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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 CD 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 the Editor-in-Chief (amber.wessels-yen@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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Transcript: Doing the Deal—The View From Here and There

[Editor's Note: This is an edited transcript of the Continuing Legal Education Program held during the Annual Meeting of the International Section of the New York State Bar Association on 29 January 2014 at the New York Hilton in New York City.]

I. Introduction

GLENN FOX: Good morning, everyone. My name is Glenn Fox. I am the Chair of the International Section. I would like to welcome everyone here today for our Annual Meeting. I also want to give a special thank you to Judge Ramos and Judge Marrero for joining us this morning on our first panel. I will let Neil Quartaro speak about the panels themselves and I want to thank Neil for everything he has done to get this meeting shaped up. I think you're in for a real treat today. So without any further ado, I would like to introduce our Executive Vice-Chair, Neil Quartaro, and he will give you the agenda for the day.

NEIL QUARTARO: Good morning, everyone.

Thanks, Glenn, for that kind introduction and thank you everybody for joining us at our Annual Meeting this year. First, just to introduce myself, I am First Vice-Chair of the International Section and I am the Program Chair for today's session, so to the extent credit is due, I suppose I receive it: to the extent reprobation is due, I suppose I receive that as well.

I would just like to very briefly outline what our program is for today. First, we're very fortunate to be joined by two very experienced judges on our first panel, which is focused on dispute resolution clauses, and I will be speaking on that panel as well. Our second panel discusses opinion practice in international transactions. Now, I am usually on the litigation side of the fence, so it's not an area in which I do a lot of practice, but we have been very, very fortunate in the speakers that have agreed to come and attend this panel, including Ettore Santucci, who is chairing the panel and is the reporter for the forthcoming ABA report on opinion practice.

We are also joined by a notable practitioner from Costa Rica, Eduardo Calderone, and by Simon Chester, who is joining us from Canada and who is well versed in transactional opinion practice. It should be a very interesting panel. Our final panel, which happens to offer ethics credits for those of you who are eagerly seeking them, is focused on the non-ownership of law firms. The panel is chaired by our very own Ken Standard, and he's joined by Jonathan Armstrong, our Co-Chair on the Opinion Committee. I would also add we are very fortunate to be joined on that panel by William Hubbard, who is the president of the American Bar Association: for those of you who have been following the issue of and discussion about non-lawyer ownership of law firms, you will be aware that the ABA has some thoughts on that. We are also fortunate to be joined by Nicolas Fluck, the President of the Law Society of the U.K., and of course they have somewhat different rules with respect to non-lawyer ownership there. He can give us very interesting insights on what's going on in this area on the other side of the pond.

II. Dispute Resolution Clause in International Transactions: The Devil You Thought You Knew

MR. QUARTARO: So with that I would like to commence our first program, the Dispute Resolution Clause Program. It's my pleasure to introduce Jay Safer of Locke Lord, which has offices downtown here in New York as well as in a number of other jurisdictions.

I have known Jay for some time and I had the privilege of being on a number of panels with him. Jay handles complex litigation and arbitration both in the United States and around the world. So he has come to grips with many dispute-resolution and foreign-resolution choice-of-law-clause issues and actually has a couple of recent cases he has been involved in. Consequently, he can really give us a report from the front on some of these issues.

We are also very lucky that Jay agreed to chair the panel, since he was successfully able to recruit our two wonderful speakers from the bench, who will help to give us a view from both state and federal levels on some of the developments that are going on in this area, which you know is an area that we may not always think of as one that offers a lot of developments in the law.

So without any delay I turn it over to our Program Chair, Jay Safer.

JAY SAFER: First, let me say that I also want to welcome you to the program. I am the one who feels very lucky to have not only Glenn as our Chair but to have Neil as Co-Chair of this first program with me. We've done a lot of programs together and I will tell you about Neil, if you don't know about him, that he graduated with an undergraduate degree in Canada and he received his law degree from Fordham Law School, so he is very appropriate to be a future Chair of the International Section.

He practices with the international litigation group of Watson, Farley and Williams. He is a lecturer at Columbia University. He represents clients in a wide range of mat-

ters, but he focuses particularly on those matters involving international or maritime issues, international contract disputes, and creditor rights. If you ever need a lawyer in maritime area, I would say Neil would be a great lawyer.

But I am also fortunate to have two of our finest judges in New York City. One is a federal judge who was kind enough to join us and who has served on other panels before. Judge Victor Marrero was appointed by President Clinton in 1999. Judge Marrero went to NYU and he received his law degree from Yale. He was a Fulbright Scholar but he wasn't throughout his career only a judge. He had a quite distinguished public service career, serving in city administrations in New York City; he was in private practice; he was involved in a number of civic organizations; and he also taught at a law school. So we are very fortunate to have Judge Marrero.

