEL: The question is a good one, and I think Axel is right. The question is not really whether the concept is obsolete or not, because it is what it is. But I think it's more of a manifestation of the very important

differences between the legal systems. In my article [on page 38 of this newsletter], I mention the distinction of what you refer to as public faith or public faith and credit and private faith in these civil law jurisdictions, particularly among us here on the panel from Italy and especially Spain. There's an enormous amount of clout given to documents that are notarized or that pass through the public registers. These documents are presumptively valid and are given strength in court; you can go through accelerated court proceedings if you have them. And certain documents, such as wills and documents relating to real estate and certain corporate matters simply have no validity if they haven't passed through this filter. In our system in New York and the rest of the U.S., there is no such element or concept of public faith. These persons and institutions don't exist. We have, however, another way of solving the problem, which I refer to as private faith, which is to say that we rely on lawyers, legal opinions, and title insurance. We rely on other means of solving similar problems, and this is kind of a generic distinction, and it's another morsel that I throw out for you.

Try to keep in mind that there are different ways of achieving an end, and that our ways aren't necessarily the best and that others can be very different and can look very expensive but might have their merits as well. What's important is that we each find ways to solve the needs and problems of our clients, and in this case, I think we do. Legal opinions and title insurance are concepts that are basically unintelligible to civil law lawyers because they are not needed where there are notaries and public registrars that serve a similar purpose. In turn, the latter are unintelligible to U.S. or common law lawyers. If we are dealing with cross-border matters, it is useful to keep these general concepts in mind so as to understand what the other person is speaking about and so that he or she has an idea of what we are speaking about.

MR. FERGUSON: One last question.

WARREN GREEN, AUDIENCE MEMBER: I'm Warren Green, and I'm a lawyer in New York. This may be out of order, but if it is, tell me and we'll hold it. Could someone get into how to select counsel in foreign jurisdictions with the knowledge and experience to help us?

MR. FERGUSON: I think this is a good time to ask it.

MR. GREEN: Let me say that, when choosing foreign counsel, it is not just a matter of knowledge and experience; it's also a question of cost-effectiveness, judgment, credibility and all the things that go into selecting domestic counsel.

MR. FERGUSON: Peter, let's start with you and work our way across.

MR. UTTERSTROM: Obviously there are a number of ways. The Swedish Bar Association now allows for at least identifying what type of specialty you have. So technically you can go to the Swedish Bar Association and look for the listings and look for a lawyer specialized in a certain area. That's technically possible. Then you have the rankings on the directories. As I said some time ago, I personally discount them because they take a lot of my time, but on the other hand you have to live with them. They are there and they are going to stay. Some rankings are better than others. In some cases you can find that the rankings refer to a person that's dead or a firm doesn't exist anymore. But some rankings are more reliable, so I would probably look at the rankings. That's what I would do if I were looking for a lawyer outside my jurisdiction. Referrals and listening to others are of course also extremely important. So you have to apply a multitude of ways of doing it.

If you're an American lawyer, one of the best things is if you can get hold of in-house counsel listings because they have vast experience with lawyers in other jurisdictions. But you have to apply a number of methods. Of course, Google™ should also be used as part of the process.

MR. FERGUSON: Peter, if I can put you on the spot, would you mind identifying a ranking or two that you consider more reliable than others.

MR. UTTERSTROM: As a firm we have focused on Chambers and the Legal 500.

MR. HORNIK: That's very similar to what we'd do in the Czech Republic. What I could add is, of course, that there is always a battle between whether you should choose an international law firm or a local law firm. I'd mention that, even if an international law firm has a very good team in New York, it might not necessarily have teams of the same quality in other places around the world. Some may have had a different experience but that's been ours.

For example, we've seen an international law firm hiring a local law firm in the Czech Republic, despite the fact that the international law firm had an office in the Czech Republic. They did that because they had a very specific problem and thought that the local firm would give better advice.

MR. UTTERSTROM: I can add an anecdote, dealing with an American law firm, one of the very reputable New York firms. I had given an opinion on Swedish law, and obviously the client in that case was so scared that he went to the New York firm. Their opinion, which the client later forwarded to me, started out by saying that the author was not an expert in Swedish law but had carried out a number of Scandinavian transactions. I told the client that he should consider going back to that firm to verify their liability insurance.

(Laughter.)

MR. FERGUSON: Drew?

ANDRE R. JAGLOM, AUDIENCE MEMBER: The other way to locate local counsel abroad is to join the International Section and go online and use either the Section directory, which you can search by country, or go to the listing of Chapter chairs, which will refer you to somebody who is a point of contact and will help you locate somebody in the area of specialty that you need.

MR. AMORESE: Gerry, can we try to make a survey of how many of the people on the floor have used rankings to select outside lawyers.

MR. FERGUSON: That's an interesting question. How many people have used rankings to select an outside lawyer? Let me clarify the question, we don't mean solely ranking, but that it's one of the factors you consider in selecting an outside lawyer?

(Show of hands.)

MR. UTTERSTROM: It is really a part of the selection process.

MR. FERGUSON: What do you say, Axel?

MR. HECK: I was going to make the same point Drew just made and maybe elaborate, because, in the final analysis, finding the right lawyer is like finding the right spouse, or restaurant, or what have you. I mean you can go on the Internet and Google™ this, and read the recommendations, and you're not sure who wrote them, or whether they have not written it themselves. But an organization like the International Section gives you much more certainty, because the person who you might not have known previously has a great interest in not screwing up because otherwise his reputation will suffer among everybody in the organization. So I would always use the friends network, even if it involves using a friend of a friend, and I've never had a problem with that, ever.

MR. ARMSTRONG: I think that's right. I think from my perspective the problem is actually slightly more difficult than that. I've instructed lawyers in the last two years in probably forty to forty-five different jurisdictions, and I want lawyers that are not only competent in their own jurisdiction but that understand mine and that understand my clients as well.

I will give you a concrete example. I'm doing a lot of work in regard to the new U.K. bribery legislation. I see some other lawyers in the U.K. say to New York clients, "Let me tell you why there is bribery legislation." For a U.S. client I think that's a bit insulting. What U.S. clients want is a snap description of the differences between the FCPA and the U.K.'s Bribery Act; they do not want to pay thousand of Pounds Sterling to be advised of the history of bribery legislation. From my point of view, if I'm looking for counsel in other jurisdictions on behalf of a U.S. client, I really want the client to pay only for that type of "gap" analysis; I don't want the client to have to pay for basic learning. And this aspect of the matter makes things more complicated. This speaks to Drew's point, where people in the International Section hopefully have been to panels like this and understand the differences among jurisdictions and can do that gap analysis more intuitively. I've picked counsel on the recommendation of some of you in this room when I've had issues recently, and I am grateful for those recommendations, which I can only suggest others seek as well.

MR. FERGUSON: Thank you for that inspiring presentation Jonathan, but tell us what you really think about rating organizations!

MR. ARMSTRONG: I have private views and public views, for one. And this has to do with Gerry's indemnity insurance. I've had a spell at previous firms as the liaison with some of the ranking agencies, and let me say, without going into further detail, that I am deeply skeptical of them.

MR. FERGUSON: What about from the French perspective?

MR. DREANO: Actually, we are quite skeptical as well, and particularly because these ranking directories would, at least a vast majority of them, would be Anglo-Saxon and would tend to maybe favor some of the Anglo-Saxon firms in Paris. That's our opinion on that. But besides that, those directories could be useful, and particularly when you would be looking at some particular specialization. When you would like to find a good arbitration lawyer in a particular jurisdiction, I mean it could be definitely useful.

MR. FERGUSON: Jim Duffy.

JAMES P. DUFFY, III, AUDIENCE MEMBER: I think there is one thing we all have to realize when we are choosing foreign counsel, and that is that, when your clients look to you to find foreign counsel, they are relying on you to pick somebody that is going to give them top-rate service. And it's very, very difficult to assure a client that they are going to be treated the same way you would treat them as a client if you don't have some sort of prior relationship with the firm to whom you are referring the work. I think that's one of the very important features of our chapters or legal networks and the like. You are going to be seeing the people to whom you are referring work to, at meetings like this, and you're going to have to look them in the eye. As Axel said, if you screw up, your reputation will suffer. I think we should not underestimate the importance of that. It is the same with most clients, who don't choose attorneys unless they have some sort of relationship with them. When we are helping to select attorneys for our clients, we should try to make

sure we have a relationship with the person that we are choosing, if we can.

AUDIENCE MEMBER: As I became more involved in picking counsel over the years, I would have a short list of maybe one or two or three firms, mostly two, and I would then invite the client to an independent meeting with each of the two law firms, so the client could get an impression from them. I would still undertake the decision-making, but I wanted the client's impression of the people because the client was going to be working with those people. I wonder if that's something that the panel has experienced or whether they think it's a bad idea or a good idea.

MR. FERGUSON: Do you want to comment on that, Axel?

MR. HECK: Yes, I totally agree with you. It is always better to play it safe, to give your client a choice, but at the same time I think you want to stay on top of the matter yourself. And in most cases the client prefers that anyway, because the client would rather talk to one lawyer, not five. The same is true for accountants and other professionals. I think that the most practical approach for everyone would be something like this: Your client says that he or she has a problem in Mexico, Greece or France, and you say that you'll think about it. Then you come back with a suggestion, and of course you offer the client two or three or more lawyers to choose from. Chances are that the client will ask you who you recommend and tell you that you're the one the client wants to keep talking to. So, I think you want to stay on top of the matter yourself.

AUDIENCE MEMBER: I definitely agree. The choice is the lawyer's, but it's a question of getting a reaction from the client.

MR. UTTERSTROM: I'd like to add a comment. Some weeks ago I heard an in-house counsel for a large multinational marketing organization relate that, if he hasn't worked with a lawyer in a specific area in the past, he looks at the directories and then has talks with other people he knows in the geographical area. He then selects a couple of potential lawyers and then he does exactly what you suggest: he meets with them to find the right person. It doesn't matter to him which firm they are associated with; the selection is done on a person-to-person basis. I think this is very common when it comes to dealing with professionals in larger international entities.

MR. FERGUSON: That makes sense, Peter.

Let me shift gears a little bit. Jonathan, this was a subject you were touching on earlier: the formation of the relationship and whether there are ethical issues in terms of conflict or privilege that may distinguish the practice in your jurisdiction that people should be aware of.

MR. ARMSTRONG: Our conflict rules are probably fairly similar to the U.S. They are less aggressive. For example, a firm's expansion into Europe could fail because of U.S. conflict rules in Europe, so there are challenges for multinational firms.

Privilege is a particularly difficult issue, and I know I've spoken on other panels about this before, but the interaction of privilege and data privacy legislation in Europe is extraordinarily challenging.

I agree with the comments of the earlier panel about being ultracautious about what you're copying into e-mails. I know of an instance where a matter turned on the head of compliance in an organization. The person held a law degree and mistakenly believed that she satisfied the test of privilege by virtue of that, but she didn't, and she conducted the entire investigation herself. As a result, it is likely that all of the investigatory reports that she did, which are subject to criminal proceedings, will go into the public domain by the victims' publishing the report, unless some of the defenses that we are trying succeed.

The real difficulty about this is that privilege in the U.K. is complex. In very, very general terms, if a lawyer is involved, then you can rely on that lawyer's privilege. If it's in-house counsel for U.K. proceedings that are led by U.K. authorities, usually the privilege of U.S. counsel and in-house counsel should stand up. But if it involves proceedings in the U.K. that are under EU legislation led by an EU authority, then it is unlikely that privilege will hold up for in-house counsel or for U.S. counsel.

Many of you will have seen the *Akzo Nobel* ruling of the EU Court of Justice. A friend of mine was the lawyer who refused, on the ground of privilege, to hand over the documents in that case, and the prosecuting authorities wrongly told him that they would imprison him until he gave the privilege point away, and to his credit he refused. This is really the front line of the conflict, particularly between the EU authorities and the legal profession as a whole. U.K. solicitors and barristers all believe that the privilege of in-house counsel particularly should be respected. And without getting on a soapbox, it is to the shame of the European Commission that they don't agree.

MR. FERGUSON: Marco, do you want to comment?

MR. AMORESE: I'd just add that the Italian rules on conflicts of interest are pretty much in line with American rules.

MR. DREANO: In France we have strict conflict-of-interest principles, and we also know about Chinese walls and things like that. Now concerning privilege, in France we have quite particular rules, which are perhaps different from what you would have in the U.K. and the U.S., and we should consider different situations. First, all the communications between an attorney and his clients

are privileged, and no one would be entitled to request an attorney to disclose those communications. Second, communications between attorneys are privileged, and that privilege may be waived whenever both attorneys accept that the communication is official and not confidential. Third, which is something that was discussed on the previous panel, whenever a French attorney would have communications with another EU attorney, the communications would not be confidential per se. This means that you would have to take all the precautions to make sure that these communications are deemed confidential, so that they remain confidential. Fourth, in France, in-house counsel are not attorneys, and therefore they do not benefit from the attorney-client privilege. This means that, when you are dealing with an in-house counsel in France, all your communications are not confidential, unless obviously it would be mentioned as being confidential.

It is important to have these rules in mind when practicing in France and dealing with French attorneys or with in-house counsel of French companies.

MR. FERGUSON: Axel.

MR. HECK: Well, there is not really very much I have to add here as far as Germany is concerned. There are perhaps a couple of things.

For one thing, a German attorney cannot do much without a power of attorney. For example, you cannot act before the courts at all without one. The powers of attorney tend to be very broadly worded, but that's just how it is.

As far as the privilege of an attorney and his work product is concerned, vis-a-vis the authorities, it is no different than what we just heard from the other countries. And as far as the relationship between or the correspondence between two different attorneys representing two different parties, there is no such privilege at all. In fact, you have the obligation to communicate to your client anything you do and anything you write to anyone, including to another lawyer.

MR. HENDEL: Just a comment about conflicts. I'm hoping to work on a litigation precisely because of conflicts, as most of the competing firms are in my jurisdiction, which is Madrid. The point I want to make regarding this is that the conflict rules are similar or identical to any others. What's different is that there is a rather concentrated legal community in Madrid. It's not New York with hundreds or many hundreds of competent and able law firms with high recognition. In Madrid there are a dozen or fifteen firms, which means that the conflict issue arises much more regularly, and that, even though the rules may be as strict formally, insofar as the black letter of the law is concerned, as they are in other jurisdictions, in practice they have to be ignored to some extent.

The example that I can mention is that I remember once being asked if our firm could represent two bidders in a private equity auction process and couldn't we have a Chinese wall? And I explained, "Well, look, this is not China, this is Taiwan, we are very small firm, and we don't have Chinese walls here. We can't." But in the sort of context of the market, the question is understandable. There were lots of bidders, and they were having trouble finding a law firm that wasn't already involved with one or another or two bidders. In Spain a firm frequently has a Chinese wall and represents two bidders in a public way. It's disclosed, and of course only one bidder goes forward, so the firm proceeds with that bidder.

MR. HORNIK: There are no major differences in the conflict of interest rules compared to the other countries.

As far as the privilege is concerned, the situation is quite similar to France. In regard to in-house counsel, remember what I said about that law degree you are receiving after about five years, and the choice you then have. If you decide not to complete the training period, you can join a company and work in the legal department as a lawyer, but you are not a member of the bar, so you do not enjoy that advantage of the privilege rule. The company could decide to have a special arrangement with a law firm and more or less outsource the legal department to an outside law firm, in which case you can circumvent the problem.

MR. UTTERSTROM: There isn't much left for me to say. It is basically the same advice up in the far north.

MR. FERGUSON: Well, thank you, Peter.

I would like to give each of our panelists a parting shot. I'll let Peter go first, so everybody doesn't steal his thunder before his turn to speak comes. But if you wanted to leave this group with something they should really know or understand to work effectively with Swedish counsel, what would you like to leave us with?

MR. UTTERSTROM: I think that a lot of what was said in the previous discussion applies. Having an open mind and trying to understand that there are differences, and obviously it can be rather devious sometimes. Because if you go to Stockholm or Helsinki, you're going to meet someone who is pretty good in English and he seems to understand everything you say, but that may not be the case, so it's easy to get misunderstandings. I think that's obviously miscommunication, man's worst enemy probably. There you have to be very, very patient.

MR. HORNIK: I would also refer to the previous discussion, because everything that was said applies. Of course, you should be aware of a number of differences that may complicate your life. For example, in the aviation business you need to register the aircraft with

the aircraft registry, and of course, in Europe there is the concept—known under New York law—of irrevocable powers of attorney. But a power of attorney is always difficult under Czech law. You may have a problem with a Czech entity providing an irrevocable power of attorney in the future, because it might not work, especially if you are dealing with Czech authorities. Also, the concept of trust is not recognized under Czech law or other European jurisdictions, unless those jurisdictions are parties to the International Convention of Irrevocable Trusts. Thus, you might have problems with arrangements that are available under New York law but won't work in Europe.

MR. FERGUSON: Cliff?

MR. HENDEL: I would summarize what I mentioned earlier, which is to keep in mind that you need to avoid false friends. Keep in mind, for example, that the American concept of notary public has nothing at all to do with the Latin notary, and it would be better for all of us and for foreign lawyers dealing with us if two different terms could be used, because when we all use a similar term it confuses all of us.

Similarly, with regard to things like discovery and disclosure and depositions, don't assume because we do it and because we think this works that other people do it or understand what we are talking about when we talk about it. And be careful when you hear them using the terms so as to be sure that what they are talking about is what you're thinking about, because the differences may not be evident in the terminology. There may be different institutions and different concepts, and you need to be careful and open-minded. Think about your own prejudices or biases or presumptions or assumptions, because the other guy or gal has similar ones, and, if you are both rigidly insisting on understanding and describing things in your own way, you'll have trouble understanding each other and working together, and your client will suffer in the end.

MR. FERGUSON: Axel?

MR. HECK: Yes, there is not much I can add. In total, it is all about people. You have to find the right person to deal with, ideally with the knowledge of your own legal system. So as Jonathan said so rightly, you want to get the advice that points out the differences between the two systems. And perhaps since we are not going to go into litigation or arbitration, I'd add one cent with respect to that if I may. For the selection of arbitrators the same holds true. I have seen many situations where people have not picked the right one. So it's all about people. You have to make sure you find the right person.

MR. FERGUSON: Yvon?

MR. DREANO: Yes, I've nothing further to add. Keep an open mind, particularly when the legal environments are different, as they are in the common law and civil law jurisdictions. That's advice we are giving to you that we also need to follow ourselves.

MR. AMORESE: It is very difficult advice to give. But let's say when you are dealing with Italy, you should always bear in mind that Italian lawyers have also enjoyed a social position, and this brings a different mindset. It might be useful to inform the Italian lawyer clearly about your client's and your own priorities in the relationship that you are undertaking.

MR. ARMSTRONG: Maybe I can say something on a macro point. One of the major differences and trip-ups for U.S. corporations is disabusing themselves of the notion of bringing the U.S.-type of employer-employee relationship into Europe. Generally speaking, no jurisdiction in Europe has employment at will. Employees have stronger rights, and we also have the rise of works councils. And they will get in the way of the best laid plans of U.S. corporations if those companies don't do it right.

My other tip, in terms of relationships with other law firms, has to do with the psychology of the process. We have found that, generally speaking, the most junior lawyer on a major M&A team, for example, has the task of lining up foreign counsel, i.e., finding the most senior lawyers he or she can. It may be startlingly obvious, but people sometimes don't get it. If you're a qualified lawyer who has been practicing for thirty years and are the top of the tree in your country, how do you feel about taking orders by somebody who has been qualified for a year or two? Instructing foreign counsel is a job for the team leader or somebody at the top of the team rather than the lowest qualified member of the team.

MR. FERGUSON: On that note, again, incredible breadth of knowledge. I think we've had only a very small percentage of what this group has to say, but thank you very much.

(Applause.)

IV. Asia, Oceania and Middle-East Panel

MR. FERGUSON: At this point you're all pretty familiar with the format. We are not going to tinker too much with what has been working, but I do think that this panel, certainly for me, is the one that I am particularly interested in, because these are jurisdictions that I've had the least experience with historically, but they are jurisdictions that are increasingly important in the transformation of the world economy.

We really have represented here all the major jurisdictions, and we're calling it—I hope without offending Gordon—Asia and Oceania. If FIFA, which is the world-governing soccer organization, can put Australia in the Asia division, then maybe the New York Bar Association can too. The Australian bar was the host of our Annual Meeting last fall. It was an amazing trip for

all who participated. Again, if not exactly on the same land mass, I think what Australia shares with the other participants in this panel is its importance as a growing market for U.S. companies.

As before, I would like to start by asking our panelists to introduce themselves and then give a brief discussion of what it means to be a lawyer in their jurisdiction, what you have to do to be able to call yourself a lawyer.

Aymen, if you would go first, please.

AYMEN ALMOAYED: I am based in Bahrain, but we handle transactions throughout the world. We are usually in the U.K. and the States. As you know, most of our clients are interested in acquisitions, as opposed to the other way around, so they acquire companies that are based in the United States, for example.

Being a lawyer is the only profession in our kingdom that's mentioned very clearly in the constitution. That in itself shows, firstly, the legitimacy and recognition that's given to the profession. But, secondly, lawyers really are the pillar of the economy, as far as we are concerned. It is a skewed outlook I think, but I think it is a relevant one. We really are facilitators when it comes to any transaction that takes place, whether it be related to banking or otherwise.

JOHN DU: Thank you. My name is John Du. I'm with the firm called Jun He Law Offices. It is a PRC-based law firm, but I am based in New York. Our firm has about four hundred lawyers with a geographic scope encompassing the major cities in China, as well as Hong Kong, Silicon Valley and New York.

What does it take to be a lawyer in China? Well, it's both easy and difficult. The easy part is the educational requirement. Really, a college degree is sufficient. However, you do not need to go through law school, although there are law schools which actually grant undergraduate instead of postgraduate degrees, as here in the states. After four years or even before you graduate you can take the bar, but you are required to graduate in order to become a lawyer. Since there is no law-school requirement, there is a large pool of test takers for the entrance exam. You may have heard about China's college entrance exam. The exam for licensing as a lawyer is even tougher now than for college graduates. In past years the passing rate was lower than ten. Now it is a little bit over ten. Even a firm like ours—which is one of the top law firms in China—has a certain percentage of soon-to-become associate attorneys who fail the exam.

And another requirement I want to highlight is that, in order to become a lawyer in China, you have to be a Chinese citizen. I don't think that's the requirement in many other jurisdictions. Certainly it is not a requirement in New York.

MR. FERGUSON: Gordon?

GORDON HUGHES: My name is Gordon Hughes. I'm a partner at a large Australian firm called Blake Dawson. I have about two hundred partners. I feel I know about thirty of them. In Australia we have about fifty thousand solicitors and five thousand barristers. It is quite a high proportion for a country of twenty-two-and-a-half million.

To become a lawyer in Australia you need a law degree, which can be an undergraduate law degree from one of our thirty authorized law schools. When you complete the degree you have to undergo a period of twelve months practical training. We have no bar exam. Once you've completed that period of practical training and you're certified to be a person of suitable character, you're entitled to be admitted to practice. If you want to go on to become an advocate as a member of the independent bar, there's a further training period to complete, which is known as the bar regents course, and you can then be admitted to prosecute. You don't have to be a member of the independent bar to be entitled to advocate in court. But most people, certainly for any complicated litigation, would engage as a matter of course an independent advocate to appear in court for them rather than a lawyer appearing as a solicitor.

RONALD LEHMANN: My name is Ron Lehmann, and I'm with the firm Fischer Behar Chen Well Orion & Co. in Israel. We are a firm of about one- hundred-thirty lawyers; we are a full-service corporate and commercial firm.

The basic rules in Israel are similar to what we have heard from other jurisdictions. Becoming a lawyer involves a combination of an educational requirement, having a law degree, and completing a clerkship that follows the law studies. The clerkship usually lasts a year and is followed by a bar exam.

What is somewhat unusual in Israel is that there is a special arrangement that obviates the need to complete the full set of the different stages for people who have practiced either for two years, in some cases, or five years, in other cases, outside of Israel before coming to Israel. This is probably intended to encourage people to immigrate to Israel and is actually a part of the structure that has proven quite relevant to lawyers like myself, who were originally trained and may have worked in the United States or other countries before moving to Israel.

KAVIRAJ SINGH: My name is Kaviraj Singh, from India. Our procedure is very simple. Once you have a law degree, you can register yourself with any registered bar counsel. Thereafter you are entitled to appear in all the courts and tribunals. There is no continuing legal education requirement, nor do we have a system of barristers and solicitors.

Another requirement in India is that you must be citizen of India to be registered as a lawyer. This is why a foreign lawyer cannot practice in India. But there is now discussion ongoing to open the legal market. Medium sized and small firms are supporting this for the entry of foreign law firms into India. Indian law firms are largely controlled by families.

Basically our chairman of the bar council of India and the law minister proposed an exam to qualify or to register as a lawyer. But this proposal has been tabled. In India everything takes a lot of time to happen.

MR. FERGUSON: Kaviraj has raised an interesting issue, which is the openness of India to other law firms, such as U.S. law firms. Right now it is not permitted, but you are on the forefront of trying to change that.

MR. SINGH: I can safely say that I am in support of opening the Indian legal market. We are one of the very first firms, and I'm the only one in my family to become a lawyer, and all of my partners are unrelated to me. Everything is run along family lines in India. If your family is headed by a policeman, you are bound to be a policeman. If your father is a businessman, you are going to be a businessman. Also, we work closely within one community or within one company or within one set of circumstances.

MR. FERGUSON: Ron, what about in Israel, do international firms have the ability to set up there?