Our other distinguished judge is also a judge with whom I have participated on a lot of panels. Judge Charles Ramos is the Senior Judge at the New York State Supreme Court for the Commercial Division. He also graduated from Fordham Law School. Not only was he in private practice, but he also served on a number of Bar Association committees. He was a founding member of the Association of Judges of Hispanic Heritage. He was a chair of the Judicial Section of the State Bar, and he also serves as a member of the Board of Directors of Judges and Lawyers Breast Cancer Alert.

And finally—I do this as a special treat for me—I have been lucky enough to have been asked to do a class at Fordham Law School one morning a week on Management of U.S. Litigation for International Lawyers, and my class was invited to join us today. They are here and, if they wouldn't mind, I would ask them to stand so the rest of the audience can see who you are.

MR. QUARTARO: And so Jay can take attendance.

MR. SAFER: I want to thank my class for coming. They are lawyers from countries around the world. They are in the LLM Program and so it's a special treat for me that they have joined us. I now would like to turn the program initially over to Neil and then we will hear from Judge Marrero and Judge Ramos. Then I will speak to you again.

MR. QUARTARO: Well, thanks, Jay, and I certainly join in that special welcome to our friends from Fordham. Being a Fordham alumnus myself, it's always great to see some fellow Fordhamites around.

So first, before we start launching into a little bit more of this substantive program, I want to identify a common running theme here. Obviously all panels that we are putting on today touch on matters of international law. What's interesting about all three panels is that at some level all three of the panels that we are putting on today focus on New York's role in international law and that's part of the reason why we have this sort of title, "The Devil That You Thought You Knew."

The reason for that is I think we can all agree that the legal professional is facing certain challenges. In addition to the globalization of many practice areas, we have an increasingly connected world and dominant legal systems (of which there are probably two primary ones) that are facing increasing competition—actually, fairly high levels of competition one might even say.

Consider, for example, the increased roles that are being played by Hong Kong and Singapore. My own law firm, as an example, has a Singapore office and until fairly recently we did not feel it was necessary to have a Singapore legal practice. We had a number of solicitors that had a U.K. law practice in Singapore, but over the last few years there has been such a significant growth in transactions and disputes based on Singapore law that as a firm we found it necessary to add that capability of advising on Singapore law. Same thing in Hong Kong. As Jay mentioned, I do a fair amount of maritime work and a lot of that is arbitration. Some of the standard foreign contracts that we commonly use in maritime matters—particularly for buying, selling and fixing ships—now may have, rather than New York law and New York arbitration, English law and English arbitration, or Singapore law and Singapore arbitration law. This is a fairly new development, and in the world of shipping, with the increased focus on Asia, it's a choice that many parties are making. And I can speak a little bit from personal experience—having done an arbitration in Singapore and having been joined by several of the people in this room at Maxwell Chambers (an arbitration venue in Singapore sort of designed to help promote Singapore as a venue for international arbitration). So what we are trying to do is place these panels in the context of this sort of global competition for choice of law and for venues and places where disputes may be heard. Of course a lot of that then links back to the transactional practice. What is the choice of law? What is the dispute resolution clause that winds up in a particular document? And I would say that we have an interest in making sure that, where we can, New York is the primary choice of law and venue. So I think we are all sort of interested in helping New York maintain its primacy.

So with respect to contract disputes, which in my world, the starting point of course is going to be the underlying transaction. Probably many of us here have seen various iterations of dispute resolution clauses and we probably feel fairly comfortable with them. Right? We have been down this road a few times, you have seen a New York choice of law or forum selection clause or something like that. A lot of times you may not give a whole lot of thought to it. But there have been some changes and there have been some changes both on the litigation and the transactional side you may want to

be aware of. In particular, Judge Ramos is going to talk about some of those developments at the state court level.

I will start by discussing some recent case developments that I think you might all want to be aware of. I will just identify the basic categories of clauses that are being discussed today. Of course, we have governing law clauses, forum selection clauses, submission to jurisdiction clauses and then arbitration clauses. Typically these actually are lumped all into one. So when we use the general term "dispute resolution clauses," we are really trying to include a subset of clauses, one or more of which may be present in particular transactions.

So it won't come as news to anybody in the room that governing law clauses and forum selection clauses have long held prima facie power. Forum selection clauses have enjoyed this deference since 1972. That is, through the *Zapata* case. That's an important commercial great maritime case. By the way, as you look at the development in this dispute resolution area, a lot of the case law is maritime in nature—for the simple reason that you've got assets moving around the world, with the result that you have multi-jurisdictional problems that can arise, and actually do arise, fairly often. Now, the big point I would really make on *Zapata*—which is hardly a new case—is that it adds certainty when parties to a contract put in a forum selection clause. You know, the contract parties can say to each other, "Look, we know this is enforceable; you are not going to be able to sue me in Texas if the forum selection clause calls for somewhere else—even if it's outside the United States." So it adds a level of certainty to that transaction, and that's certainly something that we really want to try to achieve.

And I would direct your attention to the *Final Report of the Task Force on the New York Law in International Matters*. It's a very, very interesting report. It's been added to by other bodies—in particular the Commercial Division Advisory Council looking at some of the discovery recommendations that are in that report. But the *Report* does have a handy list of some of the clauses, common clauses, that one might use. One of the issues that I am running into frequently (and other people in my office are also running into this frequently) is language about the extent to which e-discovery must be included in a dispute resolution clause. So you can imagine that in negotiations, where company A is going to be buying a product from company B and they get down to the dispute resolution clause, company A's lawyer may say, "Hey, you know, I don't really want U.S. law; I've heard about punitive damages and I don't want to go to a jury trial in the Bronx." Or they have some sort of other objection.

Well, some of those are pretty easy to resolve, right? We all know we can put into a dispute resolution clause that there will be no jury trial. We can lay venue in a place that you know that won't be scary, like the Southern District of New York. We can also cut out certain discovery pieces now—and one of the big ones that I am hearing a lot with transactions that originate overseas is e-discovery. The objection may very well be, "Well, look, there is going to be a lot of e-mails going back and forth, and if we get into litigation in the United States and something happens, the first thing I've got to do is spend, you know, $30,000 freezing my server or mirroring it, making sure that there is no chance that later on as the case progresses I can be accused of spoilation of evidence or something along those lines."

The United States, at least in my experience, seems to be way ahead of any other jurisdiction with respect to e-discovery, such as the concept of freezing one's e-mail server so that everything related to a particular dispute is available for production and discovery, is quite foreign to my colleagues outside the United States. But, nevertheless, and without trying to turn this into an e-discovery panel, the failure to do that properly can have huge consequences right up to issue preclusion or even adverse inferences.

We had a recent case out of the Southern District finding that the fact that they weren't properly preserved was one of gross negligence by counsel. I mean, imagine that: that terrifies counsel who are outside the United States. And I can tell you it doesn't help me sleep at night here. So you know, as these sort of discussions are happening, one of the things that you might want to keep in mind is that you can carve this stuff out. You can do things like limit the discovery of e-mail. You can limit certain other discovery devices, both at the state and federal level—and in many jurisdiction clauses you may not be sure which of those two places you are going to go if you wind up in a lawsuit.

So, I think it be would fair to say that some of these issues—some of these perceived shortcomings or areas in which other bodies of law may appear more attractive at the drafting stage—can be avoided by contract clauses. So I'd just like to finish by mentioning a couple of interesting cases that we've had arise over the last year or so and that really relate to what we are talking about. The first one is a New York Court of Appeals case, *IRB-Brazil Resseguros SA v. Inepar Investments*. What is important about this case is that one of the parties to it challenged an express choice of law clause in the contract and the underlying issue was, "Do we then have to go through a complex conflicts of law analysis, which we all know is going to be fairly expensive to brief?" By way of background, I want to identify that where we find the statutory basis for the enforcement of this kind of selection is in the New York General Obligations Law Section 5-1401. The reason 5-401 was passed by the legislature was "to encourage the parties of significant financial mercantile contracts to choose New York law by eliminating uncertainty as to whether their choice of law would be respected by a New York court." For those of you who aren't familiar with

that section of the GOL, it says is that you can have New York law and you can have a case in New York as long as you are over a certain monetary threshold (which is $250,000)—whether or not there is a reasonable relationship to the state. So you don't need a contract where one party is in New York, or it was performed in New York. So again international transactions got the legislature saying, "Gee, we really want to protect the role of New York law here. How do we do that and give certainty to New York law principles?" Nevertheless litigators tend to be clever and of course some clever litigator thought that, in addition to the language of 5-1401, maybe we should have a conflicts-of-law analysis.

The upshot was that the Court of Appeals concluded that there really is no need for that type of analysis—and that should be good news for all of us who practice internationally, because such an analysis would be a barrier to bringing a case in New York or at least to having a fairly prompt resolution. The Court of Appeals said New York substantive law has to be applied. They even went a little bit further and said that 5-1401 mandates that New York substantive laws must be applied when the parties agree to a New York choice of law provision in the contract.