MR. LEHMANN: It is an issue that has been very much on the front lines. Historically non-Israeli firms have not been allowed to open offices in Israel. Legislation has been enacted, but the legislation is subject to implementing regulations that have not yet been put into place. So the current situation is that international firms are not yet in a position to have a presence in Israel. I think it's fair to say that there is a lot of institutional opposition to that potential change, certainly from the larger law firms in Israel. And I suspect that there are also some structural factors that, even if the implementing regulations were promulgated, would make it difficult for foreign law firms to integrate themselves into the Israeli market. One of these factors is the very significant difference in fee structures between what international firms are able to charge in other jurisdictions and what would be considered reasonable fees in Israel.

MR. SINGH: I would like to back up with one comment regarding foreign law firms in India. In terms of the liberalized policy, some of the firms are advising on foreign law and are hiring local Indian counselors. However, a case filed by some of the Indian lawyers forced them to close all these firms. They can continue the practice, but this is just because the case has been filed in the high court and has now been transferred to the supreme court because of various participants.

MR. FERGUSON: Gordon?

MR. HUGHES: We have a number of English and American firms in Australia. Just jotting down a few names, and I might have missed some, but Jones Day, Baker McKenzie, Sidley Austin, Norton Rose, all very big firms that are operating in Australia. I think that reflects the fact that we have rather liberal rules regarding the entitlement of foreign lawyers to practice in our country. Lawyers who fly in and fly out are unregulated. Foreign lawyers wanting to practice foreign law in Australia for a period longer than that can register as foreign lawyers. Once registered they can work in an Australian firm; they can be partners in an Australian firm. We have a very accommodating regime for international firms.

MR. DU: I want to say a few words about China. A lot of international firms cry foul that China is protectionist in this regard. But when I heard stories about India and Israel, China looks pretty open. China has a dual system for international law firms and domestic law firms. First of all, international law firms are not allowed, at least on the books, to practice Chinese law. But there is a crack in the legislation. International law firms are allowed to interpret Chinese law. There are specific restrictions that apply to litigation and the rendering of legal opinions under Chinese law. But in most cases, I would say that this does not deter multinational law firms from engaging in large-scale transactions, where there is an international element or sometimes where the matter is a purely domestic one between two domestic entities in China. But of course, most of the transactions are foreign-related.

Another interesting phenomenon is that a lot of these law firms actually employ Chinese lawyers. When the Chinese lawyers go to these international law firms, they are not called Chinese licensed lawyers. They are actually called legal consultants, because their license is suspended once they join the international law firm, but they maintain their qualifications. Once they leave and go to a domestic law firm, they can reinstate their license.

In terms of scale, there are over two hundred multinational law firms in China, and the sheer number gives you the scale of the practice in China. In terms of number of people, some multinational law firms have as many as a hundred lawyers, but most I would say have fewer than a hundred.

I would like to add that, unlike India, which has had an unsuspended legal profession, in China the legal profession had been pretty much done away with. During thirty years what Shakespeare was saying about killing all the lawyers was a reality in China. But interestingly, the Chinese profession came back strong, thanks a lot to the Chinese opening to the multinational law firms. The model of a firm like mine and other Chinese law firms is based on the U.S. model, and we take the partnership agreements from international law firms and adapt them to China. That's how we form a partnership. I think this has been a very interesting development.

MR. FERGUSON: Thank you, John. Aymen?

MR. ALMOAYED: As far as the profession in Bahrain is concerned, we effectively have litigators and counsel. The role of litigators is restricted only to Bahrainis. This goes to the response with respect to international firms. International firms that don't have any litigators, any Bahraini litigators on their staff, cannot practice in the jurisdiction. We don't have a protectionist stance on the profession per se, but you actually have to be called to the bar in order to provide advice on specific transactions in the Kingdom. Therefore, there actually is a de facto limitation to what foreign nationals or foreign legal consultants, as they are called, can do. A legal consultant, a foreign legal consultant, that is—a member of Norton Rose, for example—can only provide expertise with respect to the jurisdiction that he or she is from and not to Bahrain. It is a really strange system that we have. So, yes, you can get a license, and no, you can't provide localized advice.

MR. FERGUSON: Just briefly, because I think it gives a useful context. Aymen, what would be a mid-size firm in the Gulf States and what would be a large firm?

MR. ALMOAYED: As far as the Gulf States are concerned, if you look at the Dubai firms, you have firms that would range between fifty and four hundred associates, so they do get pretty large. With respect to Bahrain, with respect to Saudi Arabia, with respect to Qatar, a mid-sized firm would be about ten to thirty, and a large-sized firm would be anything above that.

MR. FERGUSON: John?

MR. DU: The market in China is evolving so fast, so what I say here about a mid-sized firm could apply to a small-sized one in two years. Today, a medium-sized firm would range from probably seventy or eighty to two hundred lawyers. There are definitely more than twenty law firms that have over two hundred lawyers. In some of the largest ones—there are at least two or three large ones that have head counts of over one thousand. But the market is evolving so fast that some law firms claim that they will have over two thousand lawyers probably in two years. That could be a reality, because it's China, where everything is possible.

MR. FERGUSON: Gordon?

MR. HUGHES: We have a rather strange imbalance in Australia. I mentioned before that we have fifty thousand solicitors. We have nine large law firms, all of them about the same size, each of them with around about two hundred partners, for a total of seven or eight hundred lawyers and a full head count of comfortably over a thousand. But what that means is that we have fifty thousand lawyers and nine firms that accommodate seven or eight thousand practitioners. It is a rather strange imbalance, and of course we have the full range of size of firms below that. That's just a phenomenon with the way we operate.

MR. ALMOAYED: Could I ask something of Australia, just to throw this in? In a conversation we had yesterday, a colleague mentioned that there's a firm in Australia called Slater & Gordon that is actually listed on the stock exchange. That's a pretty strange phenomenon as far as we are concerned.

MR. HUGHES: I'm traveling around the world with the president of the World Council, Alex Wood, and everywhere we go that name comes up. It is true that one of our firms—in fact, two of our firms—have listed on the stock exchange. It is a strange phenomenon. I don't want to necessarily digress the discussion too much at this stage, but the biggest concern people have is how can the firm balance its duties to the court with its duties to the shareholders? That's really the only problem. But the problem has been quite successfully addressed in its prospectus, where the firm states that its first and primary duty is to the court and its secondary duty to its shareholders. And people are still ready to invest on that basis, and so be it. People seem to assume that a firm like that would have a sinister profit-making motive that would compromise the ideals of the profession. Well, that's not the case. It has as vested an interest as anyone in maintaining the highest standards, so it continues to attract good work and maintains its reputation. There actually have been no reactions at all in Australia relating to it.

MR. DU: How does their stock perform?

MR. HUGHES: Well, it dipped during the global financial crisis, but it is now twice what it was when it floated.

MR. LEHMANN: In Israel the numbers that I checked before coming here indicate that there are seven firms that have over one hundred lawyers. The largest has one hundred seventy, so that gives you sort of the range. There are eleven firms with between fifty and one hundred attorneys; fifty-five firms with between twenty and fifty; and eighty-nine firms with between ten and twenty.

What's interesting about the sizes is the rate of growth among the larger firms. Six or seven years ago a large firm in Israel would have had fifty lawyers, and basically the group of these half a dozen or so large firms have sort of grown in lockstep, adding about ten to fifteen lawyers a year on an annual basis over the last six or seven years. This is, I think, also reflective of the fact that the Israeli economy managed to weather the downturns of 2008 and 2009 perhaps somewhat more effectively than some of the other economies. So the law firms have actually continued to grow, despite what was going on in other parts of the world.

MR. SINGH: In India, all the lawyers are individual practitioners. The large law firms are limited to the big cities. What I am saying is my estimate, since no law firm in India discloses the actual number of lawyers they employ. But my rough estimate of what would be considered a large firm is one employing more than fifty lawyers; a mid-sized firm would have about twenty-five to thirty. But there are only about ten large firms.

There is a new trend now where lawyers are leaving the big firms and starting their own practices. This has led to a growth in the smaller firms having about five to ten lawyers. The number of these smaller and mid-sized firms is increasing.

MR. DU: I would like to say just a few words about integration. We talked about size. Size matters to a certain extent, but another thing that matters a lot is integration. We talk about size, and you know, some law firms in China will be growing to one thousand and then even to two thousand in the near future. Not all firms, however, are integrated to the same extent. Many firms in China adopt a model that we call a shopping-mall model, which means we have boutiques within a large marketplace. This means that a partner within that firm would have his or her own staff, and sometimes—and this may be somewhat of an extreme example—you might have two partners within the same firm representing clients from two different sides, not in litigation but in some transactions. It happens.

MR. FERGUSON: We have heard and actually it stirred up a fair bit of discussion today about the subject of the notary and its role in some of the jurisdictions we have been discussing. Does the notary play a significant role in the jurisdictions you gentlemen are representing?

Aymen, would you like start?

MR. ALMOAYED: The role of a notary is very limited as far as Bahrain is concerned. The actual notarial process is administered by the Ministry of Justice. The only time that you would actually need a notary is for real estate transactions, incorporating companies, actually certifying the bylaws once those are approved, and last wills and testaments. Otherwise, you really don't interact with a notary, but the notary is a role played by a government body.

MR. DU: In China I think the role is pretty much between what you have in Europe and what you have in the U.S. The notary plays a much larger role than notary publics here in the States but certainly not one like that in Europe. For most transactions notary publics are not necessary, although one function you come up with very often is in regard to real estate transactions and the transfer of what we call land-use rights: notaries are often used in those circumstances. That's why you see a lot of notary publics running around with the developers. It is a good business in a way, since there is a lot of construction in China right now.

Another role played by the notary, besides the normal authentication of documents, is the authentication of evidence to be used in court. For example, very often litigators hire them, in IP infringement lawsuits, to visit and authenticate a Web site that is the subject of the infringement claim, and then that evidence will be presented to the court without someone being able to contest it.

MR. HUGHES: The notary's role is very limited role in Australia. The Australian position is very similar to what was described in relation to England in the last session. Most functions that a notary public is required to perform in some jurisdictions can be performed in Australia by a commissioner taking oaths and affidavits, and that is a status that all lawyers get when they are admitted, and they keep it for life. Thus, it is only where there is a specific requirement from overseas for a notary public to witness a document that a notary even comes into play.

Peter in the last session said that in twenty years he had never had cause to use one. Being much older than he, I can say that in forty years of practice I've never used one.

MR. FERGUSON: That sums it up.

MR. LEHMANN: In Israel the position of a notary is somewhere between that of the American model and that of the European model. There are certain types of actions that require a notary to verify the authenticity of signatures, copies of documents, and the like. There are also certain particular actions that require a notary: prenuptial agreements and, if a real estate purchase is made through a power of attorney, the power of attorney has to be notarized. Wills may—but do not need to be—notarized. One way a will can be created is by its being read in front of a notary.

As a practical matter, the way in my practice that the notary is most relevant is in connection with the Hague Convention, to which Israel is a party. Thus, whenever an *Apostille* is required by someone in a foreign jurisdiction, typically the document would be signed in front of an Israeli notary, and we would take it across to the street to the appellate or district court to get the *Apostille*, and assuming the other side is party to the Hague Convention, we are in business.

MR. SINGH: The role of the notary public in India is pretty much similar to that of a notary in the U.K. It's not necessary to get documents notarized, but it adds certainty in case of a dispute regarding them.

MR. ALMOAYED: If I may add just a humorous point. Bahrain law is almost a mesh between the civil and common law. You can't say we apply civil codified

practices, and you also can't say, because of our historical context, that we apply common law. With respect to the notary, for a while—from 1973 to maybe two years ago—a notarized document actually required two things: It had to be witnessed and certified by a notary public and then also witnessed by two other witnesses, so it was a real mixture. They couldn't quite pick between one system or the other!. That has now been fixed, and the signatures of notaries don't need to be witnessed anymore.

MR. FERGUSON: That's good news. I'm a New York lawyer, and I've been asked to go into one of your jurisdictions and select counsel. Are there circumstances where I'd be better off going with one of the larger, more general-practice firms; and are there circumstances where I'd be better off going with more of a specialty firm?

Kaviraj, would you like to start with that question?

MR. SINGH: Yes, sure. You can save a lot of money by selecting a mid-sized firms. Depending on the transaction, it might be good to have a larger firm, but it can be more effective to have a mid-sized firm where the senior partner himself works on the transaction.

MR. LEHMANN: I would say that for lawyers coming from New York and working for the U.S.-based clients who have the need for legal services in Israel—I am talking about corporate or commercial types of matters—I would think that the natural place to look would be among the mid-sized to larger firms. Those are typically the firms that have the most experience with cross-border transactions. You're probably more likely to find lawyers in those firms who work at a somewhat higher level in English. Certain types of matters—two that jump to mind are criminal matters and family matters—would typically not be handled by the larger firms, and for those one would typically look to a specialist firm.

On the other hand, I think it is safe to say that virtually all the larger firms, and to some extent the mid-sized ones, have capabilities in house to deal with other kinds of what may be considered specialty matters, like employment, environmental, and tax matters.

MR. HUGHES: In Australia all of the large law firms will be capable of doing any business transaction. As is the case in Israel, the large law firms won't handle criminal or family law or cases for individuals at all. None of that is to say that smaller firms don't have the expertise as well. It is just that you can see what exists in the big firms, and with the small firms there'd be a question of what expertise they have.

There was discussion in the last session about the role of the directories.

MR. FERGUSON: Yes, go into it.

MR. HUGHES: Well, they are a necessary evil. You can love them or hate them; you can be cynical about them, but they are a reality and people do use them.

I know a firm like mine adopts the philosophy that you've got to live with them, so at least you ought to make sure that they are accurate in what they say. We have a full-time employee who does nothing but update contributions to directories around the world, which might seem a little excessive, but we think it's necessary.

The other thing which I've heard in previous discussions is how you go about selecting a lawyer. Certainly in Australia it is very common and standard practice to ask for competitive quotes. If I were looking for a lawyer in Australia I would identify the persons with the apparent abilities, and then I'd be asking for a quote. It might be just an hourly rate, or it might be an estimate of the transaction overall that would in turn involve stating how many people they are going to put on the project and what the seniority would be of the persons who would be doing the work. But we are very accustomed in Australia to get into bidding wars.

MR. LEHMANN: If I could add just one other word. I agree with what Gordon said about the ranking books being necessary evils, and, in a jurisdiction like Israel, that point is actually underscored, because until fairly recently the attention that those ranking books paid to the relatively small jurisdictions was equally small. Since Israel, particularly with the high-tech boon, has become more of a global player, so has the attention it's gotten from these ranking books. But there is sometimes a bit of lag between the historical situation, firms that existed forty or fifty years ago, and the developments that have happened in the profession over the last five, ten, or fifteen years. In addition to the other necessary evils of the ranking books, the time lag issue is sometimes quite pronounced as in Israel and, I suspect, in other similarly situated jurisdictions.

MR. DU: Well, in China the legal market is very, very fragmented; and, just like the Chinese economy, it is not evenly distributed, I would say. As a result, in coastal cities you can find fairly qualified domestic law firms, and, in this instance, I'm not talking about the international law firms. But when you go to the inland cities, there are very, very few law firms that are qualified to do your work. In those cases, I would say it's better to leave the coordination to some law firm on the coast that is better at communicating with you and better at managing the local stuff. We have had a quite a mix of bad and good experiences in this regard.

In terms of specialty, while most law firms will be able to meet most of the needs you have in terms of doing business in China, there are some specialty law firms, mainly, I think in the IP area, because China requires the licensing of patent and trademark agents and that gradually developed into a specialty in itself. There are

also other specialties, such as commercial litigation, but, even in the commercial litigation area, a boutique commercial litigation firm would mostly serve domestic and not foreign clients. Thus, I would not go only to a boutique litigation firm if I were a foreign client, because there would very likely be some communication issues.

MR. ALMOAYED: As far as Bahrain is concerned, I wouldn't want to generalize, but it really depends on whether what you propose to do requires a commoditized service (like incorporating a company for example), in which case you're more than welcome to pick a name of a firm, large or small, from one of the directories. But if you're dealing with disputes, I would not refer to a directory. I would try to analyze the transactional history and gain an understanding as to who within the firm has the expertise that I require, and I would then communicate directly with those persons, rather than with the firm as a whole.

MR. FERGUSON: Aymen, some of the other speakers have referenced the existence of rating services. Is that something that people rely on in the Gulf States, and are there any that you would consider reliable?

MR. ALMOAYED: The general ones are Chambers and Legal 500. But as far as the information that is available is concerned, it really is extremely outdated, to be honest. Instead, I would use general public forums: for example, the Chamber of Commerce provides information on what transactions have taken place and who the lead is on a particular transaction or particular arbitration dispute. Here, too, I'd pick the expert and go back to him or her, as opposed to going back to the firm.

MR. FERGUSON: John, can you address the same question for China. I know Legal 500 and Chambers are there, but what are their uses and limitations, and are there other resources people can use?

MR. DU: Well, in China the legal market serves two somewhat distinctive fields. One is in international investment, and the other is purely domestic. If we are talking within the context of foreign investment, yes, there are Legal 500 and also ALR, which stands for "Asian Legal Business." There are also the China Business Review and Chambers Asia. All of them rank Chinese law firms.

But I think one thing which is relevant is that, although information is available, a lot of it is, as previously mentioned, outdated. Since Chinese law firms are not as marketing savvy as international law firms, you may be exposed to a lot of information about international law firms, but it could be that the local law firms are doing a far better job, or they may at least have worked on more transactions than they reported to the international agencies.

MR. FERGUSON: Kaviraj, I don't know if you have had a chance to address that question about the ratings in India.

MR. SINGH: India does not have a rating agency. There is no public registry that lists the lawyers by virtue of their practice area or anything like this. However, the foreign Legal 500 do list attorneys and give them a rating. It's been my experience that often the information is not accurate, so in India the personal relationship is key.

MR. FERGUSON: A question.

AUDIENCE MEMBER: I just wondered if you could speak about whether or not in your jurisdiction lawyers are comfortable with giving quotes for work and projects. I would like to hear if quotes are common, and, if they are, what currency do you give the quote in?

MR. ALMOAYED: I mean as far as legal fees are concerned it usually breaks down to one of two things: You are either asking for a fixed-fee assessment of the legal fee, and it can be paid or quoted in dollars or dinaras, which is the local currency, or the hourly rate. And again, it depends on the complexity of the dispute; in more complex transactions some firms will emphasize the requirement of an hourly rate quote, as opposed to a fixed rate.

MR. DU: Well, in China fixed rates are mostly found in certain specialty cases, such as litigation and IPO work, and here I'm talking about the rather large-sized and quite international law firms or local law firms with international elements. But for most domestic Chinese law firms, a fixed fee is more or less the custom, and you can get quotes there. Also, some cases are on a contingency basis. An hourly rate is very rarely used among the purely domestic law firms.

MR. LEHMANN: Israeli law firms will certainly entertain both hourly quotes and fixed-fee quotes, depending on the nature of the work. I think most lawyers in Israel prefer to work on an hourly basis rather than on a fixed-fee basis, even if that means building in some level of discount.

Having said that, just to give you a flavor of the fee structure, and I speak for the large firms, you would typically find at a large firm that partner rates would probably run in the range of say $300 to $350 an hour, associate rates, depending on the level of seniority, range from $160 to $230 an hour, and article clerks around $100 an hour, just to put it all in perspective vis-à-vis what might be expected in New York or other American or western jurisdictions.

I'd like to note a couple of other points. In Israel, with certain exceptions for certain kinds of transactions, a valued-added tax (VAT) is applied to legal fees. This means that you have to add sixteen percent, and, unless you're in effect paying for the service through an Israeli

company, which can offset the VAT, this is, in fact, an additional cost. This probably doesn't necessarily close the gap between the overall lower fee structures in Israel versus what you would expect here, but it is something to bear in mind. In terms of the currency question, my firm typically quotes to U.S. clients or overseas clients in dollars. Over the last several years that has generally worked to our disadvantage, because the shekel has been one of the strongest currencies in the world during that time. While we'll quote in dollars to overseas clients, if anybody wants to volunteer to pay in shekels, we will be more than happy to do so.

MR. SINGH: In India the fixed-fee model is followed by the majority of lawyers, and rates are generally from $100 to $600 per hour depending on the firm. Mid-sized firms charge about $300 per hour maximum, and the large firms charge around $600.

MR. FERGUSON: One thing I'd be interested in hearing from this panel is if there are language and cultural issues that we should be sensitive to as New York lawyers working with lawyers from your jurisdiction. Aymen?

MR. ALMOAYED: Most contracts can be found in English or at least are drafted in English. In addition, almost all correspondence is done in English.

I believe that there was a reference earlier to two-column contracts, where you have the Arabic and English versions side by side. One thing that you have to focus on there is that the Arabic version is what takes precedence if there is a dispute. My recommendation will therefore always be that, if you don't have an in-house translator of some type, get the translation certified, get it confirmed and so on. Otherwise, it might backfire.

MR. DU: Well, in China since a lot of transactions require government approval, especially in the foreign investment area, by necessity you need to draft the documents in Chinese. On the other hand, of course, you have a foreign client for which you need to prepare an English draft. For those documents that are under Chinese law, the documents need to be in Chinese, and we often specify that Chinese law controls.

In many instances what we call back-drafting occurs, and sometimes the two clients will have egos on their side and each of them will say that it wants its language to control, so that the compromise is that both versions are equally authentic. Don't use that phrase equally: there is no such thing as "equally authentic."

MR. FERGUSON: I know you speak a language very similar to English in Australia, Gordon.

MR. HUGHES: Well, there are attempts on the part of some of the politicians to muddle the language, but we do speak English, so it is not really an issue.

But let's pick up on that last point where there's an issue about whether a contract should be in the English language or the foreign language of another party. In regard to the point you're raising about which one should prevail, we've had a couple of situations where clients have created dual versions of the contract with a running translation down the side. That is a complete nightmare, because when you really drill down into it you find out the translations aren't that precisely matched, and the court is in an impossible position, which can potentially void the contract.

MR. LEHMANN: In Israel there is a ready expectation that any kind of cross-border transaction will be documented in English. I don't think there would be really much discussion of that issue. When an Israeli party and a non-Israeli party sit down to negotiate an agreement, I don't recall ever seeing the two-column Hebrew and English. Having said that, there obviously are a range of English-language skills among Israeli attorneys. But as you mentioned before, certainly the mid-sized to larger firms certainly have the skill-set in-house to produce high-quality English language documents.

The caveat, however, to the prevalence or acceptability of English would apply to documents relating to the formation of a company. We may touch on that later, but if we are on the topic anyway, the official position at the moment is that articles of association of new companies that are formed have to be submitted in Hebrew. The position is that these sorts of documents should be submitted in one of Israel's official languages. The official languages are actually Hebrew and Arabic; English is not one of them. But having said that, there is a growing recognition that this is a policy which may be self-defeating in terms of discouraging foreign investors and other parties from setting up entities in Israel. And there is at least some proposed legislation that would allow articles of association, for example, to be filed in English with a Hebrew translation.

I think, hopefully, on the official-documentation front we'll be making progress, moving more towards English language documents.

The one other cultural aspect I would point out is for people to be sensitive to the work schedule and work week. In addition to a seven-hour time difference between Israel and New York, the Israeli workweek, for example, is Sunday through Thursday. On Friday you can really expect not to find lawyers in the office, and government offices are closed and so forth, so the weekend is in effect Friday and Saturday. On the one hand you may be frustrated when you can't reach the lawyer or the other side on a Friday, but he or she may surprise you by delivering a document on Sunday.

MR. SINGH: In India business is conducted in the English language in the Supreme Court and High Court.

All the agreements, as well as company incorporation and other documents, are executed in English only. Even though an agreement might be between two Indian companies, English still will be the language that is used.

MR. FERGUSON: We have time for one question. Norman Green.

NORMAN GREEN, AUDIENCE MEMBER: Yes. Norman Green from New York. Can the colleague who's familiar with the Chinese courts comment on whether allowing dispute resolution by the Chinese courts is a good or bad idea. This goes really for dispute resolution clauses: should we provide for commercial arbitration in U.S. courts and skip your courts, or could you just tell us?

MR. DU: Well, that's a very good question and a perennial topic. First of all, there is no official statute or provision that says that Chinese courts do not recognize or enforce foreign judgments. It's simply that they don't.

The option would then be to have an arbitration clause, because both China and the U.S. are parties to the New York Convention.

It's a common mistake made by many a non-experienced lawyer in New York to have a contract provide for litigation in New York because that's the New York lawyer's home front, and he or she thinks he'll have all the resources at his or her disposal. That's fine, but an experienced Chinese party would leave that clause alone, and then force you to litigate that, I mean, make you enforce that in China. The Chinese party would probably even default. "So what?" would be the Chinese party's thinking.

MR. ALMOAYED: As far as arbitration is concerned, Bahrain tries to position itself as an arbitration center, at least for the Gulf States. Thus, there isn't a problem as far as arbitration proceedings are concerned. They can be initiated in any language, and the awards are enforceable.

We are also a signatory to the New York Convention, and so having an international award, that is, an award granted in a different jurisdiction, is enforceable although there may be a specific procedure that needs to be complied with.

I'd like to mention another item of interest to everybody here. Quite recently the Ministry of Justice has had an extremely long backlog of cases. What they did was set up a joint venture between themselves and the American Arbitration Association (AAA), which has led to a kind of fast-track process, if you will, for claims over $1.5 million. Effectively it is an arbitration procedure for companies that don't want to go down the usual litigation route.

MR. HUGHES: Alternatively, dispute resolution in the form of arbitration and mediation is very much entrenched as part of the Australian dispute resolution process. It has become a very fertile area for retired judges to involve themselves in. I don't know that I need to say much more about it really.

Now in my jurisdiction, for example, legislation came to force on the first of January 2011, which makes it mandatory, before you can set a case down for trial, for you to certify that you have been through an alternative dispute resolution process first, which normally means mediation. Only then will the court give you a hearing certificate. As you can see, there's great emphasis on trying to avoid clogging up the courts with cases that can be dealt with otherwise.

MR. LEHMANN: I think the considerations in Israel between litigating and arbitrating are the same kinds of considerations that you would consider in other jurisdictions. To address the question specifically, I do not think that agreeing to litigation in Israeli courts for a non-Israeli party would be considered toxic or problematic.

I think the Israeli court system is on the whole highly regarded. It is somewhat overburdened, but the court system is very aware of the overburdening problem and is trying to make reasonable efforts to address it. They have recently created a new commercial court, which I think will only enhance the situation. So I don't think there are unusual considerations in Israel in one direction or the other.

MR. SINGH: In India arbitration can be enforced, since India is a signatory to various international treaties. However, a foreign judgment cannot be enforced if it is not issued by a competent court or if it is in breach of any Indian law; otherwise Indian courts consider foreign judgments to be conclusive as between the same parties.

MR. FERGUSON: I am very disappointed to say that our time has come to an end. I have found this incredibly informative for me. I really appreciate the time and thought that everyone on the panels has devoted to making very useful and practical presentations.

Thank you all very much.

(Applause.)

Recent Decisions of the Supreme Commercial Court of the Russian Federation Regarding International Arbitration

By Ekaterina Butler

I. Introduction

This article describes the rulings in four cases decided by the Supreme Commercial Court of the Russian Federation (RF) that would be of relevance to any party involved in commercial arbitration in Russia, including foreign parties involved in cross-border dispute resolution. The full text of the court decisions can be found at http://ras.arbitr.ru/.

II. Amendments to Arbitration Clause After Assignment of the Main Contract

In *LLC Intervtorresource v. LLC Glovis Rus*,[1] the Supreme Commercial Court of the RF held that amendments made to an arbitration clause in a contract by the original parties to the contract after the contract was assigned to a third party assignee were not binding on the assignee and the contract debtor.

In this case, the court had to decide the issue of the validity of an arbitration clause amended after the assignment of the main contract. A buyer and a purchaser entered into a purchase-and-sale contract that included an arbitration clause providing for arbitration, with the seat in Hamburg, Germany, under the rules of the Chamber of Commerce, and with German law as the substantive law of the contract. The seller assigned the benefit of the purchase-and-sale contract to a third-party assignee. The obligations under the purchase-and-sale contract were to be borne by the seller, as assignor. After the assignment of the contract, the original parties to it, i.e., the original seller and purchaser, entered into an additional agreement in which they amended the arbitration clause by electing to use the arbitration rules of the International Committee for Settlement of Non-Governmental Disputes (ICSNGD). When the purchaser (i.e., the contract debtor) defaulted, the assignee went to arbitration. The arbitration tribunal formed under the ICSNGD rules made an award in favor of the assignee. The debtor failed to satisfy the award, and the assignee brought an enforcement proceeding before the court of first instance of St Petersburg, Russia, which decision the assignee subsequently appealed to the appellate court. Both the court of first instance and the appellate court rejected the enforcement application.

On further appeal, the supreme commercial court also rejected the enforcement application. Applying Russian law to the assignment agreement, the high court concluded that the new arbitration clause had no effect on the debtor-buyer of the original sale-purchase contract, since the new arbitration clause was entered into between the seller and the assignee after the assignment had been effected. Thus, the debtor did not become a party to the new arbitration clause. The high court ruled that, as a matter of Russian law, unless agreed otherwise, the right of legal recourse as provided for in the original agreement is transferred to the assignee upon assignment of the agreement. Hence the original arbitration clause was validly assigned to the assignee and remained binding on the debtor. Given the autonomous nature of an arbitration agreement, any amendment thereto must be agreed between the debtor and the assignee. In the absence of such agreement, any amendment is not binding on the debtor.

III. Validity of an Arbitration Clause in an Unsigned Bill of Lading

In *ESF Euroservices B.V. v. Hyundai Merchant Marine*,[2] the Supreme Commercial Court of the RF held that an arbitration clause incorporated in a bill of lading was valid, despite the fact that the bill of lading remained unsigned, where the parties did not contest the validity of the bill of lading or the actual delivery of the goods covered by the bill of lading.

The claimant, ESF Euroservices, was the carrier, and the respondent, Hyundai Merchant Marine, was the consignor under a bill of lading for the transportation of containers with ethyl acrylate. The consignor had supplied the carrier with containers that were defective and caused a loss of pressure. As a result of this loss of pressure and due to the fact that ethyl acrylate, which was being shipped in the containers, is a highly explosive gas, additional safety measures needed to be taken while unloading the cargo at the port of delivery in St Petersburg. The carrier incurred additional costs when taking these safety measures, and claimed compensation from the consignor. The carrier filed a claim with the court of arbitration at the Central Transportation Agency in Moscow pursuant to the arbitration clause in the bill of lading. The arbitration tribunal decided for the carrier. The consignor appealed the arbitration award to the Moscow commercial court of first instance on the grounds, inter alia, that no valid arbitration agreement existed between the parties, since the bill of lading had not been signed. The court of first instance cancelled the arbitration award, and the appellate court confirmed the decision of the court of first instance. On appeal, the supreme commercial court disagreed with the appellate court and confirmed the arbitration award. The high court ruled that, although the bill of lading had not been signed by both parties, it was valid. Under Russian law, the arbitration agreement should be made in writing and signed. The arbitration agreement is deemed to be in writing if it is contained in

a document signed by the parties or is concluded by way of an exchange of letters, messages by teletype, telegraph or through use of any other kinds of communication purporting to fix the terms of the agreement, or by way of an exchange of a notice of claim and reply in which one party submits that there is a valid arbitration agreement and the other party does not contest this. A reference in a contract to the arbitration clause constitutes a valid arbitration agreement, provided that the contract itself is made in writing and the arbitration clause is incorporated by reference in the contract. Here, the high court ruled, although the bill of lading was not signed by both parties, given that the parties did not contest the validity of the bill of lading or the actual delivery of the goods under the bill of lading, the arbitration clause was valid.

IV. Awarding Interest on Damages

In *Lugana Handelsgesellschaft mbH v. OJSC Ryazan Metal Ceramics Instrumentation Plant*,[3] the Supreme Commercial Court of the RF found that awarding interest on damages was not contrary to Russian public policy, provided the amounts awarded are not excessive.

An arbitral tribunal in an arbitration conducted under the rules of the German Institution of Arbitration (DIS) made an award, whereby the respondent, OJSC Ryazan Metal Ceramics Instrumentation Plant, was ordered, inter alia, to pay the claimant, Lugana Handelsgesellschaft mbH, damages and interest thereon at the rate of eight percent above the base rate. The claimant was also awarded arbitration and legal costs and interest thereon at the rate of five percent above the base rate.

When the respondent failed to satisfy the arbitral award, the claimant filed an application with the commercial court of first instance of Ryazan Region for recognition and enforcement of the arbitral award. The commercial court of first instance rendered an enforcement order with respect to all the claims, except for the interest on the damages and the arbitration and legal costs. The award of interest was rejected as contrary to the public policy of the RF and not provided for by Russian legislation. The appellate court reversed and remanded the matter to the court of first instance. On remand, the commercial court of first instance rejected the application for recognition and enforcement in its entirety, and that rejection was subsequently confirmed by the appellate court.

The claimant then appealed to the Supreme Commercial Court of the RF, which reversed and ordered recognition and enforcement of the arbitral award in its entirety. In particular, the high court confirmed the award of interest. The high court stated that Paragraph 1 of Article 1 of the Civil Code of the RF sets out the principles of equal treatment and redress of grievances, including compensation for overdue payment of the awarded damages. Noting that the amounts ordered were not excessive and applying legal principles it had formulated in a prior case,[4] the high court stated that contractual penalties are part of the legal order of the RF and that interest on any recovery is not contrary to the public policy of the RF.

V. Arbitral Awards Not Rendered on the Merits Not to Be Recognized

In *Living Consulting Group AB v. LLC Sokotel*,[5] the Supreme Commercial Court of the RF held that Russian courts will not recognize or enforce arbitral awards not rendered on the merits.

Pursuant to an arbitration clause, the claimant, Living Consulting Group AB, commenced arbitration under the arbitration rules of the Arbitration Institute of Stockholm Chamber of Commerce (the "SCC Rules") to recover amounts due under a contract for the supply and installation of interior design elements. When the respondent, LLC Sokotel, failed to pay its fifty-percent share of the advance for costs, the claimant paid the total amount of the advance in compliance with Article 45 of the SCC Rules. The Claimant then filed an application with the arbitral tribunal for an order against the respondent to recover the fifty-percent share of the advance it had paid on behalf of the respondent.

The arbitral tribunal issued a "separate award" against the respondent, as requested by the claimant. When the respondent failed to satisfy the award, the claimant applied to the commercial court of first instance in St. Petersburg, Russia, for recognition and enforcement of the separate award rendered by the arbitral tribunal under the SCC Rules. The court of first instance and the appellate court both rendered judgments for the claimant. The respondent appealed to the Supreme Commercial Court of the RF, which reversed and refused to recognize and enforce the award, as not having been rendered on the merits. The high court ruled that the award in question was not final, nor was it rendered on the merits pursuant to Article 43 of the SCC Rules. Hence, the award was not enforceable under either the New York Convention or applicable Russian law, in particular the Arbitration Procedure Code of the RF. The high court noted that it will not enforce any interim decisions by arbitral tribunals that are of a procedural nature, such as decisions on advances for costs, jurisdiction or security for costs.

Endnotes

1. Case N° 15887/09, 20 April 2010 (Russ. Sup. Com. Ct.).
2. Case N° 16727/09, 30 March 2010 (Russ. Sup. Com. Ct.).
3. Case, N° 13211/09, 2 Feb. 2010 (Russ. Sup. Com. Ct.).
4. *Joy-Lad Distribs. Int'l Inc v. OJSC Moscow Oil Refinery* Case N° 5243/06, 19 Sept. 2006 (Russ. Sup. Com. Ct.).
5. Case No. 6547/10, 5 Oct. 2010 (Russ. Sup. Com. Ct.).

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Doing Business in Spain, Including Selecting and Managing International Counsel

By Clifford J. Hendel

I. Principal Differentiating Characteristics of the Spanish Legal System

A. Starting Point: The Essentials of the Civil Law System and Their Impact and Consequences on Legal Education and Practice

Starting with the obvious, Spain is a continental European country and, accordingly, its legal system is based on civil law, rather than common law. What does this mean in practice? Essentially, the civil law tradition gives primacy (i) to code-based law rather than judge-made law, as in our common law system; and (ii) to a Cartesian / theoretical / scientific view of law rather than an eminently practical, fact-based and case-based view, as in our system. Importantly, the conception of the lawyer as an "officer of the court," with implicit duties of a fiduciary nature toward the administration of justice and the conduct of clients' affairs generally, is little known in the civil law tradition.

This is only a very simplified starting point to analyze the key underlying differences between the civil law and common law traditions, viewed from the perspective of Spanish law and practice. An appreciation of these (and other similar) differences is essential to understanding the nature of legal practice and the "mentality" or approach of any civil law (including Spanish) practitioner, and the extent to which this approach differs from the common law lawyer's approach.

1. Legal Education

Take legal education, for example. In our American common law system, law school, to put it simply (although with a bit of exaggeration), is not a place for learning the law: instead, it is a place to learn to "think like a lawyer." Thus, classes are almost universally taught via the Socratic method and the basic course materials are court decisions which exemplify the best tradition of common law legal reasoning and analysis. The students are taught to apply principles to factual situations and thereby develop and refine the principles (i.e., the law) themselves. The course of study, aimed at developing this form of conceiving the law and developing skills for addressing and solving a legal problem (law as an art) and finding practical solutions (law as a business), is almost universally limited to three years. Judges—the paragon of legal reasoning and legal "reasoners"—are drawn from the pool of experienced lawyers, generally experienced litigators, rather than having followed a special, separate course of legal study preparing them for the judiciary. Law is, like other professional studies, a post-graduate program: a certain maturity and general (typically, liberal arts) education is presumed. Finally (perhaps as cause, perhaps as consequence), law is considered a distinguished and eminently respectable course of study in the common law world.

Civilian legal education is dramatically different. The focus is much more "learning the law" than learning to "think like a lawyer." Rote learning of vast quantities of legal texts (provisions of the basic civil and commercial codes, generally closely-based on the Napoleonic codes promulgated in France in the waning years of the eighteenth century) forms a large portion of the curriculum. Court decisions do not constitute a material focus of study: "doctrine" or scholarly works are instead the building blocks (in addition to the codes and laws themselves) of civilian legal education. So oriented (law as a science), the course of study tends to be quite a bit longer than in the U.S. (typically, five years), although recent European efforts are geared at reducing / harmonizing the length of university studies throughout Europe, and adding practical and participatory elements to the historically theoretical and passive system of learning. Civil law judges, for their part, are educated separately from other legal practitioners, attending what a common lawyer would (deridingly) call "judge school." Law is an undergraduate program: the base of general education or maturity on which the U.S. system of post-graduate professional education is built is lacking, and law studies commence directly after high school.

2. Legal Practice

How do the civil law approaches to law and legal education outlined above affect the actual practice of law in civil law jurisdictions? At the risk of gross over-simplification, and without prejudice to the more specific treatment below regarding Spain, the following characteristics seem to be of more or less general application from the perspective of a common law lawyer looking at the practice of law in a civil law jurisdiction:

(a) **Drafting**: Civil law lawyers, able to rely on code provisions and fond of Cartesian reasoning based on legal texts, pay notably less attention to precision of drafting than do their common law counterparts. The civil law system does not place the same premium on the precision of the written word as does the common law system, which has (or at least, historically, had when the system was forming) no code-based fallback serving not only to fill gaps but also to spell out unvarying terms of contracts. The civilian lawyer tends to view the common

lawyer's lengthy, carefully crafted contracts and similarly crafted correspondence as reflections of an unnecessarily punctilious and obsessive approach to practice.

(b) **Role**: Civil law lawyers tend to have a somewhat less intimate, more distant relation with their clients than do common law lawyers. They are less quick to "put themselves in the client's skin," and more inclined to limit their advice and involvement to purely legal matters rather than business, commercial, or mixed legal and commercial matters. The comparison of a typical common law lawyer's legal opinion from that of a civil law lawyer can be telling: rather than a user-friendly and forceful (so far as the circumstances warrant) defense of the client's position, the civil lawyer's opinion is often viewed by the common lawyer or common law-based client as a clumsy, scholarly and equivocal document of limited practical assistance.

(c) **Law firm size and lawyer specialization**: Civil law lawyers tend to stress the professional aspects of their calling, and minimize its commercial/business aspects, whereas for most common law lawyers "law is a business." This distinction may both explain and be explained by the smaller size and less specialized nature of civilian jurisdiction law firms as compared to the more "corporate" organization of common law firms and the higher degree of specialization of their lawyers.

B. Some Essential Spain-Specific Differentiating Characteristics

In the hope that a paragraph of history is worth at least a chapter of logic, the following can be considered as a very high-level summary of Spanish legal history: A classic civil law jurisdiction, Spanish law has Roman roots and historically has followed, and borrowed liberally from, German and French law and legal structures. A wave of codification in the early nineteenth century established Spain as a principal member of the liberal, bourgeois Napoleonic legal camp. For a good part of the twentieth century, Spanish law (like Spanish society generally) was to a certain extent cut off from developments beyond its borders due to the isolation and ostracism of the Franco regime. The final decades of the twentieth century saw a rapid "normalization" of Spain and the Spanish legal system, the two most significant motors of legal change being the adoption in 1978 of a modern constitution providing for the devolution to regional authority of certain matters previously reserved to the central government, and the accession of the country to the European Union and the resulting wholesale adoption of new and largely uniform legal rules.

Against this background, mention can be usefully made of three ideas or concepts which are omnipresent in Spanish practice and which inevitably give rise to confusion on the part of common lawyers or their clients. Specifically, I refer to (i) the concept of "public faith"; (ii) the question of corporate functioning and capacity, including the sometimes nettlesome question of powers of attorney; and (iii) certain basic matters of Spanish litigation and civil procedure that inevitably and irrevocably color a Spanish lawyer's conception of litigation anywhere.

1. "Public Faith"

It is against the historical background summarized above that Spanish law and practice has developed. To the common law lawyer, one of the principal features of the Spanish legal system that is hardest to come to grips with involves the question of "public faith" in legal matters. As with other Latin legal systems, the Spanish legal system reserves a very significant role to public or quasi-public officials such as notaries and registrars. In fact, the Spanish system probably takes this role to its highest level in Europe. While a full discussion of the meaning of public faith and the role of the Spanish notary and registrar in providing it is beyond the scope of this presentation, a useful shorthand is to say that they filter documents and transactions to ensure their efficacy; once such documents and transactions have successfully passed their filter, they are entitled to greater or lesser degrees of presumed and occasionally unimpeachable validity, on which third parties in good faith can rely and which can have certain effects important in all matters of legal and commercial intercourse, including, in particular, in judicial proceedings.

Just as the common law lawyer has trouble understanding this system of public faith, the civil law lawyer has equal difficulty in fathoming how any legal system can function (as does the largely "self-regulatory" common law system) without an extensive system of public registers and documentary and transactional gatekeepers/filters like the Spanish notary and registrar. To a large extent, what the Spanish system accomplishes by public faith—a functional and secure bedrock for the legal system—the common law system accomplishes by what can be referred to as "private faith," i.e., the conduct and expectations of conduct of individuals and collectives, most particularly, the conduct and expectations of conduct of lawyers as officers of the court.

An everyday example highlights the differences. While a civil law lawyer cannot easily conceive of having a document signed in escrow, in advance of its "release" at a subsequent closing, entrusting such a document—or, heaven forbid, the purchase price or other closing consideration—to counsel (including opposing counsel), such a procedure is standard practice for the common law lawyer. It is the very absence of a system of public faith which puts such a premium on *private* faith in the common law system: it is not that common law lawyers are more honorable or honest than civilian lawyers, it is simply that the legal system in which they operate

has no institutional provider of *public* faith to grease the wheels of legal and commercial intercourse, so they must provide the service themselves. In both systems, comparable results are achieved, but the means to these similar results are quite different, sometimes inexplicably different in the eyes of lawyers schooled in the opposite legal tradition.

This is not to say that the systems do not sometimes trigger peculiar results: the Spanish system provides such a comprehensive and effective system of public faith that not only is private faith not needed, but it is presumed not to exist—private actors tend not to be trusted and their trustful conduct is not rewarded (and thus is actually discouraged!). Thus employees of parties are presumed to testify so untruthfully that they are generally not permitted to testify in Spanish court proceedings, and even the authenticity of a date or a signature on a document are matters routinely challenged unless a notary's involvement has definitively established the date and valid signature of the document in question.

2. Corporate Authority

A classic area of conceptual confusion between Spanish and common law lawyers (and, really, little more than a variation on the theme of public and private faith) involves questions of corporate authority.

For the Spanish lawyer, signing authority is established by the presentation of a formal power of attorney, which has passed the filter of a Spanish notary and—depending on the nature of the power, general or specific—the additional filter of the Commercial Registrar. To open a bank account, sign a contract, or otherwise commit the company, this kind of power of attorney, and only this kind of power of attorney, will suffice. Spanish executives are thus required to carry with them dog-eared powers of attorney, perhaps granted years ago, in order to evidence their due capacity.

The Spanish lawyer (indeed, the Spanish system) accordingly expects the same kind of evidence of capacity from non-Spanish parties. The fact that a common law executive's authority is often really one of apparent authority based on his / her corporate office, or one supported or evidenced by an opinion of counsel in a significant transaction, or even one which is the subject of board approval evidenced in the company's customary form for the same, is wholly irrelevant. What the Spanish system requires is that the foreign party mimic the Spanish system's own requirements.

Thus, the common law executive must arrange for a formalistic power of attorney to be executed in front of a U.S. notary (who has no legal training, of course, and only certifies signatures) and including a certification as to the existence of the company and the authority of the signer—matters completely beyond the competence of the U.S. notary. But without such a power, and the apostille of the Hague Convention to certify that the notary is a notary, the power will have no utility in Spain. Clearly, experienced Spanish lawyers, notaries and registrars know that this manner of proceeding (having the U.S. notary sign things that he / she is unable to assert, let alone understand) is a bit of a scam, but (as Woody Allen says) if it works… In fact, a source of a certain amount of alarm in Spanish legal circles is that US entities and authorities seem to be waking up to this issue: in recent months, I have had to resolve problems created when a leading US bank and (separately) the Secretary of State's office of a Midwestern state both took the firm, and ultimately correct, position that the US notary simply could not and would not be allowed to make any certification of a legal nature.

A similar example involves title to real estate: the Spanish system is based on a public registral system, providing unimpeachable evidence of ownership, liens, etc. The US system is based on title insurance and other private means of providing legal certainty, or at least, a sufficient level of legal certainty.

3. Litigation

Leaving aside features of the Spanish legal landscape which affect principally corporate and contractual matters, there are enormous and irreconcilable differences between Spanish and common law (or at least, U.S.) approaches to litigation and civil procedure. In fairness, many or most of these differences probably stem from peculiarities in our system, not theirs. A sampling of these differences would include mention of the following.

First, the U.S. jury system, particularly in civil cases, is essentially unknown in Spanish law and practice. Thus, there is little or no evidentiary distinction between issues of fact and issues of law, little or no need for rules of evidence and limited restrictions on the ability of appellate courts to review determinations of fact, as well as determinations of law. Remember that our complicated rules of evidence were created to prevent undue prejudice in the minds of the untrained lay juror; in the absence of such a jury system, complicated evidentiary rules are not necessary.

Second, while the hoary distinction between the common law "adversarial" system and the civil law "inquisitorial" system may be oversimplified, it remains an essentially accurate depiction of the contrasting situations, and one which has many consequences. The most easily appreciated concerns deadlines: U.S. counsel can stipulate with each other and waive filing and other deadlines as matters of mere professional courtesy; this is not so in Spain, where deadlines—usually very (even, unreasonably) tight—are cast in cement, and lawyers and parties, having submitted to the court system, are deemed to have no ability to set the pace of the proceeding.

Third, another frequently observed distinction gives rise to the familiar—although surely exaggerated and overly-stereotypical—characterization that, while the common law judge is blind and illiterate (preferring live, oral evidence), the Spanish or civil law judge is deaf and dumb (preferring written evidence and tending to discount oral testimony).

Fourth, U.S.-style discovery and deposition practice is entirely unknown in Spain. It is very hard for a Spanish lawyer to understand why damaging documents need to be preserved and ultimately disclosed to the other side in a litigation. It is for this reason that the question of who bears the burden of proof in a particular case is so important in a civil law country, where damaging documents do not have to be given up to the other side, while burden of proof is, practically speaking, less of an issue in the U.S., since following discovery all parties will have copies of all parties' relevant files and documents.

And, finally, it is equally hard for a Spanish lawyer to envision and participate effectively in an unscripted witness examination or, especially, cross-examination, since the basic form of Spanish witness testimony is a stilted, formal series of questions yielding answers of either "yes" or "no," and nothing more. To a limited extent, Spanish lawyers and arbitrators will understand and follow prevailing practices in international arbitration, as embodied in the IBA Rules on the Taking of Evidence, of requiring the other side to disclose specifically identified documents in its possession which are considered of particular materiality and relevance. Spain is a party to the New York Convention, and is generally favorable to the enforcement of foreign arbitral awards and court judgments alike, so long as due process ("*orden público*") concerns are respected.

C. Other Areas of Interest

1. Ethical Rules

Spanish lawyers are subject to ethical rules which will be generally familiar to a common law lawyer. Conflicts of interest tend to be less rigorously policed, perhaps as a result of concentrated legal and business communities, where situations of conflicts abound. In a recent high-visibility takeover battle, it turned out that one of the participants had taken advice from virtually all of Madrid's top firms…precisely to "conflict" them from being involved on the other side of the takeover battle. Pure contingency fees are banned, although sizable "upsides" as a function of results are permitted. Bar associations (membership in which is obligatory and expensive) tend to have low visibility, with their officers elected to multi-year terms and compensated for their services, unlike in their common law equivalents.

2. Employment Issues

Spanish labor law and practice will be unrecognizable to a common law lawyer, who is used to employment and labor relations being relatively unregulated. In Spain, in what may be considered at least to some extent a legacy of the Franco regime, employment and labor relations are extremely regulated, resulting (in the view of many, including the OECD) in a rigid, inflexible system where excessive worker protection (including high indemnity payments in cases of firing and a special system of labor courts generally favorable to workers' claims) results in high unemployment and a two-tier system: those with "indefinite" (long-term) contracts and substantial protection, and those with "temporary" contracts, with little or no protection.

D. Further Points Relevant to Questions of Selecting and Maintaining Relations with Spanish Counsel

1. Legal Practice

Spain has a single-tier legal system, under which law graduates have access to the profession of *abogado* upon obtaining their university degree without need, to date at least (Spain being the only core EU country with this practice), for a bar exam or practical experience of any sort. A separate profession, called *procurador*, is for practical purposes no more than an agent for transmitting court documents between counsel and the court. While *procurador* function seems entirely unnecessary to the common law lawyer, at present there is no option to bypass the *procurador* and the (modest) additional cost *procurador* represents. There is, under current law (which pending legislation could change), no requirement for practical training or "articles" of any sort before being licensed to practice. This, and the fact that summer clerkships or similar arrangements are very rare, makes the hiring of junior lawyers in Spain very much a "hit-or-mess" proposition with a much higher proportion of "misses" than one would like to see.