So that's really a good solid reinforcement of a doctrine that we are pretty familiar with and it probably cuts out a fair amount of what I would call—with all due respect to those who make the argument—an almost pointless exercise that achieves only delay in the ultimate resolution of a case. And of course that is one of the big complaints that we also get with international transactions: "Gee, I don't want to wind up in a U.S. litigation, it's going to be years." It's that type of motion practice that helps to extend the life of a case and does not typically lead to a speedy resolution. So that's, I think, a sterling development in favor of the application or the inclusion of New York law in contracts: it gives that solidity. There is also a Second Circuit case, and it's really in the forum selection clause area. There is really some helpful language in that case if anybody wanted to duke it out over a forum selection clause case. The basic facts were that the Vatican had a master license agreement, and basically the Second Circuit states, "We are going to give substantial deference to forum selection clauses." But what's really interesting about the case is that it's the Vatican that attempts to enforce the clause against the sublicensee, so they are not actually in direct privity with the entity that they are attempting to enforce the forum selection clause against. And after noting that the court was going to give substantial deference to the forums selected by the parties, the court went on to say—and I think this is important because it's sort of a dividing line between what might be enforcement and what might not— basically, "Look, this contract was made in an arm's length negotiation by experienced and sophisticated businessmen." The court was giving a sort of expert effect. And I think that is also very helpful for those of us who are either negotiating commercial agreements or wind up litigating something that has come out of a commercial agreement. We've always got sort of a line now: you are backed up by the Second Circuit saying, "Look, this is an experienced, savvy, sophisticated group, they know exactly what they are getting into, we need to enforce the forum selection clause." The ultimate holding is pretty interesting. What it says is that a non-signatory to a contract containing a forum selection clause can enforce that forum selection clause against the signatory when the non-signatory—and this is really the touchstone of the case—is closely related to another signatory.

So that is kind of an amazing holding. It almost says, "Gee, if you've got a parent's subsidiary and a third party, the parent can enforce the subsidiary's forum selection clause." That is an expansion of how far the courts are ready to go in order to enforce a forum selection clause.

The last case that I would like to draw your attention to is another great maritime case, *Atlantic Marine Construction*. This one went up to the Supreme Court, so many of you may be familiar with it. Just to give the fast highlight on it, basically the Fifth Circuit refused to enforce the forum selection clause, and you can imagine the surprise of counsel that were litigating this. It was really quite a clear forum selection clause. Basically we had a contract between a firm in Virginia and one in Texas, with work to be performed in Texas. The contract had a forum selection clause selecting Virginia as the appropriate forum, but the Texas firm filed suit in Texas anyway and the Fifth Circuit concluded that the convenience of the parties justified keeping them in Texas. Expanding that to international practice, that is pretty far from ideal, right? Because that starts to undermine the certainty that we really, really want to see. Justice Alito really took the lead on the decision, and for those of you who are familiar with Justice Alito's decisions, it was typical.

It dealt with, among other things, one of the arguments that was raised: "Well, geez, how is Virginia going to be able to apply the law of Texas with this forum selection clause; they will never be able to do it?" And in one of the spiffier quotes from the decision, Justice Alito actually really ridiculed this sort of public interest argument (I agree with him), saying that federal judges routinely apply the law of states other than the state in which they sit. Thus he was not aware of any exceptionally arcane features of Texas contract law that are likely to defy understanding by a federal judge sitting in Virginia. I think that's accurate and correct. I also would say that's pretty much the same case for most bodies of forum law.

Generally speaking, if you need to get expert testimony on the relevant law, you will get it. But I certainly think federal and state judges are up to the challenge. So again, we've got a solid reinforcement of forum selection up to the Supreme Court level. I guess it is scary that at some level we've got the Fifth Circuit saying, "Geez, we

are not going to support this; we are not going to enforce a forum selection clause." Fortunately it got turned around by the Supreme Court. So with that case update and ending with a federal case, it is only appropriate that I introduce our next speaker, Judge Marrero, and with that I would like to turn the podium or microphone over to him.

JUDGE VICTOR MARRERO: Thank you and welcome. I am going to use the prerogative of the bench to slightly deviate from the program. Rather than addressing the specific cases and tales of dispute resolution and forum selection clauses as the previous speaker happily did, I am going to address the subject at a higher level of generality and concentrate on some overarching issues.

As a backdrop for "The Devil You Thought You Knew in Dispute Resolution and International Transactions," I am going to touch on themes that have bedeviled the legal system for many decades: the increase in complexity of litigation, its rising costs and the growing concern within the legal community about the spread of abusive practices associated with litigation. There is a vital link between these issues. And like most things, resolution of international disputes is sensitive to complexity and the cost of the process. In drafting a dispute resolution or forum selection clause, if you have a choice of where and how to pursue resolving a legal conflict, a major consideration in the calculus is likely to be what way and where it is easier and speedier to attain a resolution.