2. Law Firms

All kinds of law firm structure, size and vision are present in Spain, from the traditional small/family firm (years ago ethical rules prohibited firms from having more than twenty partners and an informal "gentlemen's agreement" prohibited firms from "poaching" partners from other firms) to full-service boutique, mid-sized, or giant firms (such as the Garrigues firm, which, with more than two thousand lawyers, is the largest in Europe) to local offices of international firms. Fee structures tend to follow the size and specialization of the firm in question—lower at the smaller traditional firms, and higher at the larger and especially international firms.

3. Sources of Information

Remarkably little information about Spanish lawyers is generally available for users to consult other than the usual international sources (Martindale-Hubbell, Chambers and the like). Some online sites and a magazine called *Iberian Lawyer* do provide useful information, but the most common and most reliable source of useful

information tends to be the recommendation of a colleague or friend with first-hand experience.

II. Summary Lessons for Selecting, Understanding and Maintaining Productive Relations with Spanish Counsel

Keeping in mind the considerations mentioned above should help the common law lawyer in choosing—and more importantly, understanding and collaborating effectively with—Spanish counsel.

The following concrete lessons should be remembered.

- Do not expect from the Spanish lawyer a carbon copy of what you would consider your ideal partner or dream associate.
- Do not expect a draftsman or draftswoman with skills of the caliber you might expect of a top-flight practitioner at home.
- Do not expect a lawyer to be as pro-active and client-involved as you might want to be yourself.
- Do not hold Spanish counsel, even if practicing in a large-firm context, to the same standards of state-of the-art specialization as you might expect at home.
- Do expect to find notaries and registrars at every turn of the corner, and try to understand that their involvement in transactions or contracts is generally both unavoidable and essential, and worth their cost.
- Do not resist Spanish counsel's requirements as to the Spanish way of evidencing corporate authority, and don't try to explain that your legal opinion should be a substitute for a U.S. notary's certification as to legal matters.
- Do not expect to find Spanish lawyers fully-versed in and experienced with U.S.-style discovery, depositions and the like, but try to find lawyers who are at least generally aware of what these institutions are and how they function.

Needless to say, try to find (i) lawyers with good English; (ii) lawyers who are quick to respond to your concerns (and, better yet, anticipate them) in a straightforward, practical and "client friendly" manner; (iii) lawyers who have Blackberries and use them 24/7…; and, if possible (and it is possible), (iv) lawyers who will understand, or try to understand, your legal system to the same extent that you will understand, or try to understand, theirs.

In conclusion, if these remarks have helped slightly to acclimate the common law lawyer to his or her Spanish counterpart, they will have served their intended purpose.

III. A Word of Caution

The above remarks are, and to some extent are intended to be, somewhat exaggerated and overly simplistic. The globalization of legal practice, the use of technologies, the requirements and expectations of sophisticated and demanding clients, and a host of similar reasons have triggered an increasing approximation of legal practices throughout the world, independent of traditional civil law/common law distinctions. Two trends which have had a major impact in this area in Spain (and surely many other civil law jurisdictions as well) are the increasing and increasingly visible presence and attractiveness to young lawyers of international firms (particularly the large English solicitor firms, virtually all of which are present in Spain, and some of the most global U.S. firms, although only relatively few of such firms are actually on the ground today in Spain) and the increasing practice of Spanish law graduates to do LLMs abroad and even to work for a year or two with firms in one or another of the leading common law jurisdictions.

These and related factors will, over time, no doubt reduce, although not entirely eliminate, many of the distinctions noted above.

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Doing Business in India

By Kaviraj Singh

I. Introduction

At present, India's gross domestic product (GDP) is 1.237 trillion U.S. dollars, which makes it the twelfth-largest economy in the world and the fourth largest in purchasing power. In the final years of the first decade of the twenty-first century, India's economic growth averaged about seven-and-a-half percent per year. A 2007 Goldman Sachs report has projected that "from 2007 to 2020, India's GDP per capita will quadruple, and the same will surpass the GDP of the United States of America before 2050."[1] The country managed a reasonable economic growth of approximately 6.1% during 2009 despite the global financial crisis. India's annual GDP growth is likely to accelerate to 7.2% in the next fiscal year and further accelerate until reaching a pace of about 9% between 2012 and 2013. India will become the third largest economy in the world in 2032.

The world's seventh-largest country in terms of geographical area, India is the second-most-populous country and the largest democracy in the world. Four hundred million people will enter India's middle class over the next fifteen to twenty years. Seventy-one percent of the population is under the age of thirty-five, and the median age is twenty-five. India is a republic consisting of twenty-nine states and six "union territories." India has legislative powers distributed between the central government and the states, with a parliamentary system of democracy. The official language is Hindi; English is a secondary official language. There are about sixteen officially recognized languages spoken across the Indian states.

II. U.S.-India Trade and Investment

With an investment of over seven billion U.S. dollars in 2009, India is emerging as the third-fastest-growing foreign investor in the recession-hit U.S. economy, according to a senior U.S. official. On the basis of a report by India-U.S. World Affairs Institute and the University of Maryland,[2] Holly Vineyard, deputy assistant secretary of commerce for Africa, the Middle East and South Asia acknowledged the positive Indian contribution.[3] According to the joint study, up to 2009, Indian companies had made 372 acquisitions worth $26.6 billion, and created an estimated sixty thousand jobs, in the U.S.

The U.S. exported $16.4 billion to India during 2009, and the Obama Administration's National Export Initiative (NEI) aims to double U.S. exports over the next five years. Approximately 103,000 Indian students attended U.S. universities, a number that is growing at nine percent per year.

III. The Legal Profession in India

Lawyers in India are called advocates. Law graduates are required to enroll with one of the state bar councils before qualifying to practice law as advocates. The legal profession is largely governed by the Advocate Act, 1961, which as an act of Parliament has pan-Indian application. The Act provides for the regulation of the legal profession through a network of state bar councils. An advocate enrolled with any of the state bar councils has the right to audience before all courts and tribunals, including the Indian Supreme Court. However, in the Supreme Court, even though the right of audience is given to all advocates enrolled with a state bar council, the right to do filings is restricted to advocates-on-record, who are selected by the Supreme Court through an examination. The system of advocates-on-record is used to ensure that a common standard of filing is maintained in the Supreme Court, which receives petitions from all over the country.

Bar councils also entertain complaints against advocates for professional misconduct. Bar councils do not enjoy a very good reputation as far as enforcing standards of professional conduct are concerned since it is seen that action against a fellow lawyer on a complaint of misconduct is rarely taken, and only a few advocates have been taken off the roll for misconduct. There has been a demand for reform in this regard in order to set higher standards of professional conduct. There are no rules or regulations governing law firms in India, but the rules governing advocates apply to advocates practicing in law firms.

Advocates in India largely practice as individual practitioners, with law firm practice being a very recent development and restricted to big cities like Delhi, Mumbai and Bangalore. There is no known and recognized system of rating of law firms or advocates. Advocates (including those practicing in law firms) are prohibited by law from advertising their services. Until recently even having a Web site on the Internet was seen as advertising and therefore not allowed. Recently, however, Web sites have been allowed as long as they are in the nature of an information catalogue rather than an advertisement. Advocates are also prohibited from forming a partnership with accountants.

Most of the courts have their own local bar associations, which maintain a directory of members. There is no publication that provides information about the practice areas of a particular advocate or law firm.

Except in big law firms, there is no distinction made between corporate and litigation lawyers. Most litigation lawyers also do corporate advisory work for their clients. In big cities, however, the distinction is becoming pronounced and roles are better defined.

Professional fees charged by lawyers vary from lawyer to lawyer and also from city to city. Some of the topmost litigating lawyers of the country practicing in the Supreme Court charge up to four thousand U.S. dollars

per hour. In big law firms the hourly rate for a foreign client ranges from one hundred to six hundred U.S. dollars per hour. Small and medium firms in big cities are also trying to attract foreign clientele and are offering highly comparative rates. Small and medium firms in big cities are typically formed by lawyers from the big law firms.

IV. Indian Judicial Structure

Despite a federal structure of governance, the structure of the Indian judiciary has the Supreme Court at New Delhi as the highest court in the country, having appellate jurisdiction over the state high courts and original jurisdiction over interstate disputes. For this reason the Supreme Court is often referred to as India's "apex court." The rulings of the Supreme Court are binding on all state high courts and subordinate courts. The Supreme Court of India also has lawmaking power. Judges of the Supreme Court are appointed from among the judges of the state high courts and from the body of practicing advocates. The Supreme Court sits in multiple division benches comprising of two or more judges, depending on the nature of the case. The Supreme Court has the constitutional authority to review government actions, as well as laws passed in Parliament and in the state legislatures, and to sit in appeal over decisions of the high courts. What is perhaps most important, the Supreme Court has jurisdiction to protect fundamental rights contained in the Constitution of India.

The highest court in each state is its high court, which has both appellate and original jurisdiction in most states. Each of the high courts has extraordinary jurisdictional powers in relation to breaches of the fundamental rights of the subjects of that state, as well as authority regarding the functioning of state government and its various departments. The decisions of the high courts are binding on the subordinate courts within the state. Unlike the subordinate courts, the high courts have the authority to strike down governmental legislation and actions. Judges of the high court are appointed from among the lawyers practicing in the state high court and sitting on the bench is a full time employment, unlike in the U.S. and U.K., where it could be a part-time duty.

Apart from courts there are special tribunals and commissions that are subject to the supervisory jurisdiction of the high court of the state where they are situated. Some of the prominent tribunals are (i) Debt-Recovery Tribunals, which are used to facilitate the recovery of debts from creditors by banks and financial institutions; (ii) a Competition Commission, which monitors anticompetitive and monopolistic trade practices; and (iii) the Company Law Board, which adjudicates certain disputes among the promoters of companies and also regulates certain areas of company operations.

The criminal justice system functions through a system of criminal courts and a department of prosecution in the states. All criminal prosecutions begin at the level of the lowest criminal court in the district, and, depending on the term of punishment prescribed under the Indian penal code for a particular offence, the criminal case is either tried at the lowest court or at the sessions court. The high court is the court of appeal in regard to orders issued by the sessions court, and the sessions court is the appellate court for the lowest court. In metropolitan cities like Delhi and Mumbai, the lowest criminal court is the court of metropolitan magistrate, and in other cities and districts it is the court of judicial magistrate. The court of sessions has the authority to impose the death sentence, although such a sentence must be confirmed by the high court of the relevant state before the sentence can be carried out.

English is the language of business in the Supreme Court, as well as in all high courts, tribunals, and commissions. In subordinate courts, business is conducted in the local language although the judicial officers are trained in and capable of using English.

The Indian judicial system is known to be impartial and fair. Indian jurisprudence is largely based on common-law principles and is at the same time credited with its own indigenous innovations. One of the recent trends seen in the Indian judiciary is judicial activism, which has become very popular among the public and the media. The Supreme Court and the high courts have been very critical of the functioning of the various governments and governmental departments, and that has made the courts heroes in the public imagination.

However, judicial activism is often criticized as an overstepping of jurisdiction and the usurping of functions that are strictly within the domain of the executive. Among the decisions that have been criticized in this way are judicial orders passed in relation to the banning of diesel public transport in the city of Delhi and mandating the use of clean CNG fuel, as well as the court-directed removal of polluting industrial units from within the city limits to outside the city, and many similar orders that, strictly speaking, fall within the domain of executive prerogative and policy.

V. Foreign investment in India

Foreign investment in India is primarily covered under the Foreign Exchange Management Act, 1999 (FEMA) and the regulations and notifications that are promulgated thereunder from time to time. All regulations under FEMA are issued by the country's central bank, the Reserve Bank of India (RBI).

Foreign Direct Investment (FDI) Policy issued by the government of India is covered by FEMA. FDI Policy is periodically reviewed and modified. Changes in sectoral policy or sectoral equity caps are notified through "press notes" issued by the Secretariat for Industrial Assistance (SIA) in the Department of Industrial Policy & Promotion (DIPP) of the Ministry of Commerce and Industry.

Foreign companies are allowed to set up liaison or branch offices for the purpose of representing the parent

company or other foreign companies in India, conducting research, undertaking export and import trading activities, and for liaison work.

The current foreign investment guidelines allow foreign investment to be made freely in most of the sectors, including the services sector, except for the following: (i) activities that require an industrial license; (ii) proposals in which the foreign collaborator has an existing venture or tie-up in India in the same field, where the SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 1997 apply; and (iii) and proposals falling outside notified sectoral policy or caps or in sectors in which FDI is not permitted and which require specific approval of the Foreign Investment Promotion Board (FIPB) of the Department of Economic Affairs in the Indian Ministry of Finance.

Therefore, there are two broad areas of foreign investment regulatory policy, namely, sectors where foreign investment is allowed freely and on an automatic basis (referred to as the "Automatic Route") and sectors where prior approval of the government of India is required (referred to as the "FIPB Route"). These are discussed below in detail.

As noted above, FDI is allowed in most of the sectors other than certain specified sectors. These ceilings on foreign investment in specified sectors are detailed in the sectoral cap policy.

Where no sectoral caps are prescribed, foreign investment under the Automatic Route is available even for proposals for foreign investment involving up to one hundred percent of the capital. FDI in sectors or activities subject to the "Automatic Route" does not require any prior approval of the FIPB or the RBI. However, the Indian company in which such foreign investment is made is required to notify the RBI.

For proposals not falling under the Automatic Route, specific and prior approval by the government of India would be required. Government approvals are accorded on the recommendations of the FIPB, as well as the Department of Economic Affairs and the Ministry of Finance, with the Union Finance Secretary, the Commerce Secretary, and other key secretaries of the Government as its members.

The FIPB, in giving its approval, will keep sectoral caps, if any, in mind. These sectoral guidelines are meant to assist the FIPB in considering proposals in an objective and transparent manner. These guidelines, however, do not in any way restrict the flexibility or bind the FIPB from considering the proposals in their totality or making recommendations based on other criteria or special circumstances or features it considers relevant. The guidelines are meant to be in the nature of administrative guidelines and are not in any way legally binding in connection with any recommendation to be made by the FIPB or decisions taken by the government in cases involving FDI.

For investment proposals eligible for the Automatic Route, the RBI has issued general permission to companies to issue shares to the foreign investor, without any prior approvals.

For investment proposals falling under the FIPB Route, the foreign investor may acquire the shares in the Indian company upon receipt of FIPB approval.

In both instances, within thirty days from the date of issue of shares to the foreign investor, the Indian company issuing the shares is required to file a declaration in prescribed form, together with prescribed documents, with the concerned regional office of RBI under whose jurisdiction the company's registered office in situated. A person resident outside India can purchase equity shares or compulsorily convertible preference shares and compulsorily convertible debentures (equity instruments) issued by an Indian company under the FDI policy, and the Indian company is allowed to receive the amount of consideration in advance towards the issuance of such equity instruments, subject to certain terms and conditions. The RBI[4] has notified that, with effect from 29 November 2007, equity instruments should be issued within one hundred eighty days of the receipt of the inward remittance.

The dividending of company profits earned in India is freely permitted, subject to applicable Indian income tax regulations regarding the remittance of profits earned in India by branches of foreign companies to their head offices outside India. Such remittances are subject to the prior approval by the RBI.

VI. Technology Transfer

Under the current FDI regime there is no requirement to obtain the approval of the government of India or the RBI or to register a foreign technology license agreement with the RBI if the terms of the foreign technology license agreement fall under the Automatic Route, that is, the royalty does not exceed five percent on domestic sales and eight percent on exports and any lump-sum payment does not exceed two million U.S. dollars. The royalties can be paid without any limit in time and may also be paid by a wholly owned subsidiary to its parent company.

The royalty is payable on the value-added portion only and is calculated on the basis of the net ex-factory sale price of the product, exclusive of excise duties, minus the cost of standard bought-out components and the landed cost of imported components, irrespective of the source of procurement, including ocean freight, insurance, custom duties, and the like.

Any proposal not covered by the aforesaid parameters would require a specific approval from the government of India. This approval is accorded by the SIA.

VII. Use of Foreign Brand Names

The use of foreign brand names and trade marks on goods for sale (whether imported or locally manufactured) within India is freely allowed. Payment of a royalty up to two percent on exports and one percent on domestic sales in allowed under the Automatic Route, without any approval from the government of India or the RBI, for the use of trademarks and brand names of the foreign collaborator without any technology transfer. A royalty for the trademark or brand name is to be paid as a percentage of net sales, that is, gross sales less agents' or dealers' commissions, transport costs, including ocean freight, insurance, duties, taxes and other charges, and the costs of raw materials, parts and components imported from the foreign licensor or its subsidiary or affiliated company. In the case of a technology licensing arrangement (as discussed above in Part V), the payment of a royalty for the technology license includes the payment of a royalty for the use of the trademarks and brand names of the foreign collaborator.

VIII. Enforcement of Intellectual Property Laws in India

India still remains on a U.S. priority watch list, but it is expected that 2011 will bring about greater protection and enforcement of intellectual property rights in India. The long awaited amendments to the Copyright Act are finally tabled in Parliament, and it is hoped that the amendments will be passed in 2011. The proposed amendments seek implementation of WIPO treaties. Moreover, the Human Resources Ministry (Copyright Wing) is contemplating to establish a copyright cell that will coordinate efforts across government departments to influence legislation, public awareness, and enforcement of intellectual property rights.

In 2010, Mr. P.H. Kurien, IAS, was appointed as the Controller General of the Indian Patent Office (IPO), reflecting the growing significance of this office. The information-technology (IT) and software industry in India is keen to see the rollout of the Indian Patent Manual that will clarify the patentability of software-related inventions that have technical effect. In the light of the fact that the IPO will start functioning as an international search authority (ISA), the industry is also keenly watching the efforts of the government in infusing technology and modernizing the IPO. In addition, the Indian government has proposed amendments to trademark laws that would facilitate India's accession to the Madrid Protocol.

Some industries report improved engagement and commitment from enforcement officials on key enforcement challenges such as optical disc and book piracy. However, concerns remain over India's inadequate legal framework and ineffective enforcement. Piracy and counterfeiting, including the counterfeiting of medicines, remain widespread, and India's enforcement regime remains ineffective at addressing this problem. Pursuant to a Business Software Alliance-International Data Corporation (BSA-IDC) study for the year 2009, software-piracy rates in India were reduced to sixty-five percent from a rate of sixty-eight percent in 2008. With such huge losses, the establishment of intellectual property (IP) courts with fast-track mechanisms for expediting IP-related disputes will fulfill a long pending desire of industry players in India. The Delhi high court has taken a lead in granting search and seizure orders (so-called Anton Piller orders) in IP matters that can be served anywhere in India. High court rules pertaining to best-practices in IP cases will go a long way in spreading IP awareness to other jurisdictions within India, and making the court more efficient and accessible to copyright and IP owners.

Some state governments in India have also introduced laws to include video and audio piracy under the preventive detention laws (referred to as the "Goonda Act"). This reflects the recognition of the state legislatures that those involved in acts of IP piracy either harm or endanger the security of the general public (whether directly or indirectly) by using the proceeds of piracy to fund and perpetuate organized crime. It is hoped that, in 2011, more Indian states will adapt such legislation and broaden the ambit to include violations of IP rights for all industries.

IX. Employment Law in India

One of the major criticisms of India from the perspective of the environment for foreign investment is its strict labor laws, which are meant to provide a protectionist regime for the country's labor force. India does not recognize an at-will hire-and-fire employment policy. There has a been demand from the international business community to reform the labor laws of the country.

It is important to note that domestic labor laws essentially cover the labor force in nonsupervisory and nonmanagerial positions, with managerial positions regulated by individual employment contracts that are governed by general contract law and not any specific employment-related legislation.

Although most of the employment legislation has national application, each of the individual states has the ability to legislate within the broad framework of national law to suit the peculiar requirements of that state. Therefore, a firm having multiple offices across various states in the country would be required to comply with the employment laws of each state in which it has offices.

Some of the employment legislation relates to the payment of a minimum wage, workplace conditions, the terms and conditions of employment contracts, social security benefits, and the like. The minimum standards prescribed in the various employment statutes are not difficult to comply with, and it is often found that foreign businesses doing business in India have much higher standards than the minimum standards prescribed by law.

India has a very strong industrial union law, which has come under severe criticism for its regressive impact on

the growth and development of the business environment. The state of West Bengal in an example of a strong union-based industrial environment that has discouraged the industrial and economic growth of the state in comparison to other states that follow a comparatively liberal employment-law regime.

X. Employment of Foreign Nationals

Indian companies are allowed to engage the services of foreign nationals on a long-term basis, and foreign nationals are permitted to make recurring remittances for family maintenance, subject to limits specified from time to time. There is no restriction on the appointment of foreign nationals as directors of Indian companies.

XI. Public Liability Insurance

The Public Liability Insurance Act, 1991 (together with the rules thereunder) is an act providing public liability insurance to afford immediate relief to persons affected by an accident occurring while handling any hazardous substance and related matters. Section 3 of this act provides that the owner is liable to give such relief as specified in a schedule to the act, in situations in which death or injury is caused to a person (other than a worker) or damage to any property has resulted from an accident. For this purpose, before the owner starts handling any hazardous substance, he must obtain policies of insurance to insure against this liability. The coverage must not be for an amount less than the paid-up share capital of the company and must not exceed the amount as may be prescribed by law. The liability of the owner under an insurance policy is not to exceed the amount specified in the terms of that policy.

XII. Arbitration Law in India

The Indian arbitral system was governed by the Code of Civil Procedure 1908 until the Arbitration Act of 1940 came into force, and that act was later replaced by the Arbitration and Conciliation Act 1996 (the "1996 Act"), which amended and consolidated the law relating to domestic arbitration, international commercial arbitration, and the enforcement of foreign arbitral awards; the new law also included provisions relating to conciliation. In addition, there have been the Arbitration (Protocol and Convention) Act 1937 and the Foreign Awards (Recognition and Enforcement) Act 1961. The 1996 Act is largely based on the model law of the United Nations Commission for International Trade Law (UNCITRAL).

Arbitration proceedings are governed by the agreement signed between the parties, and the Indian courts have a very limited role in such proceedings. Section 11 of the 1996 Act deals with the appointment of an arbitrator by the court if the parties cannot agree on the appointment of an arbitrator pursuant to the terms of the arbitration agreement.

Section 9 of the 1996 Act also deals with the interim relief obtainable by a party from the high court if urgent and interim relief is appropriate even before the arbitration proceeding has started.

Section 34 of the 1996 Act deals with the application to the court for setting aside an award. The grounds are very limited, and generally courts in India do not interfere with the award of the arbitrator unless there is a gross error in the finding of facts and law.

Part II of the 1996 Act deals with the enforcement of foreign arbitral awards in India. A foreign award is an arbitral award between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India. Any foreign award that would be enforceable under the 1996 Act is binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set-off or otherwise in any legal proceedings in India.

Where the court is satisfied that the foreign award is enforceable, the award is to be deemed to be a decree of that court. The award of the arbitrator can be enforced through a court order in the same way a judgment of that court might be enforced.

XIII. Enforcement of Foreign Judgments

A foreign court is defined as a court situated outside India and not established or continued by the authority of the Indian central government, and a foreign judgment is a judgment of a foreign court. Sections 13 and 14 of the Civil Procedure Code (CPC) enact a rule of res judicata in the case of foreign judgments. These provisions embody the principle of private international law that a judgment delivered by a foreign court of competent jurisdiction can be enforced by an Indian court and will operate as res judicata between the parties thereto, except in the cases mentioned in Section 13 of CPC and subject to the other conditions mentioned in Section 11 of CPC. The rules laid down in Section 11 are rules of substantive law and not merely of procedure. The fact that the foreign judgment may fail to show that every separate issue, such as the status of the contracting parties or the measure of damages, was separately framed and decided, is irrelevant unless it can be shown that such failure brings the case within the purview of one of the exceptions set out in Section 13 of CPC.

The judgment of a foreign court is enforceable on the principle that, if a court of competent jurisdiction has adjudicated a claim, a legal obligation arises to satisfy that claim. The rules of private international law of each nation must in the very nature of things differ, but, by the comity of nations, certain rules are recognized as common to civilized jurisdictions. Through the judicial system of each country or as a result of international conventions, these common rules have been adopted to adjudicate disputes involving a foreign element and to effectuate judgments of foreign courts in certain matters. Such recognition is accorded not as an act of courtesy but due to

considerations of justice, equity and good conscience. An awareness of foreign law in a parallel jurisdiction would be a useful guideline in determining notions of justice and public policy. The view is that we are sovereign within our territory but it is no derogation of sovereignty to take account of foreign law.

A foreign judgment that is conclusive under Section 13 of CPC can be enforced in India in the following ways:

(a) A foreign judgment may be enforced by instituting a suit based on such foreign judgment. The general principle of law is that any decision by a foreign court, tribunal or quasi-judicial authority is not enforceable in another country unless the decision is embodied in a decree of a court of that country. In such a suit, the court cannot go into the merits of the original claim, and it is conclusive as to any matter directly adjudicated upon between the same parties. Such a suit must be filed within a period of three years from the date of the judgment.

(b) A foreign judgment may also be enforced by proceedings in execution in certain specified cases mentioned in Section 44-A of the CPC. This section provides that, if a certified copy of a decree of any of the superior courts of any reciprocating territory has been filed in a district court, the decree may be executed in India as if it had been passed by the district court. When a foreign judgment is sought to be executed under Section 44-A, it will be open to the judgment-debtor to assert all objections that would have been open to him under Section 13 if a suit had been filed on such judgment. The fact that, out of six exceptions, there has been due compliance with some of the exceptions is of no avail. The decree can be executed under Section 44-A only if all the conditions set forth in Section 13 (a) to (f) are satisfied.

XIV. Tax Issues in India from an International Perspective

A. Transfer Pricing

The globalization of the Indian economy and increasing cross-border investment have led to most large and mid-size business enterprises being subject to transfer pricing (TP) regulations in India. The tax authorities have typically been adopting aggressive approaches in respect of mark-ups, especially with respect to captive units in India.

Concern with respect to exposure under TP regulations in India has been growing considerably. To avoid the pitfalls that differing interpretations may cause, most developed countries have introduced an advance pricing agreement (APA). Such a mechanism can mitigate disputes and uncertainty in relation to transactions between associated enterprises.

Under the new proposed tax regime, however, the introduction of APAs, along with safe-harbor provisions, in India would certainly allow taxpayers to obtain the regulator's nod vis-a-vis the proposed pricing of international transactions and would also mitigate the risk of double taxation in certain circumstances. This would lead to a greater degree of comfort and reduce litigation to a considerable extent.

To mitigate any risk of an unanticipated tax liability, it is highly recommended to obtain an advance ruling before entering into any transaction.

Even a liaison office has encountered difficulties if it is found to be doing business and is therefore treated as a permanent establishment of the overseas parent or if the liaison office exceeds its authority under the Act (which allows the liaison office to facilitate the business of the overseas parent but not actually do any business itself).

B. Royalty or Fee for Technical Services (FTS); Business Income

Sometimes disputes arise with the income tax authorities relating to the nature of income in the case of fees for technical services and royalty income. At times income may be categorized as both royalty income and as a fee for technical services (FTS), which may always be treated as business income, depending upon the facts and circumstances of the cases. Usually, if the business establishment has a fixed place of business in India, this may lead to profits attributable in India being taxed in India as business income. Attribution of income is again a contentious issue in the absence of any specific guidelines to this effect.

Endnotes

1. Goldman Sachs Global Economics Group, *BRICs and Beyond* 11 (2007), available at http://www2.goldmansachs.com/ideas/brics/book/BRIC-Full.pdf.
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3. Reported in *India Review*, 1 July 2010, at 12 (Embassy of India in the U.S.).
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Observations on Doing Business in China

By John Du

I. Introduction

Perhaps no country has elicited so many misunderstandings on the part of the outside world and at the same time evoked so many different explanations for those misunderstandings than China. The amount of information on the topic of doing business in the People's Republic of China (PRC) is so voluminous yet so inconsistent that it is hard to know where to start. There is a good reason for this: today's China is full of contradictions and paradoxes. China is both old and new, homogeneous and diverse, static and fluid.

The purpose of this article is not to give a comprehensive guide to doing business in China, whether from the cultural or legal perspective. It is intended to share some of my observations—from the perspective of a practitioner whose practice for the past decade has been exclusively focused on U.S.-China cross-border transactions—on some common issues that our clients encounter in the course of doing business in and with China.

II. Identifying the Right Lawyers

A. Introduction

China's legal profession has benefited tremendously from its economic development, especially in the area of foreign investment. Although still evolving, China's legal market has become increasingly mature and competitive. However, just like its economic development, the development of China's legal profession is extremely uneven, both horizontally and vertically. Choosing the right lawyers requires a good deal of due diligence.

B. General Sources

Word of mouth is often your best bet in selecting good lawyers in China. Unlike the market in the U.S., the legal market in China is very fragmented and good law firms largely concentrate in economically developed cities like Beijing, Shanghai and Shenzhen. The difference in quality and ethics among the firms is astonishing. Word of mouth from a trusted source that has dealt with local lawyers there, especially from your peers who have dealt with Chinese local lawyers on a regular basis, is the most efficient and reliable source for selecting lawyers in China.

There are several international publications that regularly rank and report on law firms and lawyers in China. Among the most reputable ones are Asia Legal Business (ALB) and its sister publication China Legal Business (CLB), Chambers Asia, International Financial and Legal Review (IFLR). American Lawyers' sister publication, Asia Law, also reports on China. Although these publications are not entirely objective in their selections, they at least provide comprehensive information on the leading law firms in China today, including representative offices of multinational law firms and local PRC firms.

C. Foreign Versus Local Law Firms

Foreign law firms, even with qualified PRC personnel, are legally restricted from practicing Chinese law. However, that has not deterred more than two hundred international law firms from establishing representative offices in China, some with as many service professionals as a hundred. The vast majority of these firms, however, have fewer than twenty legal service professionals in their China offices. The degree of sophistication and depth of local knowledge vary widely among the firms. With the limited exception of litigation and legal opinions, these PRC representative offices of foreign law firms provide a wide range of services from assisting with merger and acquisitions to advising on local legal compliance. With the economic expansion overseas by many Chinese companies in recent years, many multinational law firms have developed a specialty serving the needs of PRC companies as well, with their services ranging from assisting these companies in getting listed on U.S. securities exchanges to advising them on overseas mergers and acquisitions.

Despite a short history of experiment and operation, an increasing number of PRC national law firms have come to dominate the practice of PRC law, serving multinational clients. Among the top ones are Jun He (with which the author is affiliated), King and Wood, Fangda and Partners, Haiwen and Partners, and the Commerce Law Firm. The runners-up include Zhonglun, Allbright and Jingtian & Gongcheng. These law firms are staffed with Chinese lawyers who graduated from China's elite law schools, with many of them also having attended elite U.S. law schools and / or having had years of experience at international law firms. While they differ in the size and strength of their specialties, all these law firms have multiple offices around the country and offer a relatively consistent level of services.

Compared with representative offices of international law firms, PRC national firms offer several advantages: (i) their understanding of the legal system may be more intuitive and practical; (ii) they are not restricted from the areas of practice (such as litigation and offering legal opinions on Chinese law) from which a foreign law firm's representative office is restricted; and (iii) their capacity is often bigger and more encompassing because they have more personnel and cover a wider geographical area.

International law firms offer a better understanding of the foreign clients (especially if those clients are existing clients of the firm) and more seamless coordination (if their home offices are involved). Many of these firms may also have more expertise in offshore structuring if it is considered that the legal landscape in the offshore jurisdictions bears more similarity to the legal setting in their home countries if they happen to be from the U.S. or U.K.

D. National Versus Local PRC Law Firms

As mentioned above, the legal market in China is still very fragmented. Good-quality law firms are largely concentrated in such economically developed cities as Beijing, Shanghai and Shenzhen. The development of PRC corporate firms largely corresponds to the economic development of China itself, especially in the area of foreign investment. Over the past decade, several Beijing-based law firms have expanded into secondary cities such as Hangzhou, Chongqing and Wuhan.

By and large, local PRC law firms in secondary and tertiary cities, although they may enjoy a local advantage, are weak in their institutional composition and international experience. If your client happens to venture into those areas of the country in the course of its economic activities, it should exercise special caution in working directly with these local law firms. It is recommended that, at least initially, you work through a national firm in Beijing or Shanghai, and leave it to the national firm to manage the work of the local firm.

E. General Practice Versus Specialty Firms

Unlike their U.S. and other Western counterparts, with the exception of intellectual property (IP) and litigation practice, specialty firms and specialty lawyers are a relatively recent phenomenon in China. Most of the top Chinese law firms started as general commercial practice firms serving foreign clients investing in China. Until about six to eight years ago, many of the lawyers working at these top PRC national firms did not have any specialty practice groups (other than the simple division between litigation and non-litigation practices). Over the years, sometimes by necessity and sometimes by choice, specialties have developed among the law firms and individual lawyers, regardless of whether they were assigned a specialty group or not. Now all these top law firms have a wide range of specialty practices ranging from general corporate, banking and financial services, mergers and acquisitions, real estate, IP, private equity, capital markets, infrastructure, to tax and litigation.

With the exception of IP, specialty firms are rare and relatively small in size in China. There are several IP boutique firms built largely on the history of China's IP practice, which requires patent registration firms and trademark agents to be separately licensed. These IP firms started as registration agents but gradually developed into specialty law firms with IP lawyers offering a wide range of IP-related advice, ranging from planning to IP due diligence in transactions. Some general practice law firms have eaten into the pie of these IP firms by establishing or acquiring patent- and trademark-agent firms themselves.

III. Effective Negotiations

Having represented clients from both sides, here are some of my suggestions in conducting effective negotiations with the Chinese counterparts:

(a) *Treat your Chinese counterparts as equals and with respect*. This may seem obvious. However, many Americans, especially in the past, have gone into China with a sense of superiority, thinking that they possess something that the other side does not have or wants more of, whether it is technology or expertise, or simply their money. The fact is that, after some thirty years of economic development, many Chinese business people have become sophisticated deal-makers, and the balance of power has undergone a huge shift towards the East.

(b) *Build relationships along the way, as you make deals*. The Chinese place tremendous amount of importance on personal trust in deal-making, whether you come from a reputable organization or not. The best way to earn such trust is to get to know your counterparts and let your counterparts know you as a person as much as possible. So if they invite you to a dinner or other social function after a negotiation session, be as receptive as possible. The Chinese especially appreciate it when you make a sincere effort to understand their culture and customs, and many of the obstacles and misunderstandings from a negotiation session are resolved at the dinner table or over afternoon tea.

(c) *Be prepared to make iterative concessions*. Bargain shopping is a way of life in China. Therefore, making progressive and iterative concessions is important to the Chinese because they like to feel good about how much they have gained through negotiations. Also, do not be offended if the Chinese partner sets out its initial conditions beyond your expectations. Just hold your ground and show that you have done your due diligence. (If you have been to a Chinese bazaar, especially the ones targeting foreigners, you will understand why.)

(d) *Prioritize your negotiation items and be prepared to trade some in a compromise*. Price is not the only factor in a contract. Things like dispute resolution and penalties for breach, which are often overlooked in a purely domestic

contract, may be critical in a cross-border one with a Chinese counterparty. On the other hand, at least in the joint venture setting, a liquidation preference may not be something that you would insist upon, because it may be unenforceable or may provide you with little value.

(e) *Be prepared to negotiate with someone without legal representation.* Use of intermediaries and advisers in China is still unpopular, especially among small-to-medium-sized companies and entrepreneurs. This could make the negotiation frustrating and inefficient, especially in complex deals where legal compliance is an important part of the structure. In those instances, to the extent possible and with sufficient subtlety in not appearing offensive, you should suggest to the Chinese counterparty that he or she hire a lawyer before the negotiation starts. However, if the party appears without representation, just be prepared.

(f) *Note the difference in priority between state-owned companies and privately owned companies.* Someone representing state-owned companies may be obligated, explicitly or implicitly, to preserve the economic face value of a transaction, especially if the contracts may need to be approved and/or filed with government authorities. In those instances, the representative may be insistent on such economic terms as price and contract value, but more flexible in regard to such non-economic provisions as management rights. In contrast, privately owned companies are simply intent on getting the best deal without such concerns.

IV. Common Mistakes to Avoid

The following are some common mistakes that can and should be avoided.

(a) *Applying U.S. legal concepts directly to similar situations in China.* An alarming number of lawyers, some very experienced ones, assume that U.S. legal concepts are universal and can be applied to other jurisdictions with minimum adaptation. There have been quite a few times that our firm was brought in after the structuring of a deal was completed and documents were prepared to essentially give our "blessing" for a closing. We often ended up restructuring the deal and redrafting the documentation.

For one thing, the PRC Company Law places various limitations on creating different classes of equity and therefore makes it difficult to structure a transaction that provides preference in dividends and liquidation. Even if preferences are agreed upon by the parties, their enforcement may be hampered by bureaucrats in other regulatory departments such as the State Administration of Foreign Exchange. Therefore, most of the private-equity transactions have been structured using an offshore structure in either Hong Kong or some other offshore tax havens such as the British Virgin Islands or Cayman Islands.

Another example is that Chinese law provides strict requirements on capitalization of foreign-invested enterprises (FIE). Not only does the initial capital injection require government approval, but so does each subsequent request to increase the FIE's capital. Chinese law also places restrictions on using intangibles as a capital contribution. A classic example is that a U.S. company, thinking that its technology is worth millions, plans to use the technology as a capital contribution to a joint venture with a Chinese party and discloses that technology to the Chinese party in anticipation of the joint venture, only to find out later that the deal may not be approved by the Chinese government because PRC law requires that at least thirty percent of an investor's capital contribution must be in cash,[1] and all intangibles must be appraised by PRC-licensed appraisers. In such a case, the joint venture will not be able to move forward in its current form but certain confidential information about the technology has already been disclosed.

(b) *Assume "if it is not prohibited, it is permitted."* U.S. lawyers are known for creative lawyering in identifying loopholes in regulations and statutes. A recent example is the Goldman Sachs' use of a special-purpose vehicle (SPV) in investing in Facebook on behalf of its wealthy clients. The typical philosophical basis for a U.S.-trained lawyer might be "if it is not prohibited, it is permitted." A classic example is the purpose or scope of business description used for a corporation. In the U.S., a company needs not specify the business it intends to engage in and may engage in any business that is lawful.

In China, however, not all things that are not prohibited are permitted. For example, a company must specify the scope of the business it intends to engage in when it applies for a business license, and, after approval, may only engage in the business stated in its business license. Therefore, carefully drafted descriptions of the business scope are a must for many businesses in certain sensitive areas that may be subject to government restrictions on foreign investment.

(c) *Choose U.S. litigation as the method for resolving disputes.* For experienced China practitioners, it

is no secret that China almost never enforces foreign judgments. Therefore, a judgment obtained by a foreign party outside China has little effect on a Chinese entity if that entity does not have assets outside China subject to collection. However, as a signatory to the 1958 New York Convention on the Recognition and Enforcement of Arbitral Awards (the "Convention"), China is obligated to recognize and enforce arbitral awards rendered in other countries as long as the arbitration was conducted in accordance with the Convention's procedural requirements and the disputes are "commercial" in nature. One procedural protection for parties seeking to enforce a foreign arbitral award under the Convention is that lower courts intending to deny recognition of an award must refer the matter to the Supreme People's Court in Beijing for confirmation. However, jurisdiction for the enforcement of the awards still remains with the lower courts, even if the awards are confirmed.

(d) *Think that a protected trademark in the U.S. will be automatically protected in China.* The U.S. is one of the few countries that recognize first use as the basis for trademark ownership. For many other countries, including China, it is the first registration that matters. The unwariness of the American businesses in this area is so acute that trademark squatting has become a booming business in China. There are two common techniques that a trademark squatter uses in China: first, he or she may simply register whatever brand names that are expected to enter China so that the squatter may then sell those brands to the foreign business. Second, sophisticated trademark squatters scour business registration records of foreign businesses around the country, especially in major cosmopolitan cities like Shanghai or Beijing. Once they determine that the business names may be trademarks or service marks of the foreign business, they often rush to register the names as trademarks in China.

(e) *Think supermajority interest in a joint venture offers automatic control of the joint venture.* In certain industries such as financial services, Sino-foreign joint ventures are the only vehicle through which foreign investment is allowed in China. Yet in many other areas, even where a foreign investor is allowed to go alone, there are compelling business reasons for having a Chinese partner. However, if your intention is to fully manage the joint venture and take on a "sleeping partner," think twice.

First, assuming that there is only one Chinese party to a joint venture, no matter how small a percentage that Chinese party has in the joint venture's equity, the Chinese party must be represented on the board. Second, unanimous board approval (i.e., requiring the Chinese party's consent) must be obtained in several key matters regardless of what the joint venture contract stipulates. Such matters include any amendment to the joint venture contract or articles of association; an increase or decrease in registered capital; a merger, sale, or split of the joint venture; and liquidation of the joint venture. The consent requirement in regard to an increase or decrease in the registered capital of the joint venture essentially protects a party's equity interests from being diluted under any circumstances. A party's stubborn insistence on withholding consent on such matters could prove lethal to the operation of the joint venture.

So the practical advice is, if you can afford to go it alone and Chinese law allows you to do so, by all means go it alone.

(f) *Blindly believe that, in China, "guanxi" is the key to all locked doors. Guanxi*, loosely translated as "connections," has long become a cliché for the effect of personal influence on getting around in China. There are actually two sides of the coin for *guanxi*: when the word is used among the Chinese themselves, it more often refers to a network or circle of trusted peers. In this sense, it is an important conduit for information-sharing. As trust is built in, people who have *guanxi* with each other are also more ready to help each other and get things done. As the business network and bureaucracy in China have become increasingly established and complex, *guanxi* also plays an important role in information sharing and trust-building.

When the word is bandied about by locals offering help to the Westerners to get around in China, *guanxi* takes on a different meaning. It means that with the special relations and network that the speaker enjoys, he or she can get things done that would be otherwise difficult or impossible to do. This was especially useful in the early days of China's "open door" policy, when regulations were weak and murky, and bureaucrats exerted an undue amount of influence on project approvals. However, after some thirty years of economic and regulatory development, the importance of *guanxi* (in the sense of personal influence) has been declining. Regulations are increasingly enforced consistently and more transparently, and approvals and decisions obtained through

personal relations in violation or circumvention of legal requirements often run the risk of being suspended or voided.

In short, *guanxi* may serve you well if you intend to use it as an information and networking resource. However, if you plan on using connections to open doors which are otherwise closed to others, then you will very likely encounter difficulties down the road. The doors opened this way may also be easily closed later and perhaps after you have invested significant amount of capital and resources.

V. Concluding Remarks

With China having become the world's second-largest economy, there is little doubt that its role in international economic life will only increase. Despite the obstacles one faces in doing business in China, the dynamics in its economic activities and legal landscape make the practice all the more interesting and exciting. Having a good appreciation of some of the most important differences and a grasp of the service resources will make your representation more efficient and effective.

Endnote

1. It is still possible that certain locations would apply the PRC Law on Foreign-Invested Enterprises and its Implementation Rules (2001) to require a foreign investor's capital contribution in the form of IP not to exceed twenty percent of the registered capital. In large cities such as Beijing or Shanghai, due to the amendment to the Company Law of the PRC (2005), IP rights and other non-cash investment (the value of which can be appraised) are permitted to be contributed to the registered capital of the company, but such non-cash investment may not exceed seventy percent of the total registered capital of the a foreign-invested enterprise.

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Public Takeovers and Mergers in Hong Kong

By David Friedlander and Hayden Flinn

I. Introduction

The purpose of this short article is to provide an overview of the rules governing public takeovers and mergers in Hong Kong. It covers (i) the primary purpose of Hong Kong takeovers regulation; (ii) the disclosure of holdings requirements; (iii) the mandatory offer regime; (iv) the rules around voluntary offers; and (v) the squeeze-out of minority interests in the target.

II. Takeovers Code

Public takeovers and mergers in Hong Kong are governed by The Code on Takeovers and Mergers ("Code"). The Code was first introduced in 1975 and comprises the rules regarding acceptable commercial conduct and behavior in takeovers and mergers as determined by market practitioners and the Hong Kong Securities and Futures Commission ("SFC"). The Code is a voluntary code that relies, other than for parties bound by the Hong Kong Stock Exchange listing rules, on the willingness of market participants to comply rather than the force of law. But all parties concerned with the relevant transactions are expected to be subject to the Code and are required to co-operate to the fullest extent with the SFC, as well as to provide all relevant information.

Those who are in breach of the Code may face "cold shouldering" in the Hong Kong market in a manner similar to the position in the United Kingdom prior to its accession to the European Union Directive on Takeovers. In that respect they may face disciplinary actions from the Takeovers and Mergers Panel ("Panel") of the SFC, such as public criticism, private reprimand or bans from participating in the financial market activities. The Code is administered by the Executive Director ("Executive") of the Corporate Finance Division of the SFC.

The primary purpose of the Code is to afford fair treatment for shareholders who are affected by takeover and merger transactions. The Code seeks to achieve this by:

- requiring equality of treatment of shareholders;
- mandating disclosure of timely and adequate information to enable shareholders of a target company to make an informed decision as to the merits of the offer; and
- ensuring that there is a fair and informed market in the shares of companies affected by takeover and merger transactions.

The Code applies to takeovers and mergers affecting public companies (which are not necessarily listed companies) in Hong Kong, companies with a primary listing of their equity securities in Hong Kong and REITs (real estate investment trusts) with a primary listing of their units in Hong Kong. In some circumstances, the Code also applies to REITs listed in Hong Kong other than by way of a primary listing. Ever since the British handover of Hong Kong, it is common for listed entities to be incorporated outside Hong Kong (primarily Bermuda, Cayman Islands and China) and the Code applies to those overseas entities.

The term "public company" is not defined under the Hong Kong Companies Ordinance. By inference from the definition of a "private company," a company which has more than fifty shareholders or which does not restrict transfers of its shares will be able to be regarded as a public company. In addition, the Executive will consider, primarily, the number of Hong Kong shareholders and the extent of share trading in Hong Kong. Other factors that the Executive will consider are the following:

- Location of the head office and the place of central management.
- Location of the business and assets.
- Existence or absence of protection for HK shareholders.

Responsibilities provided for in the Code also apply to other entities and persons involved in takeovers and mergers, such as directors of companies that are subject to the Code and their professional advisers.

III. Disclosure of Holdings

Under the Hong Kong Securities and Futures Ordinance ("SFO"), a person who acquires an interest of five percent or more of the voting shares of a Hong Kong listed company (a "notifiable interest") must disclose their shareholding to the Hong Kong Stock Exchange and the company. Disclosure is also required where:

- a person's interest drops below five percent;
- a person's interest in a company increases or decreases across a whole percentage number that is above five percent (e.g., from 6.8% to 7.1%);
- a person has a notifiable interest and the nature of their interest changes (e.g., on exercise of an option);
- a person has a notifiable interest and they acquire, or cease to have, a short position of more than one percent; and

- a person has a notifiable interest and there is an increase or decrease in the percentage figure of their short position that results in the aggregate short position crossing over a whole percentage number which is above one percent.

Under the Code, once an announcement has been made of a proposed or possible offer, the offeror and their associates must disclose all their dealings in the relevant securities of the target throughout the offer period (and certain dealings in the offeror, if securities are being issued as consideration by the offeror). Disclosure must be made in writing to all offerors, the offeree, and their respective financial advisers, and in electronic form to the Executive and to the Hong Kong Stock Exchange.

IV. Mandatory Offer

Hong Kong adopts a mandatory offer regime that is very similar to that of the United Kingdom. Under the Code, a person (or persons acting in concert collectively) who:

- acquires thirty percent or more of the voting rights of a company, or
- hold not less than thirty percent but not more than fifty percent of the voting rights of the company and acquires more than two percent of the voting rights within a twelve-month period ("creeper rule"),

must make a general offer to all the shareholders of the company. This requirement does not apply to persons who acquired thirty to thirty-five percent of the voting rights of a company immediately before 19 October 2001 (when the offer threshold was reduced from thirty-five percent to thirty percent), but instead, the Code will apply as if the relevant percentage was thirty-five percent for a period of ten years. In addition, the creeper rule will not apply to those persons.

With the exception of a partial offer or where the prior consent of the Executive has been sought, all offers made under the Code (mandatory or voluntary) must be made conditional upon the offeror (and any person acting in concert with it) having received more than fifty percent of the voting rights of the company at the end of the offer period. But unlike a voluntary offer, except where approval has been sought from the Executive, no other conditions can be attached to a mandatory offer, and the minimum acceptance level cannot be higher than fifty percent. The mandatory offer becomes unconditional once the offeror and persons acting in concert with it have received more than fifty percent of the voting rights. In particular, a mandatory offer may not be made conditional upon the passing of a shareholder resolution of the offeror.

The most contentious issue that often arises under the Code is whether a person is *acting in concert* with another, since this will require each person to aggregate their interests with the other for the purpose of the mandatory offer rule. Persons who actively co-operate to obtain or consolidate control of a company through the acquisition by any of them of voting rights of the company pursuant to an agreement or understanding (whether formal or informal) are deemed to be concert parties. The Code sets out a list of classes of persons who will be presumed to be acting in concert with others in the same class, such as, for example, a company with any of its directors. The following important circumstances will not normally amount to persons acting in concert.

- *Joint Bidders*—Where a person has acquired shares in a company independently, but subsequently comes together with other shareholders to take control of the company, and their existing shareholding amounts to thirty percent or more of the voting rights.
- *Underwriters*—Where there is an underwriting arrangement on arm's length commercial terms.
- *Irrevocables*—Where a shareholder gives an irrevocable undertaking to an offeror to accept his offer.

A mandatory offer must be made in cash or have a cash alternative at the highest price paid by the offeror or any concert party for any voting rights acquired during the offer period and six months prior to its commencement. If acquired for a consideration other than cash, the offer price must be determined by independent valuation.

The Executive may waive the requirement for a person to make a mandatory offer in any of the following circumstances.

- *Whitewash*—Where the obligation arises as a result of the issue of new securities as consideration for an acquisition, a cash subscription or receipt of a scrip dividend and the proposal is approved by disinterested shareholders.
- *Distress*—The target is in such a serious financial position that the only way it can be saved is by an urgent rescue operation which involves the issue of new securities without approval by a vote of independent shareholders.
- *Mistake*—There has been an inadvertent mistake and the person disposes of the securities within a limited period to unconnected persons.
- *Top-Up Placements*—A shareholder holding fifty percent or less of the voting rights places part of its shares with independent parties and then, as soon as practicable, subscribes for new shares up to the number placed at a price substantially similar to the placing price less expenses. This responds to a

common practice in Hong Kong where affiliates of companies assist those companies to raise capital by selling down their shareholdings (which can be done very quickly) and then receiving a top-up placement from the company.

V. Voluntary Offer

Where a mandatory offer is not needed, a voluntary offer can be made. It is made to all the shareholders of the target but, unlike a mandatory offer, a voluntary offer may incorporate any conditions except conditions which depend on the offeror's own judgment or the fulfillment of which is in the offeror's hands.