In May of 2010 the United States Judicial Conference Advisory Committee on Civil Rules sponsored a conference at the Duke University Law School to review rising concerns about the increase and complexity and higher cost of litigation in federal courts as well as the perceived spread of abusive practices in federal court proceedings. At the Duke Conference participants—which included practitioners, judges and legal scholars—heard charges alleging that, in the words of one critic, "the pretrial discovery process is broadly viewed as dysfunctional" with litigants utilizing discovery "excessively and abusively," and plaintiff's attorneys "routinely burdening Defendants with costly discovery requests and engaged in open-ended fishing expeditions in the hopes of coercing a quick settlement." In return, some plaintiff's attorneys countered that what the lawyers advocating for less pretrial discovery would bring about would be "concealment of the truth." Participants discussed reform ideas ranging from modest tinkering with the federal rules to a radical revamping of federal practice through tighter restrictions on discovery, shifting of attorneys' fees to the losing party and imposing severe sanctions to deter violations of the federal rules. Adopting largely the recommendations of the Duke Conference, the Federal District Court in the Southern District of New York put into operation in November of 2011 a pilot program recommended by a task force of leading practitioners and judges for the purpose of studying the problems creating by skyrocketing litigation costs and the delays as experienced in complex cases. The program seeks to streamline conflict litigation in federal courts—especially in the Southern District of New York—essentially by promoting earlier and more efficient case management on the part of judges and parties, by encouraging greater cooperation among counsel, by minimizing disputes that require court intervention or formal rulings on motions, and by reducing paperwork in other ways.

The pilot program, which was issued as a standing order by the court in October 2011, adopted procedures applicable to complex cases filed in the Southern District of New York after November 1, 2011. The order defines complex cases by major category, specifically including actions relating to securities, antitrust, patent and trademark, labor relations standards, product liability and constitutional issues as well as all class actions and multidistrict litigation.

During the first two years of the program approximately 2,440 actions were designated as kinds of actions under the program. In terms of procedural details, the program adopted revisions in four areas: first, initial pretrial case management; second, discovery; third, motions and motion practice; and, finally, pretrial conferences. Because of time constraints, I will mention just a few of the highlights from each of these topics.

Regarding initial pretrial conference, the pilot program requires that the parties file an initial report not later than seven days before the initial conference. The report includes three types of information schedules.

One: initial disclosures pursuant to Rule 26A1 and whether a particular discovery document should be produced immediately in lieu of initial discovery.

Two: A schedule for fact and expert discovery, including recommendations for limiting document depositions and applying and obtaining discovery.

And third: Settlement discussions or remediation.

Regarding discovery, the most significant procedure provided for is a stay of discovery, which permits only documents and electronically stored information, and which goes into effect upon the filing of any motion to dismiss. Second, a presumptive limit providing for fifty requests for admissions of not more than 125 words each. And third, preparation of a joint electronic-discovery submission identifying issues to be addressed by the parties in a Rule 26 conference.

As to motion practice, the procedures call for an exchange of correspondence among the parties, discussing the basis for the motion followed by a pre-motion conferences as to most types of motion—except a motion to dismiss under Rule 12B. For Rule 12B motions, the court may require the parties to correspond and allow the plaintiff to

amend the complaint to cure any deficiencies that may be the subject of a motion. If the plaintiffs decline to amend, they could not subsequently make another request to do so. Perhaps the most significant part in connection with motions is that relating to the summary judgment. The procedure allows the parties by agreement and court approval to dispense with local Rule 56.1 statements of undisputed facts—a major problem in many motions for summary judgment in federal court.

Finally, concerning the final pretrial conference, the pilot program provides for the parties to submit within fourteen days after the completion of fact discovery a joint preliminary trial report describing the claims and defenses and legal issues remaining open for trial. The court is then urged to meet with the parties to review the issues raised by the preliminary court. Roughly four weeks before trial the parties must file a joint trial report detailing remaining issues, lists of trial exhibits, motions and limiting proposed jury selection, questions and instructions and other trial materials that will govern the proceedings.

Reflecting the continuation of concern over rising litigation cost and abuses, the issue has once more reached the highest levels of the federal court system. Last year the Judicial Conferences Standing Committee on the Federal Rules of Practice and Procedures approved and released for public comment yet another round of amendments to the federal rules that is further designed to streamline discovery, reduce the abusive practices, and lessen litigation cost.