Similar to a mandatory offer, a voluntary offer must be made conditional upon the offeror having received at least fifty percent of the voting rights of the company at the end of the offer period. But differently from a mandatory offer, a voluntary offer may be conditional upon a higher acceptance level (e.g., ninety percent), failing which the offeror is entitled to withdraw the offer.

Similar to a mandatory offer, a voluntary offer is subject to a minimum offer price rule. If an offeror, or any person acting in concert with the offeror, has purchased shares in the target either:

- within three months before the start of the offer period (or earlier in the case of purchases from directors or connected persons), or
- during the period, if any, between the start of the offer period (the time when an announcement is made of a proposed or possible offer) and the announcement of a firm intention to make an offer,

the offer must be on no less favorable terms than those applying to that purchase. Where a voluntary offer is not subject to the price matching rule, a general rule also applies to mandate that the offer price be no less than fifty percent of the market price of the company's shares, to prevent so-called "low-ball" or "one cent" offers being used to frustrate the offeree's business where there is no genuine intention to seek control.

Unlike a mandatory offer, a voluntary offer may be in cash or securities. However, there are prescribed situations where only a cash offer may be made. For example, if the offeror or any party acting in concert with it has purchased shares of the target company during the offer period and six months prior to its commencement which carry ten percent or more of the voting rights of a particular class, the general offer must be in cash, or accompanied by a cash alternative, at not less than the highest price paid for such shares.

VI. Squeeze-out

Under the Companies Ordinance, an offeror who has, during the period of four months beginning from the date of a takeover offer, acquired at least ninety percent by value of the shares for which the offer is made ("Targeted Shares") is entitled to acquire the remaining Targeted Shares by giving notice to the holders of those shares ("Remaining Shareholders"). If the Targeted Shares relate to several classes of shares, the offeror can only "squeeze-out" the shareholders in that class of shares which it has acquired at least ninety percent of shares, but not shareholders in other classes which it has failed to acquire at least ninety percent of shares. This statutory right to "squeeze out" the Remaining Shareholders is available only in respect of target companies that are incorporated in Hong Kong. Similar rights apply to companies incorporated in Bermuda and the Cayman Islands, but not to Mainland Chinese companies.

For Hong Kong target companies, the Remaining Shareholders have certain rights under the Companies Ordinance. They can oppose the "squeeze-out" procedure by application to the court within two months after the squeeze-out notice. Alternatively, the Remaining Shareholders may require the offeror to acquire their shares, provided the offeror is the holder of ninety percent in value of all the shares and the original offer period has not expired.

The Code limits the effect of the statutory "squeeze-out" provisions by requiring that, unless the Executive agrees otherwise, an offeror must only exercise its right to "squeeze-out" the remaining shareholders if it is able to acquire at least ninety percent of the "disinterested shares" in the company within the same four-month period. "Disinterested shares" here means the shares held by other shareholders, and excludes the shares held by the parties acting in concert with it for the purpose of the "squeeze-out" provision in the Code.

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Public Tender Offers in Sweden

By Carl-Olof Bouveng and Anna Lindstedt Coates

I. Introduction

This article provides a brief summary of the Swedish rules governing public tender offers in Sweden in regard to (i) stake building and disclosure requirements; (ii) voluntary public offers; (iii) mandatory public offers; and (iv) compulsory acquisition of minority interests in the target.

II. Stake Building and Disclosure Requirements

The offeror may build a stake in a target, subject to certain restrictions and disclosure requirements, although stake building is not permitted where the offeror has received insider information about the target. Stake building may also affect the offer consideration, as discussed further below. The applicable disclosure requirements are set out in the Financial Instruments Trading Act and apply to shares issued by Swedish companies listed on regulated markets. The regulated markets in Sweden are NASDAQ OMX Stockholm and NGM Equity.

The offeror is obliged to disclose information on its shareholdings in the target when it (whether alone or together with any affiliate) reaches, exceeds or falls below any of the thresholds of five, ten, fifteen, twenty, twenty-five, thirty, fifty, sixty-six and two-thirds, and ninety percent of the total number of votes or shares of the target. Disclosure is required when such thresholds are crossed either as a result of (i) the acquisition or disposal of shares by the offeror itself, or (ii) corporate actions of the target such as dilutive share issues or accretive share buybacks which have the effect of changing the offeror's percentage ownership interest in the target.

The above information must be disclosed and reported to the target and to the Swedish Financial Supervisory Authority ("SFSA"). Such disclosure must be made in writing no later than the first trading day after the transaction(s) was completed. SFSA urges non-Swedish shareholders to establish contact with the SFSA (presumably prior to reaching any disclosure thresholds) in order to establish how the reporting on the disclosure will be made on a practical basis.

The SFSA will make the disclosure public before noon on the first trading day after the reporting of the disclosure was made to the SFSA.

III. Public Offers

A new act concerning public takeovers implementing EU Directive 2004/25/EC entered into force in Sweden on 1 July 2006 (the "Swedish Takeover Act"). The Swedish Takeover Act is merely framework legislation, and the detailed rules for takeovers in Sweden are set forth in rules prepared by the Swedish Industry and Commerce Stock Exchange Committee (in Swedish: *Näringslivets Börskommitté*, "NBK"), which rules the respective stock exchange has adopted (the "Rules"). On 18 May 2010 the NBK was dissolved, and its mission to promote the observance and development of good market practice on the Swedish securities market was transferred to the Swedish Corporate Governance Board. The Rules were revised by NBK in cooperation with NASDAQ OMX Stockholm during 2009 and the revised Rules entered into force in NASDAQ OMX Stockholm and NGM Equity on 1 October 2009. In this article, the Swedish Takeover Act and the Rules are together referred to as "Takeover Rules."

The Takeover Rules must be observed carefully when launching an offer, not only in order to avoid sanctions, but also to avoid negative publicity that can impair the chances of completing a successful offer. Takeover rules corresponding to the Takeover Rules have also been adopted by First North (an MTF operated by NASDAQ OMX Stockholm), Nordic MTF (an MTF operated by NGM Equity), and Aktietorget, and entered into force on 1 January 2010.

The Takeover Rules apply to a public offer by a Swedish or foreign legal entity or person to shareholders for their shares or other financial instruments in a Swedish company listed on a Swedish regulated market. The Takeover Rules also apply to offers for shares in foreign companies whose shares or depository receipts are not listed on a regulated market in its home state, but listed on a Swedish regulated market. The Takeover Rules are binding on all offerors. When launching the offer, the offeror must undertake, in regard to the relevant stock exchange, to follow the Takeover Rules and agree to be subject to any sanctions that the stock exchange might impose on the offeror due to any violation of the Takeover Rules. The offeror must also inform the SFSA that such an undertaking has been entered into.

The Swedish Securities Council (in Swedish: *Aktiemarknadsnämnden*), a private body inspired by the UK Takeover Panel, is responsible for the observance of good practice on the Swedish securities market. Under the Takeover Rules, the Securities Council is empowered to issue statements and rulings on points of interpretation of the Takeover Rules as well as to grant exemptions from the Takeover Rules. Past statements and rulings by the Securities Council offer guidance on the interpretation of the Takeover Rules. The Securities Council is also empowered to issue statements and rulings on the points

of interpretation of the takeover rules applicable to First North, Nordic MTF and Aktietorget.

The Takeover Rules are to be interpreted so as to achieve their underlying purpose. The Takeover Rules are based on a number of general principles and offer guidance on how to interpret the Takeover Rules. One such principle is fair and equal treatment of the shareholders of the target. Another principle is that an offer must not be launched until it has been ascertained that the offeror can fulfill the offer, including that cash payments can be completed in full (if cash is offered) and that reasonable steps have been taken to ensure payment of all other forms of consideration.

The offer as such is launched by means of a public announcement, which must be made immediately once the resolution to make the offer has been passed by the offeror. The offer must state all principal terms and conditions, such as the identity of the offeror, the number of shares already held, a description of any securities that are included in the offer, the main terms of the offer as to price and premium, how the offer is financed, any conditions for fulfillment of the offer, whether any acceptances have already been solicited, the period during which the offer will be open to acceptance (which can be no less than three weeks) as well as the form for accepting the offer. The public announcement is made by way of a press release and simultaneously disclosed to the applicable stock exchange, the Securities Council, the SFSA and the target. The announcement is also to be available on the offeror's web site, if it has a web site, as well as the target's web site, as soon as possible.

The offeror must offer all holders of the target's shares identical terms and the same consideration per share. In special circumstances, certain shareholders may be offered consideration in another form, but with the same value. If the target has different classes of shares, the same form of consideration must be offered for all shares, irrespective of class. If the difference in the classes of shares consists of different economic rights, the price difference between the respective classes of shares may not be unreasonable. The offeror may not offer a higher price for shares with multiple voting rights ("A-shares"), although in certain limited circumstances the Securities Council may consent to a higher price being offered for the A-shares. Consent may also be given if the classes of shares that carry different voting rights are listed and, on the basis of a number of factors, the quoted price is considered to accurately reflect a difference in market value.

The Takeover Rules also include provisions on treatment of holders of securities in the target other than shares.

An offer generally may not be made on terms less favorable than the highest price paid by the offeror (or an affiliate) during the six months prior to the announcement of the offer or during the course of the offer. If the offeror (or an affiliate) has acquired more than ten percent of the target shares in exchange for securities in the six months preceding the offer or during the course of the offer, a securities exchange offer will be required. A cash alternative is required where the offeror (or an affiliate) has acquired more than ten percent of the target shares for cash in the six months preceding the offer or during the course of the offer. The offeror must compensate the shareholders who have accepted the offer if the offeror (or an affiliate) acquires shares issued by the target on more favorable terms within the six months following the initiation of the payment of the offer price.

The target board has a key role in the offer process, and the board has the duty to act in the interest of the target shareholders. The Takeover Rules also include requirements concerning conflicts of interest that are broader in scope than the conflict of interest requirements to which the board is subject to under the Companies Act. The target board must announce its opinion of the offer and the reasons behind its opinion no later than two weeks prior to the expiry of the acceptance period. The Takeover Rules do not require the target board to seek independent financial advice in relation to its opinion, although a fairness opinion from an independent financial adviser is often obtained by the target board. However, see the discussion below of the specific requirements in a management buy-out situation.

Within four weeks after the announcement of the offer, the offeror must prepare an offer document in regard to the offer and apply to the SFSA for its approval. The offer document is to be made public and sent to the applicable stock exchange, the Securities Council, as well as to any shareholder on request. The preparation of the offer document, as well as marketing of the offer, will normally be by a financial advisor with knowledge of the local market.

The Takeover Rules contain detailed requirements with respect to the contents of the offer document. Among other things, the offer document must state the background of the offer, a presentation of the target, key ratios, future prospects and financial objectives. In the event of a securities exchange offer, information equivalent to the information in a prospectus must in addition be included in the offer document. The information on the target should be prepared in co-operation with its board of directors. Further, the board of directors of the target may allow the offeror to perform a due diligence on the target. If the board chooses not to cooperate, the offeror will be confined to current publicly available information on the target.

The offeror is required to announce the outcome of the offer as soon as the acceptance period has expired. The announcement must be made in the same way as

was the initial offer. If an offer is withdrawn, the offeror cannot, without the consent of the Securities Council, make another offer for the target or acquire a stake in the target that would trigger a mandatory offer within twelve months after the expiry of the acceptance period.

The Takeover Rules contain specific requirements in the event of a management buy-out. The specific provisions are triggered when a board member or a member of the senior management (or any of their affiliates) of the target, or of any of the target's subsidiaries, participates in the offer. In a management buy-out situation, the target board is required to obtain a statement from an independent financial expert concerning the fairness or adequacy of the offer price. Further, the acceptance period must be at least four weeks.

IV. Mandatory Public Offers

Once a shareholder (whether alone or together with an affiliate) reaches at least thirty percent of the total number of votes in the target, the shareholder must disclose his or her current shareholding in the target, and within four weeks thereafter launch a public offer for all of the remaining shares in the target. Such a mandatory offer will, with a few exemptions, be subject to the same rules as a voluntary offer, as set forth above.

The obligation to launch a mandatory offer will cease to apply should the shareholder's interest fall below thirty percent of the total number of votes in the target within four weeks after the transaction leading to the obligation has occurred.

Under special circumstances, it is possible to apply to the Securities Council for an exemption from the obligation to launch a mandatory offer. For example, a shareholder could normally obtain such an exemption should the threshold be reached due to the shareholder's subscription of its pro rata share in a share rights issue. Another situation where exemption could be obtained is when shares are issued as consideration in connection with acquisition of companies or other property or is a necessary step in the restructuring of a company with serious financial difficulties.

The offeror may choose to offer securities or any other form of consideration in a mandatory offer. However, the offeror must always include a cash alternative.

V. Compulsory Purchase of Minority Interests

If full ownership of the target company is being contemplated, it should be noted that a shareholder with more than ninety percent of the shares in the target company has a statutory right under the Companies Act to purchase ("squeeze out") all remaining minority shareholders. Thus, a public offer (together with possible permitted purchases on the market) is deemed successful if more than ninety percent of the shares can be obtained (regardless of the number of votes controlled). The squeeze-out procedure is settled by arbitration under the Swedish Arbitration Act.

In a squeeze-out procedure, the offeror typically requests the transfer of title to the minority shareholdings, a so-called advance title. The minority shareholders must accept that the offeror is granted advance title to the minority shareholdings (and the offeror thereby becomes the sole shareholder of the target), if the offeror provides satisfactory security for the price of the shares, including interest. It is the arbitration panel that determines whether the security is satisfactory. The offeror would typically have been granted advance title within nine to twelve months after the squeeze-out procedure is initiated.

Once the offeror has been granted advance title to the minority shareholdings, the squeeze-out procedure concerns only the price for the shares. The Companies Act provides that, where a public offer has been accepted by at least ninety percent of the target shareholders, the price must be equivalent to the value of the offer consideration, unless there are any special reasons for a different price (such as where a long time has passed since the offer was completed or a material change in circumstances affecting the value of the consideration has occurred). In such a situation, the price must reflect the market value of the minority shareholdings at the time of the initiation of the squeeze-out procedure, i.e., in practice often the stock market price of the target shares at the time the squeeze-out was initiated, unless there are any special reasons for a different price.

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Takeover Bids in the United Kingdom

By Mark Cardale

I. Introduction

There are two possible ways to implement a takeover bid resulting in the acquisition by the acquirer or offeror (the "offeror") of all (or perhaps a majority) of the stock of a U.K. publicly listed target company or offeree (the "offeree"):

(a) A conditional offer to the offeree shareholders to acquire their shares on stated terms—On acceptance of the offer and satisfaction (or waiver) of its conditions, a binding contract between the offeror and the accepting offeree-shareholder is created in accordance with normal common law principles for the sale and purchase of the relevant offeree shares.

The offeror may become entitled under statute compulsorily to acquire (or squeeze out) minority shareholdings if it acquires pursuant to the offer at least ninety percent of the shares for which the offer is made.

(b) A statutory procedure known as a scheme of arrangement or simply a "scheme"—Nothing devious is implied in this context by the use of such term, which has been part of statute law for a long time. Under this method, the takeover, if its terms are approved at a specially convened shareholders' meeting by a majority in number of shareholders together holding at least seventy-five percent of the offeree's shares and then sanctioned at a court hearing, binds all offeree-shareholders to sell their shares to the offeror on the terms of the scheme.

Both offers and schemes, and the possible advantages and disadvantages of each, are explained further below.

The principal source of regulation of the conduct of takeovers (both offers and schemes) and of takeover activity in the U.K. is the City Code on Takeovers and Mergers (the "Code"), which is promulgated, administered and enforced by the Takeover Panel (the "Panel"). In the regulatory context, practitioners must also have regard to certain parts of the Companies Act 2006, the Financial Services and Markets Act 2000 and perhaps the Listing Rules issued by the U.K.'s Financial Services Authority (FSA) and applicable to companies listed on the London Stock Exchange (or the AIM Rules for companies whose shares are traded on the AIM market).

Competition (i.e., antitrust) aspects are subject to the U.K.'s Enterprise Act 2002, and, on the European Community (EU) level, where a combined enterprise will have total sales in excess of EUR five billion and European Community-wide sales in excess of EUR 250 million, by the EC Merger Regulation 139/2004. The substantive issues that may arise in relation to competition references and clearances are not discussed in this article.

II. The Takeover Panel and Code

The Panel, constituted by representatives of major institutions within the City of London, was originally set up in 1968, without formal legal powers, to supervise public company takeovers. As a result the Code was drawn up that sets out a set of "General Principles" upon which the Code is based and which are to be observed by takeover participants (and their advisers). The Code is not concerned with the financial or commercial merits of a takeover.

The General Principles focus particularly on the fair treatment of minority shareholders and the avoidance of false markets. They are supplemented by detailed "Rules" and appendices, and even more detailed notes on the Rules, governing the conduct of takeovers, the timetable for their implementation and the behaviour of takeover participants.

The Panel states that the Rules are to be interpreted to achieve their underlying purpose and that both the spirit and the letter of the Rules are to be observed. Although some of the language used is peculiar to takeover practice, the Rules are drafted in essentially nontechnical terms. Accordingly, points of interpretation arise not so much from ambiguity of the language, but in relation to the application of a particular Rule in novel or complex circumstances.

The Panel's powers of enforcement have traditionally been based on its "cold-shouldering" powers, used to bar those in breach of the Code from using the facilities of the securities markets, rather than on legal sanctions. Now, as a result of the EU Directive on Takeover Bids (the "Takeover Directive"),[1] the Panel itself has statutory status and its enforcement powers have legal backing (see the discussion below).

Day-to-day decisions of the Panel are delegated to its "Executive," comprising both permanent staff and representatives from professional organisations and financial institutions seconded to the Panel for fixed terms. The Executive is responsible for the administration of the Code, and its members are available for consultation, by telephone or otherwise. Such consultation is encouraged by the Panel and in some instances required by the Code; and in major and complex transactions consultations with members of the Panel's Executive are likely to be extensive.

In light of this practice, the Code has been regularly amended and developed over time, to meet changes in market practice. In addition to occasional ad-hoc

amendments to deal with specific issues, regular amendments are made in April each year, on the basis of an ongoing review and consultation process.

Following implementation of the Takeover Directive, separate committees of the Panel, with no cross memberships, operate to do the following:

- review rulings of the Panel's Executive, resolve appeals from any decision of the Executive which cannot be resolved by agreement and hear disciplinary proceedings (the "Hearings Committee"), and
- carry out the Panel's rule-making function, by keeping the Code under review and proposing amendments to it as appropriate (the "Code Committee").

Decisions of the Hearing Committee may be appealed to the Takeover Appeal Board, which is normally chaired by a former judge of senior status. Its hearings will normally be held in private, and its decisions (or appropriate sections of them) published in writing.

The Panel publishes on its Web site (www.thetakeoverpanel.org.uk) its formal decisions on matters arising out of particular transactions and disciplinary hearings ("Panel Statements"), as well as occasional Practice Statements as guidance to the interpretation of specific areas of the Code, a discussion of similar issues each year in its Annual Report, and consultation papers on possible amendments to the Code.

III. Impact of the Takeover Directive; Future Reform

The Takeover Directive had originally been intended to create a "level playing field" for takeover activity throughout the European Union, and was very extensively (and sometimes angrily) negotiated over a very long period. Following its eventual adoption by the EU, it was implemented by the U.K. through the Companies Act 2006. As a result partly of the U.K.'s lengthy experience in takeovers and the status of London as a financial center (which enabled the U.K. to argue its own position with some force), and partly as a result of the "opt-outs" from certain provisions which were created to secure member states' agreement to the Takeover Directive as a whole, it can be argued that the impact of the Takeover Directive on U.K. practice has been limited, and because of the opt-outs the playing field in Europe is still not very level.

Certainly, changes to the Code Rules as a direct result of the Takeover Directive were not numerous, but there have been significant changes to the status of the Panel and of the City Code itself, both of which now have statutory recognition, and the Panel's powers (including its enforcement powers) now have legal effect.

Historically, the English courts have been reluctant to interfere with Panel decision-making (see the *Datafin* case[2] in 1987), and there has been little takeover litigation in the U.K. The Companies Act 2006 appears to preserve the status quo here, by expressly stating that breach of the Code will not give rise to an action for breach of statutory duty, and will not make any transaction void or unenforceable.

The Panel retains its former disciplinary powers to make public or private statements of censure in relation to breaches of the Code or of its own rulings. Its flexibility of response is retained by its now statutory authority to dispense with or modify Rules in particular cases. It also remains self-funded through fees and other charges that it is authorized to collect from takeover participants.

The Panel also has new statutory powers to do the following:

- require documents and information to be delivered up to it;
- seek compliance or enforcement of the Rules or Panel rulings through the courts, and
- impose financial compensation orders where appropriate.

The Panel also has statutory responsibilities to cooperate with other regulatory bodies (including the FSA and bodies outside the U.K. that have equivalent functions to the Panel), and may require such organizations to consult with it.

Further development of U.K. takeover practice may now be driven by political factors, arising out of the general economic malaise since the credit crunch in 2008 and the concern (particularly in hostile takeovers) that the balance of advantage has lain too much with the offeror. Disquiet has been expressed in several quarters that the U.K.'s liberal takeover regime, which had been felt to assist U.K. companies in the 1980s and 1990s, now seemed to count against them (as in the Kraft / Cadbury takeover last year), and that too many takeovers generate fees for advisers which are out of all proportion to any benefit which might accrue to investors generally (as in the abortive bid by Prudential in the U.K. for AIA). Concern has also been expressed about the extent to which short-term investors may influence the outcome of a takeover battle.

In light of these and other concerns, the Panel has conducted a wide-ranging review of the Code and has recently published a lengthy consultation paper (PCP 2011 / 1), proposing a number of detailed amendments to the Code. These amendments (whose specific impact is outlined where relevant in the following section of this article) are likely to be given effect later this year, once the consultation period has ended.[3] It remains to be

seen whether the U.K.'s coalition government will seek legislative reform in addition, but it is not impossible.

IV. Specifics of U.K. Takeover Law and Regulation

The remainder of this article looks at some of the specifics of current U.K. takeover law and regulation.

A. Transactions Subject to the Code

The applicability of the Code to a particular takeover transaction is governed by the status of the offeree. Offerees subject to the Code include a public company or Societas Europaea registered in any part of the U.K., which:

- has any of its securities admitted to trading on a "regulated market" in the U.K. (e.g., a full listing on the London Stock Exchange), regardless of its central place of management; or
- does not have its securities admitted to trading on a regulated market (e.g., is unlisted, or is listed on AIM), but does have its central place of management in the U.K.

If a U.K.-registered offeree has a listing on an exchange within an EEA member state other than the U.K., the Panel may share jurisdiction with the relevant authority in that other member state. The Panel does not normally accept jurisdiction over offerees that are not strictly subject to the Code.

The Code applies generally to transactions involving a "change of control" of an offeree subject to its provisions. For this purpose, "change of control" means, broadly, the obtaining or consolidation of ownership of thirty percent or more of the current voting rights in the offeree.

B. Market Information and Announcements

The Code places great emphasis on the requirement for secrecy before a takeover bid, or the possibility of one, is formally announced to the market, and requires all those privy to price-sensitive information to keep it secret. Before a potential offeree has been "approached" by the offeror, it is the potential offeror's responsibility to watch the offeree's share price, and to be ready to make an announcement if its actions have led to an "untoward" movement in that price.

After the offeree has been approached, responsibility shifts to it for ensuring that the market is kept properly informed. The offeror must weigh this loss of control against the possible benefits of discussions with the offeree, which might cover due diligence issues and/or the possibility of obtaining the offeree board's formal recommendation of the offer The possibility of agreeing to the payment of "break fees" or other deal protection measures will, however, be very significantly reduced by the proposed new amendments to the Code.

The proposed amendments to the Code will also:

- specifically permit an offeree board to take into account factors other than price in deciding whether or not formally to recommend a bid to its shareholders; and
- require a potential offeror to be identified at an early stage in the talks process, thereby increasing the pressure on such an offeror to "put up" or "shut up" as explained below.

Once an offeror has announced a "firm intention" to make a bid, it will be required to proceed with the bid within twenty-eight days. Consequently, an offeror should not make such an announcement until it is entirely certain that it wishes to make the bid and is fully prepared to do so. A "firm intention" announcement, sometimes referred to as a "Rule 2.5 announcement" after the relevant Code Rule, is required to include a report from its financial advisers that it has sufficient resources to implement any cash payments which may become due to offeree shareholders under the bid, and to comply with further detailed content requirements set out in Rule 2.5. These requirements include the terms (including consideration) of the bid and the conditions attached to it (see below), as well as of certain dealings.

Sometimes a potential offeror will wish voluntarily to announce a possible offer before making a Rule 2.5 announcement, or it may be required to do so (to prevent a false market developing), either under the Code or the "market abuse" regime of the Financial Services and Markets Act 2000. In any such case, it will be held to the particular language it uses about possible terms for the offer and any preconditions to the offer, which must be discussed with the Panel before the announcement is made.

After an announcement that identifies a potential offeror, that offeror will be required under the proposed amendments to the Code to clarify its position: by "putting up" (i.e., proceeding with the bid) or "shutting up" (i.e., not making a bid) within twenty-eight days. If shutting-up, the offeror will normally be precluded from bidding for a period of six months after the date of its announcement.

The Code requires both offeror and offeree to establish a publicly accessible Web site at the start of an offer period, and to publish on that Web site all announcements and other documents sent to shareholders in relation to a takeover.

C. Share Dealings Prior to and During a Bid

1. Introduction

The Code imposes various restrictions and limitations on share dealings. Stakebuilding (the purchase of offeree shares by an offeror or potential offeror and/or those acting in concert with it in advance of or perhaps during

an offer) is also subject to disclosure rules. Some dealings are illegal, and others may impact unfavourably on the exercise of squeeze-out rights.

The rest of this section gives brief details of some of this law and regulation. It is a difficult area for rule-makers because of the complexities of dealing systems in markets today, and for lawyers because of definitional issues that are in part due to these complexities. Different sets of U.K. regulations use different definitions for the same terms, but it should be assumed in what follows that dealings refer generally to dealings of any nature in securities of all types, including forms of derivatives. Most restrictions etc. impact not only on the principal parties to a takeover but also those who may in some manner be acting in concert with them.

2. Code Restrictions and the Like

In a number of circumstances, dealings may be permitted by the Code, subject to the following consequences that may be disadvantageous:

- If an offeror acquires any interest in shares in the offeree, either prior to a firm intention announcement or thereafter while the offer remains open for acceptance, the takeover offer must be on no less favorable terms. This applies to acquisitions made at any time during the three months prior to the start of an offer period or in some cases earlier.

In consequence, an offeror which acquires offeree shares at above the offer price at any time after a firm intention announcement and while the offer remains open must revise its offer.

- A takeover offer must offer a cash or cash-alternative consideration at the highest price paid by the offeror if the offeror has acquired at least ten percent of the voting rights in the offeree for cash during the offer period and the twelve months prior to it.
- A takeover offer must include a securities consideration if the offeror has acquired at least ten percent of the voting rights of the offeree in a securities exchange during the offer period or the three months prior to it.
- If any person acquires more than thirty percent or more of the voting rights in an offeree, that person will (subject to some significant exceptions) become immediately bound to make a "mandatory" (or "Rule 9") offer for all the remaining offeree shares. A Rule 9 offer (named after the relevant Code Rule) can be conditional only on the offeror acquiring fifty percent of offeree voting rights as a result (but will lapse if it becomes subject to a relevant competition reference), and must provide a cash or cash alternative consideration equal to the highest price paid for offeree shares by the offeror during the twelve months prior to the announcement of the offer.

In addition, the Code contains a number of prohibitions, as follows:

- An offeror may not enter into arrangements relating to offeree shares with favourable conditions attached that are not being extended to all offeree shareholders, except in certain cases (where shareholder consent is given) with the consent of the Panel. This will normally prevent "top-up" payments from being offered to shareholders who sell in advance of an offer at a price which may be below the eventual offer price.

  (An offeror wishing to exercise squeeze-out rights may be prevented from exercising those rights if it does not treat offeree shareholders equally.)

- (i) A person who holds share interests representing less than thirty percent of the voting rights in a company may not make an acquisition that would increase its interests to thirty percent or more of the voting rights, and

  (ii) Any such person holding share interests representing at least thirty percent but less than fifty percent of the voting rights in a company may not acquire any further voting rights in the offeree except for the following:

  - acquisitions by way of acceptance of an offer;
  - an acquisition from a single shareholder that is the only such acquisition within any period of seven days (so long as a firm intention to make an offer has not already been announced);
  - acquisitions made immediately before a firm intention to make an offer is announced, if the offer will be recommended by the offeree board or the acquisition is made with the agreement of the offeree board and is conditional upon the announcement; or
  - acquisitions made in some specified circumstances after a firm intention announcement has been made.

  This rule (Rule 5.1 of the Code) is intended to ensure that an offeree board has full opportunity to consider an offer before (thirty-percent) "control," as defined in the Code, passes to an offeror, and does not in any event apply if the acquirer owns at least fifty percent of the target company's voting rights before the acquisition.

- Offerors, offerees and certain persons connected with either of them may not engage in borrowing or lending transactions with respect to offeror or offeree securities during an offer period.

- An offeror at any time during an offer period may neither (i) sell offeree securities, except with the consent of the Panel; nor (ii) make certain acquisitions through "anonymous order book systems."
- An "exempt principal trader" connected with an offeror or offeree may not carry out any dealings with the purpose of assisting the offeror or offeree.
- Financial advisers and corporate brokers to an offeree (unless they are "exempt" traders or fund managers) may not engage in certain dealings in interests in offeree securities that may support the offeree share price.

The Code also prohibits certain dealings by an offeror for a period following the lapse of a bid. These rules are designed to prevent continued interference in an offeree's affairs following an unsuccessful bid.

3. Disclosure

Those holding direct or indirect interests in the voting rights of companies listed on the London Stock Exchange or traded on AIM (including offerors) are required to notify the company when their interests exceed three percent of the voting rights and at each percentage point above this. Corresponding obligations arise on any decrease in the level of the holding. These obligations arise under the FSA's Disclosure and Transparency Rules, and a breach is punishable by a fine. A company receiving any relevant notification must publish the information through usual market channels (a "regulatory information service").

The Companies Act empowers any U.K.-public company (including a potential offeree) to require persons it reasonably suspects of being interested in its shares to confirm or deny such fact, and to provide relevant information. A register of replies is required to be maintained and kept open for public inspection. Failure to respond to any requisition may lead to the relevant shares being disenfranchised and/or other sanctions.

The Code requires all principal parties to a takeover, including certain persons connected with them, and those holding at least one percent of the shares in either offeror or offeree, to make an "Opening Position Disclosure" of their interests in the shares of the offeree and (unless the offer consideration is wholly cash) the offeror, at the commencement of an offer period. Such disclosures are required to be updated throughout the offer period by "Dealings Disclosures."

4. Unlawful Dealings

(a) Insider Dealing

Insider dealing (that is, broadly, dealing on the basis of unauthorized use of price-sensitive, confidential information) is outlawed in different ways by both the Criminal Justice Act 1993 and the Financial Services and Markets Act 2000. Following a number of unsuccessful prosecutions, the FSA has recently secured several convictions.

In addition, both the Code and the Listing Rules (through the model code for securities transactions applicable to companies listed on the London Stock Exchange) also prohibit insider dealing in certain circumstances.

Nothing in any of these laws or regulations prevents an offeror itself from acquiring offeree shares by reason of the offeror's knowledge of its own impending bid.

(b) "Share Support" Operations

Provisions in the Companies Act 2006, which make unlawful the giving of "financial assistance" by a public company for the purpose of the acquisition of its own shares, may still apply to the kind of share support operations which made the takeover of the Distillers Company by Guinness in 1986 notorious. These may have an impact on both offerors and offerees seeking to boost their own share prices in takeover contexts.

Dealings to support an offeror's or offeree's share price may also constitute an offense under the Financial Services and Markets Act, as a "misleading practice," since they will, almost certainly deliberately, create a misleading impression of the relevant share price in the market.

5. Other

Shares in the offeree held by an offeror or any "associate" of the offeror at the time when an offer is made (i.e., when the offer document is posted) will not be counted towards the ninety-percent acceptances required for the purpose of exercising "squeeze-out" rights in a takeover offer (see below). Consequently, acquisitions made before the offer may have an adverse effect on the offeror's ability to exercise such rights.

It is common practice to obtain (or to seek) "irrevocable commitments" to accept an offer from key offeree shareholders in the period immediately before it is announced. Provided these are given for no consideration (other than a promise to make the offer), the shares to which any such commitment relates may be taken into account in determining the level of acceptances for squeeze-out purposes.

D. Offeree Preparations; "Poison Pills"

Although well-prepared companies may adopt various commercial strategies to maintain their share prices and defend themselves against unwelcome bids (e.g., dividend increases, share buy-backs, disposal/acquisition programs), "poison pill"-type devices are generally not capable of implementation by a U.K. company. This partly reflects the impact of judicial decisions on (offeree) directors' duties, but also Code restrictions against "frustrating action." These last apply as soon as "a bona fide offer may be imminent."

The Code restrictions were in place prior to the Takeover Directive, but were found too difficult to accept in some parts of the EU and opt-outs were made available under the Takeover Directive. The continuance of the restrictions in the U.K. represents an important aspect of the way in which the "level playing field" for takeovers which had been sought through the Takeover Directive does not exist throughout the EU.

During an offer (or in some cases earlier, as indicated above) an offeree may not, for example, do any of the following:

- Take any action that might "frustrate" any offer or bona fide possible offer;
- Issue any shares, options or convertible securities; or
- Enter into contracts otherwise than in the ordinary course of business, including service contracts with abnormal increases in emoluments or other significant improvements in terms except in any such case with its shareholders' prior approval.

An offeree board is required to consult with the Panel in advance in any case of doubt and, specifically, if an offeree board is of the opinion that an action that might possibly be "frustrating action" is to be taken in pursuance of a preexisting obligation. Dispensations from the restrictions may be available, for example, if the proposed action is approved by the offeror.

Another issue that an offeree may have to consider at an early stage is the supply of information to a bidder. Specific Code Rules cover issues that may arise in potentially competitive situations and in buyouts if existing members of the offeree's management are part of the bidding team, and are designed overall to achieve fairness in these situations.

E. Structure of Bid; Schemes and Offers; Conditions; Timetable

1. Overview

Once the offeror has announced its firm intention to proceed with a bid, it must mail an "offer (or scheme) document" to offeree shareholders within twenty-eight days, although a well-prepared offeror will probably want to do this sooner. There must be "objective justification" for not sending the document to any particular shareholder (e.g., legal restraints on sending the document into the particular jurisdiction where a shareholder resides).

It is at this point that material differences in procedure will start to emerge, depending on whether the bid is proceeding by way of an offer or a scheme, and, to some extent, on whether the terms of the bid are being recommended by the offeree board—although decisions on these issues are likely to have been made earlier:

- If a bid is being recommended, the offer document is likely to be combined with a response document from the offeree; in any other case, the offeree's response must be published within fourteen days after the offer document.
- If a bid is proceeding by way of a scheme, the scheme document, containing the scheme, will need to comply with the content requirements of the court and those of the Code covering both offer and response documents, and it must be formally issued by the offeree as the company promoting the scheme to the court.

The contents requirements of the Code, for offer documents and offeree response (or "defense") documents are both general (i.e., requiring the disclosure of all relevant information) and detailed (i.e., with an extensive list of financial and other specific disclosures concerning the bid and the parties). The Code stresses the individual responsibility of all directors for the information contained in the documents, which they are required expressly to acknowledge in the documents. The offeree response is also required to state the offeree board's views on the merits of the offer, and to include an opinion as to those views given by an independent financial adviser.

The proposed Code amendments will require greater disclosure than previously of the detail of the financing arrangements for a bid and of the fees being charged by advisers in relation to a bid. The amendments will also require fuller disclosure of the offeror's intentions regarding the future of the offeree's business and the continued employment of its workforce. Employee representatives will have increased scope formally to make their views known on a bid.

2. Offers Versus Schemes

An "offer" is made to offeree shareholders individually and may be accepted by a shareholder returning a "form of acceptance" in respect of that shareholder's offeree shares. The acceptance will be made subject to a number of conditions, which are to be satisfied or waived before it becomes "unconditional" and a contract is formed between offeror and shareholder. The conditions will cover a number of issues concerning the financial and other condition of the offeree, the listing of any consideration securities, and the obtaining of necessary consents.

The Code requires that there be an (unwaivable) acceptance condition, pursuant to which the offeror must obtain at least fifty percent of the offeree shares before the offer can be declared "unconditional as to acceptances," with the offeror having the choice to set the level above fifty percent (as it will do if it wishes to ensure the availability of squeeze-out rights requiring ninety percent accceptances) and to vary the level at any time (always above fifty percent). Other conditions are generally not capable of being invoked (and thus preventing the offer

from proceeding) unless they are of material significance to the offeror in the context of the offer, and they should not normally depend wholly on the subjective judgments of the directors of the offeror.

Broadly, it will be possible (subject to formalities) for an offeror to acquire all outstanding shares in the offeree if it has offered to acquire all offeree shares (except those already owned by the offeror) on the same terms, and pursuant to the offer it acquires ninety percent of those shares. A squeeze-out then requires outstanding shareholders to sell their shares to the offeror for the same consideration (or choice of consideration) as was available under the offer, and in some cases the shareholder may require the offeror to purchase its shares on the same basis (a "sell-out").

A "scheme" proceeds by way of the offeree's applying to the court for a special meeting of shareholders to be convened to consider the scheme by which the offeror would acquire all the offeree shares. The offeror may not vote any offeree shares it holds at this meeting. A scheme is possible only where the offeree is a U.K. incorporated company.

If the scheme is approved at the meeting by a majority in number of those attending, with seventy-five percent of the votes cast, the scheme is proposed to the court. Absent some procedural defect, or conceivably some blatant unfairness overlooked by shareholders (and by the offeree's financial adviser, whose view on the terms of the scheme must be published in the scheme document), the scheme is likely to receive court sanction and may then be made binding on all offeree shareholders. Conditions to the implementation of a scheme are possible only to the extent agreed between offeror and offeree, and obviously an acceptance condition is irrelevant.

In recent years there has been a marked increase in the use of schemes relative to offers as a means of implementing a takeover. This is largely because of the possibility in most cases of avoiding a 0.5% stamp duty on the transfer of offeree shares to the offeror in a scheme, and the certainty (if the scheme succeeds at all) in the offeror acquiring ownership of one hundred percent of the offeree at the end of a scheme, which may be attractive to banks financing a bid. The unusual majority of shareholders required to approve a scheme is often easier to acieve than the ninety percent acceptances required for a squeeze-out under an offer, but it is subject to potentially strange outcomes if shareholdings in the offeree are not evenly spread—a review of the offeree's public share register may be helpful to reach a view on this.

To vary a proposed scheme after it has been published may be difficult and costly, while variations to an offer can be straightforward. In light of this, and, given the need for offeree cooperation, a scheme may not be the best option in hostile and/or competitive situations.

3. After the Posting of the Offer/Scheme Document

(a) Offers

An offer must remain open for at least twenty-one days following the posting of the offer document, "day 21" being called the "first closing date." The offeror may then close the offer or extend it for a stated period. It must announce the number of acceptances it has received at this time (and on subsequent closing days).

The offer may "become unconditional as to acceptances" at any time when the acceptance condition is fulfilled, or be "declared unconditional as to acceptances" if the offeror decides it is appropriate to proceed with fewer acceptances than those stated in the original acceptance condition (so long as the level is above fifty percent). After an offer has become or been declared unconditional as to acceptances, other conditions must be fulfilled or waived within fourteen days.

The offer must become or be declared unconditional as to acceptances by "day 60," and other conditions must be fulfilled or waived within twenty-one days after that, otherwise it must lapse. Once wholly unconditional, an offer may be left open indefinitely, or closed.

Variations and extensions may be made at any time, but fourteen days' notice is required of any closure and any revised offer must be open for at least fourteen days. The offeror may not provide new information to offeree shareholders after "day 42." These are all points likely to be of particular relevance in a hostile or competitive situation, and in some circumstances (e.g., if a rival offer is announced late in the timetable for the original offer) extensions of the "day 60" and "day 42" requirements may be allowed.

b. Schemes

A scheme timetable must be agreed with court officials, but normally it is possible for a scheme to become effective around two months after the "firm intention" announcement. There must be at least twenty-one days between the posting of the scheme document, which will give notice of the shareholders' meeting to approve the scheme and the meeting itself. The court hearing can be expected to follow two weeks or so later, and the scheme to become effective by the filing of the court order a day or two after this.

Endnotes

1. 2004/25, 2004 O.J. (L. 142) 12-23 (EC).
2. *R (Datafin plc) v. Panel for Takeovers and Mergers* [1987] Q.B. 815.
3. The amendments to the Code referred to in this article have been the subject of a consultation process in which comments on the amendments were invited by the Panel by 27 May 2010. It is expected that the amendments in their final form will be implemented in the summer of 2011.

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Public Takeovers and Mergers in Australia

By Guy Alexander

I. The Twenty-Percent Rule

A. The Twenty-Percent Prohibition

The basic takeover restriction in Chapter 6 of the Australian Corporations Act (the "Act") is that a person may not acquire a "relevant interest" in issued voting shares in a company if (i) the company is a listed company, or an unlisted company with more than fifty members, and (ii) because of the acquisition, that person's or someone else's "voting power" in the company increases from twenty percent or below to more than twenty percent, or from a starting point that is above twenty percent and below ninety percent. The rule also applies to the acquisition of interests in listed management investment schemes (e.g., listed trusts, whether stapled or un-stapled).

B. The Exceptions

The exceptions to the Twenty-Percent Rule include the following.

- An acquisition that results from acceptance of an offer under a takeover bid made in accordance with the Act, as discussed below.
- An acquisition by a person with voting power of nineteen percent or more, where the aggregate acquisitions do not exceed three percent in the prior six-month period.
- An acquisition approved by shareholders of the target in a general meeting at which the acquirer and its associates cannot vote.
- An acquisition that results from an on-market transaction if (i) the acquisition is by or on behalf of the bidder under a takeover bid; (ii) the acquisition occurs during the bid period; (iii) the bid is for all the voting shares in the bid class; and (iv) the bid is unconditional or conditional only on certain prescribed occurrences.
- An acquisition that results from a court-approved scheme of arrangement.
- An acquisition that results from a buy-back authorized under the Act.

C. Rules on Relevant Interests and Voting Power

The principal concepts for the purposes of the Twenty-Percent Rule are "relevant interests," "voting power" and "association." In broad terms, a person has a relevant interest in shares if the person is the holder of the shares; has power to exercise, or control the exercise of, a right to vote attached to the shares; or has the power to dispose of, or control the exercise of a power to dispose of, the shares. It does not matter how remote the relevant interest is or how it arises. The Act includes broad tracing provisions through corporate groups. For example, if a person has voting power in more than twenty percent of a corporate body A, that person is deemed to have the same relevant interests in shares in other companies as A has.

A person has voting power in a company equal to the shares in which they have a relevant interest plus the shares in which their associates have a relevant interest. Although the term used is "voting power," relevant interests (and therefore voting power) may arise even where there is no power to control the right to vote attached to shares.

In general terms, persons are associates if:

- where they are corporate bodies, one controls the other or they are under common control (Here, "control" means the capacity to determine the outcome of decisions about the other entity's financial and operating policies.);
- they have entered or propose to enter into an agreement, arrangement or understanding for the purpose of controlling or influencing the composition of the relevant company's board or the conduct of the relevant company's affairs; or
- they are acting in concert in relation to the relevant company's affairs (Note that "affairs" is defined extremely broadly.).

D. Other Disclosure or Approval Thresholds

Other relevant disclosure or approval thresholds include the following.

1. Substantial Shareholder Notices

Chapter 6C of the Act requires a person who acquires a substantial holding in a company or listed scheme (five percent or more of the voting securities) to file a substantial shareholder notice, giving particulars of that interest. Notices are also required for each subsequent change of one percent or more. The notice must be lodged within two business days after the person becomes aware of the information (or by 9.30 am on the next business day if there is a takeover bid on foot). This issue is particularly relevant in the context of building a pre-bid stake.

2. FIRB

Section 26 of the Foreign Acquisitions and Takeovers Act requires a foreign person to notify the Treasurer (in practice, the Foreign Investment Review Board) before acquiring a substantial shareholding in an Australian corporation or, if they already have such a shareholding, acquiring more shares. Once the notification has been given, it is illegal to proceed with the acquisition unless

advice is given by the Treasurer that there is no objection to the acquisition or forty days elapse without an offer being made. For these purposes, a "substantial shareholding" exists where a person, together with any associates, holds not less than fifteen percent of the voting power or issued shares in the company. Note also the divestment powers of the Treasurer under Section 18 of the Act where two or more unrelated foreign persons hold more than forty percent of the voting power or issued shares in a company without approval. There are more extensive notification requirements for transactions relating to acquisitions of land. Note that FIRB policy also requires all acquisitions by foreign governments and their agencies (e.g., state-owned enterprises, sovereign wealth funds and all entities with fifteen percent or more owned by a foreign government) to be notified to FIRB for consideration.

II. Takeover Bids

A. General Description

There are two kinds of "takeover bid": (i) an off-market bid, which may offer cash or other consideration, and may be subject to conditions; and (ii) a market bid, which is an unconditional cash offer. This paper looks at the provisions which apply to an off-market bid only.

In very general terms, a takeover bid involves the bidder sending written offers to all holders of shares in a particular class in the target company. The offer is contained in a document called a "bidder's statement." The target company then responds by preparing and dispatching to shareholders a document (the "target's statement") that sets out the target directors' recommendations in relation to takeover bid and certain other statutory information.

B. Key Rules Applying to Takeover Bids

The key rules for takeover bids include the following.

1. Offers Must Be the Same

All the offers made under the bid must be the same, subject to certain statutory exceptions.

2. Minimum Offer Period

The offers must remain open for a minimum of one month and a maximum of twelve months.

3. The Minimum Floor Price Rule

The consideration offered for securities in the bid class under a takeover bid must equal or exceed the maximum consideration that the bidder or an associate provided, or agreed to provide, for a security in the bid class under any purchase or agreement during the four months before the date of the bid. There are particular rules for determining the value of pre-bid non-cash consideration, and for applying this rule where the consideration under the bid is or includes scrip.

4. Collateral Benefits Rule

The bidder cannot give or agree to give a benefit to a person outside the benefits offered to all shareholders under the bid if it is likely to induce the person to dispose of their shares or accept the offer under the bid. In theory, such benefits (known as collateral benefits) are only prohibited where given or offered during the offer period. However, the Takeovers Panel's application of the "equality of opportunity" principle essentially means that there is a risk of the Panel making a declaration of unacceptable circumstances in relation to a benefit given in the four months prior to the bid.

5. Escalator Agreements

A bidder or an associate who acquires a relevant interest in bid class securities in the six months before the bid must not give a benefit to the holder where the value of that benefit is determined by reference to the value of the bid consideration. For example, a bidder cannot agree to buy shares in the six months before the bid on the basis that the price payable will be increased if the bidder subsequently makes the bid at a higher price.

6. Conditions to the Offers

The rules in relation to conditions include the following:

- Any conditions to the bid cannot be "self triggering," i.e., dependent on the bidder's opinion, events within its control, or events which are a direct result of the bidder's actions.
- There can be no *maximum* acceptance condition (one triggered if acceptances exceed a specified level).
- The bidder cannot vary the conditions to which its offer is subject, i.e., to substitute a seventy-five-percent minimum acceptance condition for a ninety-percent condition. Bidders have avoided the restriction on variation of minimum acceptance conditions by announcing that they will declare their offers free of that condition if they achieve a certain lower level of acceptances by a particular date.
- A bidder can waive conditions of its offers, but must do so at least seven days before the offers close. (The exception to this is what are called prescribed "occurrence conditions," which are a very narrow category of circumstances in relation to the target, such as insolvency events.) A formal notice of waiver must be filed. If conditions are not waived and, at the end of the offer period, a condition is not fulfilled, all contracts resulting from acceptances are void.

7. Bid Financing

The Act requires that the bidder's statement provide details of the source of any cash consideration to be

provided under the bid. (There is a body of case law around this requirement.) In addition, Takeovers Panel Guidance Note 14 deals with the degree of certainty of funding that is required prior to and during the course of a bid. The requirements of the Guidance Note include the following.

- A bidder should not announce a bid without either adequate funding arrangements already in place or reasonable grounds to expect that it will have sufficient unconditional funding in place to satisfy acceptances when its offers become unconditional. Reasonable grounds may still exist even if the financing has not been formally documented or remains subject to conditions to drawdown, but there must be an enforceable commitment.
- While the financing remains subject to material conditions precedent, the bid should be subject to corresponding conditions precedent.
- The bidder should not declare its bid unconditional while financing arrangements remain subject to material conditions.

8. Time Limits for Payment of Consideration

The consideration must be paid by the earlier of one month after the offer is accepted (or if the offer is subject to a defeating condition, within one month of the contract becoming unconditional) and twenty-one days after the end of the offer period.

9. Squeeze-out

If, by the end of the offer period, the bidder has received acceptances of the offers sufficient to give it a relevant interest in ninety percent of the shares, the bidder can proceed to compulsorily acquire the remaining shares in the target at the bid price. There is power for a court to block bid compulsory acquisition, but only if it is satisfied that the consideration is not fair value for the shares.

C. The Bidder's Statement and the Target's Statement

1. Bidder's statement

The offers dispatched to target shareholders must be accompanied by a bidder's statement. This document requires a considerable amount of preparation on the part of the bidder and its advisers. It is required to contain all information material to a decision by a target shareholder whether to accept the offer. It is also required to contain a series of statutory disclosures, including the following:

- A statement of the bidder's intentions regarding the continuation of and any major changes to be made to the target's business, and the future employment of present employees.
- A disclosure of any pre-bid collateral benefits.
- Where securities are offered as consideration, information to prospectus disclosure standard in relation to the assets, liabilities, profits and prospects of the issuer and particulars of the securities being offered.

2. Restriction on Dispatch of the Bidder's Statement until Considered by the Target

The bidder cannot dispatch its bidder's statement and offers to target shareholders for a period of fourteen days after service of the bidder's statement on the target (unless the target directors consent to early dispatch). During this period, the target board will, in addition to meeting to consider its initial response to the bid, review the bidder's statement to determine whether there are any aspects which require clarification for shareholders. If the bidder's statement is defective in any way or contains any material misstatement or omission, the target board will also consider bringing an application to the Takeovers Panel for a declaration of unacceptable circumstances. In practical terms, any such application to be effective needs to be brought no later than the end of the first seven days of that fourteen-day period.

3. Target's Statement

After receipt of the bidder's statement, the target must prepare and dispatch to its shareholders a target's statement responding to the bid. The target's statement must contain a statement by each director of the target recommending that the bid be accepted, or not accepted, and giving reasons for the recommendations, or reasons why a recommendation has not been made. It must include all information that target shareholders and their professional advisers would reasonably require to make an informed assessment whether to accept the bid (and certain other statutory disclosures).

4. Timing for Dispatch of the Target's Statement

Once the fourteen-day period expires and the bidder dispatches the bidder's statement to target shareholders, the target then only has fifteen days to finalize preparation of its target's statement and print and commence dispatch of that target's statement to its shareholders. This can place considerable pressure on a target that is subject to a hostile bid.