As proposed, the new rules would lower the presumptive limit of depositions from ten to five, the number of interrogatories from twenty-five to fifteen and the duration of the depositions roughly from seven hours a day to six hours a day. Potentially the most significant part is a modification of the Rule 26 proportionality principle that would permit tighter regulation of the collection of relevant evidence by limiting the scope of discovery and requiring discovery to be related to the parties' claims and defenses and to be proportional to the amounts stated in the case and the importance of issues in dispute.

Another proposed amendment would be one to Rule 37E that would limit discovery sanctions only in cases where the party willfully engaged in some form of conduct or did so in bad faith and caused substantial prejudice. Now, whether or not these experiments that I have talked about produce improvements on the underlying problems of costs of litigation and complexity remains to be seen. The Southern District Pilot Program includes an evaluation of the effectiveness of these amendments that is to take place after about three years of the program, and that review should commence this year.

My personal view is that it is unlikely that the pilot program, even combined with the most recent amendments of federal rules, will make more than nominal differences in these problems. In fact, the underlying issues regarding litigation costs, complexity and abusive practices existed and have plagued the federal court system since before the adoption of the Federal Rules in 1938 and have continued to this day, as evidenced by the repeated attempts to address essentially the same issues through substantial amendments of the Federal Rules adopted by Congress in 1970, 1980, 1983, 1993, 2000, 2006 and now with the recent proposed amendments.

The persistence of the problems and their intractability and resistance to change suggest two possibilities: first, that there are much more fundamental causing agents at work generating problems, affecting litigation costs and abusive practices; and, second, that all previous reform efforts have either failed to recognize or have not detected the real issues, but rather chosen to sidestep them because of the great difficulties and predictably strong reaction from the bar that any real forthright effort to grapple with the problems are likely to engender. I will describe but one illustration that I believe represents but the tip of the iceberg about "the devil you thought you knew."

I refer to arbitration proceedings involving conflict disputes, many of which nowadays involve international transactions. Concern over the rising complexity, delays and cost of court proceedings brought Congress to enact the Federal Arbitration Act in 1925. The FAA, as it is known, was designed to foster arbitration as a substitute for litigation in federal courts. As intended by Congress, arbitration was to serve as a means—stripped of the strict rules and complicated procedures that govern lawsuits—by which individuals and especially businesses could resolve disputes more simply, expeditiously and economically. Since then, arbitration has gained widespread acceptance and proved its efficiency virtues and financial value in some types of the more common routine disputes—such as consumer transactions, individuals' securities purchases, and standard employment contracts. In the more complicated cases, however, reality has dimmed Congress's vision. It is now common wisdom among many lawyers, judges and commentators that the beneficial aims for which arbitration received the congressional stamp have not come to pass as broadly as the lawmakers contemplated when they passed the FAA. Rather than arbitration keeping some burdensome litigation out of the courts, in practice the reverse has transpired, creating the worst of both worlds. More and more, litigation and the courts have been injected into arbitration. And more often than not this practice turns out to be far worse than necessary. For many, it proves financially disastrous. For judges, it burdens the dockets with some of the case law burden that Congress sought to spare the courts.

Though in theory, it seemed to be a more economical and efficient means to resolve private disputes, in prac-

tice arbitration and complex disputes have developed, as some critics might portray it, into a mutant form of conflict resolution over the years. It has evolved, growing tissues and organs and shapes that now feature virtually all of the procedural appendages that characterize conflicts in court. In sum, arbitration has morphed into a freakish hybrid that's deformed by the worst traits of both forms: in essence, a recapitulation litigation. But the distortion of the design and the intent of the arbitration proceeding is not the most troublesome departure from Congress's initial conception. Many arbitration actions now routinely entail not only private adjudications before the arbitrators but essentially a public reenactment of the entire conflict of a court and, worse yet, repeat performances that seldom succeed.

Typically, unless curbed by specific agreements among the parties—and generally few are ready to exercise any form of self-restraint—much of the prevailing arbitration practice includes the same long means of discovery that define litigations: exchange of documents; depositions; interrogatories and admissions; affidavits and declarations. These proceedings mass evidentiary records, tome for tome, as voluminous and as costly, and as either excessive or unnecessary, as any produced for trial and court.

As in litigation, the arbitrators' consideration of the merits of the disputes is frequently receded by prehearing motions and briefings and followed by formal hearings that are no less complex and lengthy than trials—and that are conducted before arbitrators who often are former judges or experts.

Indeed a dispute resolution at a trial that could be completed in several court days could take arbitration several weeks. Also mimicking court practices are the post-hearing briefs in which the arbitrators submit the post-hearing findings of fact and conclusions of law, and frequently the arbitrators' decisions are as detailed and thoroughly analyzed as judicial opinions—only to be challenged in court later as unlawful, unauthorized and even corrupted. As I stated earlier, this review of arbitration is one example of the larger question that encompasses every stage of court proceedings. For New York and federal courts to be the venue and the center for international dispute resolution that you wish to achieve, you will need to address these threshold issues. Thank you.

JUDGE CHARLES E. RAMOS: Good morning, everyone.

I think I can sum up what Judge Marrero has said and what the other speakers have said by stating that you and I have a bad reputation. You've had conversations with attorneys overseas and the last thing they want to do is bring their clients to America to litigate. It's our fault: it's the way we litigate here. The New York courts have just recently acknowledged that there is a world outside the State of New York, and because of that, I have been appointed to oversee international arbitration responsibilities within the Commercial Division.

I don't want to go into any detail in terms of the international arbitration rules that I drafted. But I will refer you to them and also to the addendum to the preliminary conference order. It's my effort to try to streamline the process—not only of litigation but also of arbitration. It's an acknowledgment that the Commercial Division (and I am also a member of the Advisory Council of Jonathan Lippman's Advisory Council in the Commercial Division) realizes that this is a real problem and that we cannot attract international dispute resolution here unless we change our culture. We're very flexible in the Commercial Division. We are now in the process of communicating recommendations to the Administrative Board within the unified court system to adopt new rules that we hope will speed up not only litigation but ultimately, as far as I am concerned, international arbitration as well.

We listen to the practicing bar and that's something I want to do today. I've just begun. I have been on the bench for several years, but I've just begun handling the international arbitration cases. It's a new area for us. It's exciting. It's far more complicated than domestic arbitration, and it's developing a new body of law or will be developing a new body of law here in New York. We have concurrent jurisdiction with the federal courts, under the FAA that Judge Marrero has mentioned. Default jurisdiction is within the federal district courts, but the parties may—and here we get to the devil you thought you knew—agree otherwise. They may opt, for example, for commercial litigation. Many contracts that are being executed now provide for exclusive jurisdiction in the Commercial Division of New York County.

Transactional attorneys realize that they can come to the Commercial Division. They get one out of eight or nine judges that they know fairly well and they understand we are dedicated to moving our cases very, very quickly. We pride ourselves on that. Unlike Judge Marrero, I don't have a criminal docket that takes precedece. You are my clients. You are the ones I want to please, and if your clients are happy with what happens in terms of expedition and predictability, we are all happy. We are really making an effort to change the culture in New York County, and I think it's working. Perhaps it's working too well; we are overwhelmed with cases now. We started off with three commercial judges in the State of New York; we are now about thirty. Not too long ago the judges in the Southern District invited us to lunch. They could do that because they actually have a dining room; we don't.

They're lovely people—they really are—but the meeting deteriorated into a complaint session, because they

said we are taking all the good cases from them—and it's true. We're becoming the venue of choice because we specialize, so we do have that advantage. We are trying to do the same thing with arbitration and international disputes. Jay Safer and I have been kicking around this idea of international arbitration coming to New York as a favorite venue for a few years. Judith Kaye has now established the New York International Arbitration Center on 42nd Street, not too far from the UN. We are all making a push, but we need to know what it is that you know. What would make New York an acceptable venue?

We are working on delay in the Commercial Division. I think we are doing a good job in New York State. We do have a predictable body of law. It may not be what your clients want, but it is predictable. What I am trying to do in my international arbitration rules is to remind the transactional attorneys through you—because you are the litigators, I imagine—that you can agree to limit discovery. If you can agree to go to arbitration, you can agree to almost anything. If you can limit discovery you can have time limitations. I am also on the Task Force that is working on e-discovery. We have a monster that is continuing to grow as technology improves and changes.

The cost of litigation has gotten so high. In one of my cases the cost of the discovery had passed the four million dollar mark and the plaintiff came to me one day—it was a case involving a hotel chain, an international hotel chain—and she said she was going to have to discontinue the action. I said, "You mean you settled?" She said, "No, we are discontinuing. We cannot afford to litigate."

I had one case where twenty-five million documents were examined by the attorneys for the company that had already settled but now was a witness for the accounting firm that had the documents and then the attorneys handling the litigation itself. One hundred million dollars was expended in that discovery, was all paid for by director's insurance. But how many clients can afford to litigate that way? All right, the prosecuting attorney happened to be the Attorney General of the State of New York. But this kind of experience gets spoken of in Europe or in Southeast Asia and your clients—or the people you hope would be your clients—want to avoid New York at all costs.