5. Independent Expert's Report

If the bidder's voting power in the target is thirty percent or more, or a director of the bidder is a director of the target, then the target's statement must be accompanied by an independent expert's report. That report must state whether, in the expert's opinion, the offers are fair and reasonable. It is also possible that the company will wish to obtain an independent expert's report as part of its defense, which would accompany the target's statement to shareholders. If an expert's report is required, or the target elects to obtain a report, the expert must be briefed, the report written and printed with the

target's statement, within the twenty-nine-day period following the bidder's announcement.

6. Liability Regime

Chapter 6 contains an onerous liability regime for misleading statements in and omissions from a bidder's statement or other takeover document. Where the alleged misleading statement relates to a future matter (e.g., forecasts and other forward looking financial information), the onus of proving that the statement was misleading shifts from the claimant to the person who made the statement.

III. Schemes of Arrangement

A. Scheme Process

A scheme of arrangement is quite different from the regulated offer and acceptance structure under a takeover bid. A scheme is a binding arrangement between the target company and its shareholders, approved by the court. Schemes can be used for more complex restructures, but in the case of schemes to effect change of control, the scheme provides for all of the shares in the target not held by the bidder to be transferred to the bidder or cancelled. In return for the transfer or cancellation, the bidder pays to the former holders cash consideration or issues new shares in itself.

To make the scheme binding on members, it must be approved by a special majority at a court-convened meeting of members (or, if there is more than one class of members, at meetings of each class) and subsequently by the court. The special majority required is a majority in number of those shareholders voting on the scheme in person or by proxy and approval by seventy-five percent or more of the votes cast.

B. Steps in a Scheme

The basic steps in the scheme process are as follows. This whole process usually takes about thirteen weeks, which is not materially longer than the usual takeover timetable, one factors in at least a few extensions of the takeover bid in order to get to the ninety-percent compulsory acquisition threshold.

1. Implementation Agreement

First, the bidder and the target enter into an Implementation Agreement containing the target's obligations to pursue the scheme, the bidder's obligations to provide the consideration, and various other provisions dealing with operation of the company prior to implementation. The Implementation Agreement will also commonly contain exclusivity provisions (i.e., "no-shop" and "no-talk" obligations) and a break fee, much the same as those which would be found in an implementation agreement for an agreed takeover.

2. Information Memorandum

After the Implementation Agreement is executed and the transaction announced, the parties complete preparation of the information memorandum ("IM") to be sent to shareholders in connection with the scheme meeting. The IM must include the disclosures required by the Act, including the target directors' recommendations in relation to the scheme, and any other information material to a shareholder's decision on the scheme. Invariably, the target also obtains an independent expert's report on whether the scheme is in the best interests of shareholders.

3. ASIC Review

Once the IM and the independent expert's report are in final form, they are lodged with the Australian Securities and Investments Commission ("ASIC") for review. The review period is a minimum of fourteen days, subject to ASIC abridgement.

4. First Court Hearing

Following the ASIC review, the target applies to the court (supreme or federal) for orders approving the IM and convening the scheme meeting. This is usually an ex-parte application, but the court will allow objectors with an obvious interest to be heard on this first court hearing.

5. Scheme Meeting

Once the IM and notice of meeting are approved, there is a twenty-eight-day notice period prior to the scheme meeting.

6. Second Court Hearing

If the scheme is approved at the scheme meeting by the necessary majorities, the target returns to court for an order approving the scheme. At that second court hearing, the court does have a discretion to refuse to approve the scheme, but the courts are normally very reluctant to impose their own commercial judgment in relation to the scheme approved by the requisite majority of members at the scheme meeting.

7. Effective Date and Implementation

If the scheme is approved by the court, it takes effect upon lodgement of the court order with ASIC or such earlier date specified in the court order.

C. Limits on Use of Schemes

It is important to note, however, that the freedom to use a scheme rather than a takeover bid is not absolute. Section 411(17) of the Act states that (i) a court may not approve a scheme unless it is satisfied that the scheme has not been proposed for the purpose of enabling any person to avoid the operation of any of the provisions of Chapter 6; and (ii) even if ASIC produces to the court a certificate stating that it has no objection to the scheme, the court need not approve a scheme merely because ASIC has

given its certificate to the court. ASIC's Regulatory Guide 60 sets out the circumstances in which ASIC will give its certificate under Section 411(17).

D. Advantages and Disadvantages of Scheme versus Takeover

These are a number of reasons why a bidder may prefer to use a scheme.

First, there is the "all or nothing" outcome of a scheme. If the scheme is approved, the bidder gets one hundred percent of the target; if it is not, it does not acquire any shares. A bidder will often require one hundred percent for accounting and tax reasons and to avoid having future related party issues. One of the main issues for a bidder looking to acquire one hundred percent under a Chapter 6 takeover is that, while the bid will be subject to a ninety-percent minimum acceptance condition, hedge funds and index funds often won't accept while the bid remains conditional, so that bidders have to go unconditional in order to get to the ninety-percent compulsory acquisition threshold for a takeover. This is particularly an issue in leveraged bids, where the bidder's financiers also don't want to take that risk. The all-or-nothing outcome of a scheme overcomes this issue.

Second, there is the "lower" compulsory acquisition threshold for a scheme. The compulsory acquisition threshold for a scheme is a majority in number of those shareholders present and voting and seventy-five percent or more of the votes cast, compared to ninety percent of all shares for a takeover. It is not just the different percentages which are relevant—shares held by apathetic, deceased or missing shareholders do not count toward the ninety-percent threshold for a takeover and therefore make it harder to achieve, but the seventy-five-percent test for a scheme is only of those shares voted in person or by proxy.

Third, there is the relative certainty of timing. In a takeover, the bidder will almost invariably have to extend a number of times as part of the negotiation process with institutions to reach a successful outcome. In contrast, the timetable for a scheme is fixed by the orders made at the first court hearing. This greater certainty of timing can be particularly important to facilitate the bidder's financing of the bid.

Fourth, a scheme may allow for more flexible transaction structuring than a takeover bid under Chapter 6. For example, under a scheme certain target shareholders may retain their shares in the target, may receive a different form of consideration to other target shareholders, or may receive some benefit not being provided to other shareholders, provided those parties are placed in a separate class for the purposes of voting on the scheme.

However, a scheme can only be undertaken as an agreed deal. This may be acceptable if the bidder needs due diligence in any event, or if it believes that it will be necessary in any event to obtain a board recommendation to achieve control. Also, a bidder which proceeds by way of scheme can subsequently flip into a takeover bid if topped by a competing transaction.

IV. ASIC and the Takeovers Panel

A. Australian Securities and Investments Commission

ASIC has general supervision of all aspects of the Corporations Act, including takeovers. ASIC is active in enforcing its "truth in takeovers" policy, which requires that market participants (including bidders, major shareholders and targets) who make public statements of intention in relation to any aspect of a takeover bid (e.g., if a bidder makes a public statement that it does not intend to increase or extend its takeover bid) are required to act in accordance with those statements.

B. Takeovers Panel

The Takeovers Panel is a specialist tribunal for resolving takeover disputes, and was established under the Act and related legislation. The Panel has, subject to certain limited exceptions, exclusive jurisdiction to hear disputes in relation to takeovers during the bid period. The Act prohibits any person other than ASIC and certain government bodies from commencing court proceedings in relation to a takeover bid or proposed takeover bid before the end of the bid period. The Panel also has a broad non-exclusive jurisdiction in relation to control transactions and substantial acquisitions which do not involve a takeover or proposed takeover.

In exercising its powers, the Panel is required to have regard to the purposes of takeovers provisions set out in Section 602 of the Act. These are the so-called Eggleston principles, namely, that:

- the acquisition of control over shares in a listed company should take place in an efficient, competitive and informed market;
- target shareholders and directors know the identity of any person who proposes to acquire a substantial interest in the company, have a reasonable time to consider the proposal, and are given enough information to enable them to assess the merits of the proposal;
- as far as practicable, shareholders have a reasonable and equal opportunity to participate in any benefits accruing under the proposal (this is called the "equality of opportunity principle");
- an appropriate procedure is followed as a preliminary to compulsory acquisition under the Act.

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Public Tender Offers in China

By Jing Gang

I. Background

China's Rules on Merger & Acquisition of Listed Companies (the "Takeover Rules") were promulgated on 31 July 2006 and were amended on 27 August 2008, which clarified the various rules provided under different regulations relating to takeover activities to make the acquisition process more transparent and efficient. In addition, the Takeover Rules have imposed stringent information disclosure requirements on the transaction parties.

The Takeover Rules came after the so-called "Full Circulation Reform" in China (the "Reform"). It is well known that the Reform dramatically altered the basic shareholding structure of the companies listed in the People's Republic of China (PRC), as well as the market players. Before the far-reaching Reform which began in April of 2005, the nontradable shares that were held by state-owned companies amounted to up to seventy percent of the market. By offering liquidity back into the secondary market, the Reform has exerted substantial influence on the acquisition of listed companies. It not only has diversified the acquisition mechanisms, but has also increased the possibility of hostile and competitive acquisitions. In short, the Reform has invigorated M&A activities in China.

On 27 October 2005, the amended Securities Law was promulgated, enacting adjustments to the takeover scheme, under which investors may extend partial offers. As the Reform moved forward, the China Securities Regulatory Commission (CSRC) issued the Takeover Rules in coordination with the 2005 revisions to the Securities Law. The Takeover Rules unified, under a single piece of legislation, provisions that were previously spread out over numerous circulars and regulations.

II. Information Disclosure: An Early Warning System

Like many other countries, China has established an early warning system for M&A activities. The threshold percentage that triggers the early warning is five percent of the total outstanding shares of the target company. Whenever the percentage of equity held or controlled by an investor increases or falls by five percent, the investor will be obligated to make disclosure of additional information.

Moreover, the investor is also subject to a mandatory lock-up period during which the sale or purchase of shares of the target company is expressly prohibited. The lock-up period will be three days since the five-percent threshold is reached for the first time and will vary from three to five days subsequently, depending on the date of the announcement made by the investor. In the case of an open market purchase, the investor cannot proceed further when the shareholding reaches the appropriate warning limit unless relevant disclosure requirements are fulfilled.

Furthermore, the Takeover Rules have introduced a detailed disclosure system to regulate disclosures made by investors holding or controlling up to twenty percent of the total outstanding shares of the target company. Under this system, not only must more detailed information be provided by the investor, but verification by financial advisors and lawyers regarding the documents disclosed is also required. By now, the information disclosure system has become more comprehensive. In summary, the information to be disclosed corresponds to the shares held or controlled by the investor, and the closer the shareholding is to the thirty-percent threshold for control over the listed company, the more detailed the disclosure is required to be.

III. Public Tender Offer

A. Establishment of a Semi-Mandatory Tender-Offer Scheme

The Takeover Rules require a mandatory tender offer by the acquirer when the equity interest held by the acquirer exceeds thirty percent of the outstanding shares of the target company. The most significant amendment of the amended Securities Law and the Takeover Rules is the introduction of the "partial offer" approach.

In direct acquisitions, the acquirer may increase its shareholding through open market purchase, acquisition by private agreement or the extension of a self-initiated offer (with a minimum requirement of five percent of all the shares of the target company). However, when its shareholding percentage reaches the thirty-percent threshold, an acquirer can only get more shares through the extension of a general or partial tender offer unless a waiver from the CSRC is obtained. In indirect acquisitions, the mandatory general tender offer scheme shall strictly apply. In other words, when the acquirer indirectly controls more than thirty percent of the total outstanding shares of a listed company as a result of acquisition of the parent company, the acquirer is obligated to make an offer for all the remaining outstanding shares held by the other shareholders.

B. Acquisition Methods

1. Partial and General Tender Offers

Tender offers can also be divided into partial and general tender offers, based on the percentage of shares requested in the offer. Regardless of the type of tender offer, the offer must be extended to all the shareholders of the same class, and shares must be proportionally acquired from those shareholders.

2. Direct and Indirect Acquisition

Acquisition of a listed company can be direct or indirect, depending on whether or not the acquirer will directly hold the shares of the target company.

A direct acquisition can be further categorized as follows: an open market purchase; an acquisition by private agreement; a tender offer; and an acquisition by other means (such as inheritance or a transfer by court order). An acquirer may choose any of the foregoing methods to increase its shareholding, provided that it holds less than thirty percent of the shares. Neither open market purchase nor acquisition by private agreement (unless a waiver from the CSRC is obtained) can proceed when the thirty-percent threshold is reached. When the acquirer has already held or controlled at least thirty percent of the total outstanding shares of the target company and proposes to hold or control more, the only available option is to extend a tender offer.

3. Self-initiated and Compulsory Tender Offer

There are self-initiated tender offers and compulsory tender offers, and the latter will be triggered in the event that the acquirer, through indirect acquisition, indirectly controls more than thirty percent of the total outstanding shares of a listed company.

C. Specific Requirements

1. Equal Treatment

All of the conditions for takeover as specified in a tender offer must be equally applicable to all shareholders.

2. Offer Reporting and Approval Procedure

An acquirer should prepare an Offer Report, including information like price, terms and conditions of the offer and the offer period, and the like.

A financial advisor should be engaged to submit the Offer Report to the CSRC and disclose a summary of the Offer Report.

If there is an indication of no-objection from the CSRC after fifteen days after the submission of the required documents to the CSRC, the Offer Report, its financial advisor's opinions and its counsel's legal opinions are to be disclosed to the public.

3. Offering Price

The offering price for shares of the same class may not be lower than the highest price paid by the acquirer to purchase such shares during the previous six months.

If the offering price is lower than the average trading price for the past thirty days, a financial advisor should be engaged to analyze the reasonableness of the offering price and trading prices and activities during the previous six months.

4. Temporary Custody

Shareholders that agree to accept a tender offer are to engage a securities company to proceed with the related procedures for preliminary acceptance; the acquirer shall also engage a securities company to make an application to China Securities Depositary and Clearing Corporation Limited (SD&C) for temporary custody of the shares. Shares under temporary custody may not be transferred within the period of the tender offer. During the tender offer period, the acquirer must disclose the amount of shares being held on a daily basis.

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Takeover Law in India

By Abhijit Joshi

I. Introduction

Disclosure and mandatory bid obligations under Indian law for acquisitions and takeovers of listed Indian companies are governed by the Takeover Code, which prescribes certain thresholds or trigger points that give rise to these obligations, as applicable. The Takeover Code is under constant review by the Securities and Exchange Board of India (SEBI) and was last amended in April 2010.

The term "shares" is defined under the Takeover Code to mean equity shares having voting rights or any other security entitling a person to receive shares with voting rights but it does not include preference shares.

II. Disclosure Obligations

Any "acquirer" who acquires shares or voting rights that would entitle that acquirer, in each case, to more than five percent, ten percent, fourteen percent, fifty-four percent, or seventy-four percent of the shares or voting rights in a company is required to disclose the aggregate of his or her shareholding or voting rights in that company to such company and to each of the stock exchanges on which such company's shares are listed at every such stage, within two days after (1) the receipt of intimation of allotment of shares or (2) the acquisition of shares or voting rights, as the case may be. The company in turn is also required to disclose the same to the stock exchanges on which the company's shares are listed. For the purposes of the Takeover Code, an "acquirer" means a person who, directly or indirectly, acquires or agrees to acquire shares or voting rights in a company, or acquires or agrees to acquire control over a company, either alone or with any person acting in concert with that acquirer.

A person who holds more than fifteen percent of the shares or voting rights in any company is required to make an annual disclosure of his or her holdings to that company within twenty-one days after the fiscal year ending on 31 March, and the company in turn is required to disclose the same to each of the stock exchanges on which its shares are listed. Furthermore, any person holding more than fifteen percent but less than fifty-five percent, or more than fifty-five percent but less than seventy-five percent, of the shares or voting rights in any company is required to disclose to that company any purchase or sale of shares aggregating two percent of the share capital of that company, along with the aggregate shareholding after such acquisition or sale, and the company in turn is required to disclose the same to each of the stock exchanges on which its shares are listed. That person must disclose the same to each of the stock exchanges on which the shares of that company are listed within two days after (1) such person receives an indication of the allotment of shares or (2) the acquisition of shares or voting rights, as the case may be. Promoters or persons in control of a company are also required to make periodic disclosure of their holdings, or the voting rights held by them along with persons acting in concert with them, in the same manner as above, annually within twenty-one days after the end of each fiscal year, as well as from the record date for entitlement of dividends. A company is also required to disclose the holdings of its promoters or persons in control, as of 31 March of the respective year and on the record date fixed for the declaration of dividends, to each of the stock exchanges on which its equity shares are listed. In addition, promoters or persons forming part of the promoter group of a company are also required to disclose to such company the details of the shares of such company pledged by them within seven days after the creation or invocation of the pledge, as the case may be. The company is, in turn, required to disclose the information to the stock exchanges within seven days after receipt of such information, if during any quarter ending in March, June, September, or December of any year (1) the aggregate number of pledged shares taken together with the shares already pledged during that quarter exceeds twenty-five thousand, or (2) the aggregate total pledged shares taken together with the shares already pledged during that quarter exceeds one percent of the total shareholding or voting rights of such company, whichever is lower.

III. Mandatory Bid Obligations

An acquirer who, together with persons acting in concert with that acquirer, acquires or agrees to acquire shares or voting rights that, taken together with existing equity shares or voting rights, if any, held by it or by persons acting in concert with it, would entitle the acquirer or persons acting in concert with the acquirer to exercise fifteen percent or more of the voting rights in the company would be required to make a public announcement offering to acquire a further minimum of twenty percent of the shares of the company at a price not lower than the price determined in accordance with the Takeover Code. Such offer has to be made to all public shareholders of a company within four working days of entering into an agreement for the acquisition of, or the decision to acquire, shares or voting rights exceeding fifteen percent or more of the voting rights in a company. On the date on which the public announcement is published, a copy of such announcement is required to be delivered to the SEBI, the company, and the stock exchanges on which the company's equity shares are listed. For these purposes, a "public shareholding" is

defined as a shareholding held by persons other than the promoters.

An acquirer who, together with persons acting in concert with that acquirer, has acquired at least fifteen percent but less than fifty-five percent of the shares or voting rights in the shares of a company cannot acquire additional shares or voting rights that would entitle that acquirer to exercise more than five percent of the voting rights (with post-acquisition shareholding or voting rights not exceeding fifty-five percent) in any fiscal year ending on 31 March, unless that acquirer makes a public announcement offering to acquire a further minimum of twenty percent of the shares of the company at a price not lower than the price determined in accordance with the Takeover Code.

An acquirer who, together with any persons acting in concert with that acquirer, holds more than fifty-five percent but less than seventy-five percent of the shares or voting rights in a company (or less than ninety percent of the shares or voting rights, if the company concerned obtained the initial listing of its shares by making an offer of at least ten percent of the issue size to the public pursuant to Rule 19(2)(b) of the Securities Contracts (Regulation) Rules, 1957 (SCRR)) cannot acquire additional shares by himself or herself, or with or through persons acting in concert with that acquirer, that would entitle that acquirer to voting rights (or to exercise voting rights), unless that acquirer makes a public announcement offering to acquire a further minimum of twenty percent of the shares of the company at a price not lower than the price determined in accordance with the Takeover Code.

However, such an acquirer may, together with persons acting in concert with that acquirer, acquire additional shares or voting rights that would entitle that acquirer to exercise up to five percent of the voting rights in a company, without making a public announcement as aforesaid, if (1) the acquisition is made through open-market purchase in normal segment on the stock exchange (i.e., the segment in which secondary stock market transactions occur) but not through a bulk or block deal, negotiated deal, or preferential allotment, or the increase in the shareholding or voting rights of that acquirer is pursuant to a buyback of shares by a company; and (2) the post-acquisition shareholding of that acquirer, together with persons acting in concert with that acquirer, will not increase beyond seventy-five percent.

If an acquirer (together with persons acting in concert with that acquirer) holding at least fifty-five percent but less than seventy-five percent of the shares or voting rights in a company (or less than ninety percent of the shares or voting rights, if the company concerned obtained initial listing of its shares by making an offer of at least ten percent of the issue size to the public pursuant to Rule 19(2)(b) of the SCRR) intends to consolidate its holdings while ensuring that the public shareholding in the target company does not fall below the minimum level permitted by the listing agreement with the stock exchanges, that acquirer may do so only through an open offer under the Takeover Code. Such open offer would be required to be made for the lesser of (1) twenty percent of the voting capital of the company, or (2) such other lesser percentage of the voting capital of the company as would, assuming full subscription to the open offer, enable that acquirer (together with persons acting in concert with that acquirer) to increase the holding to the maximum level possible, i.e., up to the delisting threshold (seventy-five percent or ninety percent, as the case may be).

The mandatory public offer requirements prescribed by the Takeover Code have also been made applicable to acquisitions of global depository receipts in cases in which the holders of such global depository receipts become entitled to exercise voting rights in any manner on the underlying shares.

In addition, regardless of whether there has been any acquisition of shares or voting rights in a company, an acquirer cannot directly or indirectly acquire control over a company (e.g., by way of acquiring the right to appoint a majority of the directors or to control the management or the policy decisions of the company), unless such acquirer makes a public announcement offering to acquire a minimum of twenty percent of the shares of the company. In addition, the Takeover Code introduces the "chain principle," by which the acquisition of a holding company will obligate the acquirer to make a public offer to the shareholders of each of its subsidiary companies which are listed. However, the public announcement requirement will not apply to any change in control that takes place pursuant to a special resolution passed by the shareholders in a general meeting where voting by way of a postal ballot is also provided to shareholders.

The Takeover Code sets out the contents of the required public announcements, as well as the minimum offer price. The minimum offer price depends on whether the shares of the company are "frequently" or "infrequently" traded (as defined in the Takeover Code). In the case of shares which are frequently traded, the minimum offer price shall be the highest of the following:

1) the negotiated price under the agreement for the acquisition of shares or voting rights in the company;

2) the highest price paid by the acquirer or persons acting in concert with the acquirer for any acquisitions, including through an allotment in a public, preferential, or rights issue, during the twenty-six-week period prior to the date of the public announcement; and

3) the higher of (a) the average of the weekly high and low of the closing prices of the shares of the company as quoted on the stock exchange if the shares of the company were most frequently traded during the twenty-six-week period prior to the date of the public announcement or (b) the average of the daily high and low of the prices of the shares as quoted on the stock exchange if the shares of the company were most frequently traded during the two-week period prior to the date of the public announcement.

The open offer for the acquisition of a further minimum of twenty percent of the shares of a company has to be made by way of a public announcement, which is to be made (1) within four working days after entering into an agreement for the acquisition or the decision to acquire shares or voting rights exceeding the relevant percentages or (2) within four working days after the decision to make any such change(s) that would result in acquisition of control is made.

The Takeover Code provides that an acquirer who seeks to acquire any shares or voting rights that would result in the reduction of the public shareholding in the target company to a level below the limit specified in the listing agreement with the stock exchange for the purpose of listing on a continuous basis shall take the necessary steps to facilitate the compliance by the company with the relevant provisions of such listing agreement within the time period mentioned therein. Furthermore, the Takeover Code contains penalties for the violation of any provisions.

The Takeover Code permits conditional offers and provides specific guidelines for the gradual acquisition of shares or voting rights. Specific obligations of the acquirer and the board of directors of the target company in the offer process have also been set out.

Acquirers making a public offer are also required to deposit a percentage of the total consideration for such offer in an escrow account. This amount will be forfeited in the event that the acquirer does not fulfill his or her obligations. The public offer provisions of the Takeover Code do not apply (subject to certain specified conditions), inter alia, to certain specified acquisitions, including the acquisition of shares (1) by allotment in a public and rights issue subject to the fulfillment of certain conditions; (2) pursuant to an underwriting agreement; (3) by registered stockbrokers in the ordinary course of business on behalf of clients; (4) in unlisted companies (unless such acquisition results in an indirect acquisition of shares in excess of fifteen percent in a listed company); (5) pursuant to a scheme of arrangement or reconstruction, including an amalgamation or demerger, under any law or regulation of India or any other country; (6) pursuant to a scheme under Section 18 of the Sick Industrial Companies (Special Provisions) Act, 1985 (SICA); (7) resulting from transfers between companies belonging to a group of companies or between promoters of a publicly listed company and their relatives, provided the relevant conditions are complied with; (8) through inheritance on succession; (9) resulting from transfers by Indian venture capital funds or foreign venture capital investors registered with the SEBI to their respective promoters or to other venture capital undertakings; (10) by companies controlled by the Indian Government, unless such acquisition is made pursuant to a disinvestment process undertaken by the Indian Government or a State Government; (11) pursuant to a change in control by the takeover or restoration of the management of a borrower company by a secured creditor under the terms of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002; (12) by acquisition of shares by a person in exchange for equity shares received under a public offer made under the Takeover Code; and (13) in terms of guidelines and regulations relating to delisting of securities as specified by the SEBI. The Takeover Code does not apply to acquisitions in the ordinary course of business by public financial institutions, either on their own account or as pledgees. An application may also be filed with the SEBI seeking exemption from the requirements of the Takeover Code.

SEBI had set up a Takeover Regulations Advisory Committee to consider whether changes should be made to the present Takeover Code. By its report dated 19 July 2010, the Takeover Regulations Advisory Committee proposed certain amendments to the Takeover Code. Some of the key recommendations include (1) increasing the acquisition threshold for triggering open offer requirements from fifteen percent to twenty-five percent; (2) providing that the takeover offer must be for acquiring one hundred percent of the share capital of the company; (3) mandating clarity on indirect acquisition of shares and control; and (4) amending the method of computation of the offer price. However, to date these remain only recommendations and are not yet in force.

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