That's why my focus has been drafting an agreement that provides for restrictions on discovery. In my addendum to the preliminary conference order it's scaled based upon how much is actually in controversy. An enormous amount of discovery may be warranted in a case worth hundreds of millions of dollars, but it's not worth it in a case worth half a million dollars.

We all in the Commercial Division informally try to be flexible, try to be reasonable, in the way we handle discovery. But we thought it would be a good idea to put it on paper, so you can take it to your clients and you can take it to your transactional attorneys and say, "Look, the courts of New York are willing to work with you." But we need to know—and this is why I am not going to continue speaking—we need to know, we need feedback from you, about what is it that stops people from coming to New York to litigate and what do we have to do as a court system that really is dedicated to making New York a favored venue. How do we make it more attractive? We know we have good restaurants, we know the shopping is terrific. New York is the most exciting city in the world. There are a number of reasons why the attorneys would want to come here rather than go to Paris again or London again. But we scare them away with this reputation we have. We need feedback. This is all new to me. In private practice I never handled an international arbitration. But I know it's very important to you and I know, given the global economy, that it's an increasingly important section of your practice that has to grow and should grow. New York is a great place with an exceedingly good system, state and federal. We have a good reputation that way, but it's ruined because we have enjoyed ourselves too much.

When I started practicing law, we used carbon paper and the newest piece of technology in the office was a Xerox machine that was the size of a refrigerator. We didn't have smart phones. We didn't own anything that was smarter then we were. I still don't, and that's because I am still living in the past. We want you to succeed. We want this practice to grow. Of all of the sections in the State Bar Association, the International Law Section is the one that is going to grow and it should be growing. That's what Judith Kaye has dedicated herself to on the New York Center of International Arbitration. That's what I have dedicated myself to by volunteering for the international arbitration cases. Jay said I shouldn't say this, but it's true: a lot of the judges in the Commercial Division did not want to handle the international arbitration cases. They considered them to be too boring. They are not. The fact is, it is an exciting area. There are wonderful cases.

New York has always been willing to take on these cases. The General Obligations Law had a section added back in the 1960s that essentially said that, if any two litigants anywhere in the world had a dispute that involved more than a million dollars they can pick New York as their venue. That has been on the books for forty or fifty years; we are more than welcome to have cases. The Ukraine is now in the news every day because of what is going on in Kiev. I had a case involving two Russian oligarchs who were fighting over a Ukrainian television station. They were brilliant. These fellas were just a delight. But they came to New York because they needed a fair place to litigate this thing, and they couldn't litigate in Moscow. One of them in particular couldn't litigate in Moscow. These fellas were very, very clever. He had some problems with Mr. Putin, as many of the oligarchs do. So

when he was on the witness stand, the adversary attorney asked him, "Well, you have some problems returning to Russia?" and his answer was, "No, I don't have any problems returning to Russia; I have problems leaving Russia!" People like that are a delight. The case was just wonderful. They were marvelous. They were inventing capitalism and making a lot of mistakes along the way, but those cases belong here. We have the experience. We have judges like Judge Marrero, who has a wealth of experience in private practice and in business and on the bench.

This is where the cases should be. So what we need is some feedback, whether it's today or tomorrow, or whether it's right now, or when I'm back in my chambers. We need you. We are passionate that this is what we want. We are being flexible and we are trying to listen. So I'm going to end my remarks now. If anybody has any questions I will be more than happy to either answer your questions or make up an answer if I don't have one.

There were a few things that I do want to mention. Oh, just on e-discovery: the technology is getting ahead of even the experts. We've come up with procedures and strategies on the Task Force involving e-discovery, and we are finding out now that some of our reforms are already outdated. Again, that's one of the principal things I would focus in on if we are going to be drafting or have a role in drafting contracts: consider the fact that cost can be reduced.

Thank you so much. Thanks for inviting me.

MR. QUARTARO: Just very, very briefly before Jay goes on, I would like to identify that some of these materials in our handouts, commencing on page 23 and in particular the addendum to the third preliminary conference order, are really worth scanning, because they give you an idea of the large number of discovery issues that can be excised in the context of draft agreement and the way this can be set up as a pretrial order. In the event that you're in a negotiation and the other side says, "Gee, how do I know this stuff is enforceable?," you can offer them the draft preliminary order and say, "Well, you know, it's a form order from the Commercial Division." I would encourage people who do have thoughts or questions or contributions that they want to make to this process—beyond whatever happens during our question period—to e-mail me or Jay Safer or the Section. We're happy to pass those comments on. You know, I can't resist the plug for the International Section. What other section gives its members and participants an opportunity to help shape judicial policy, right? That is probably unique to us. And I would specifically thank Judge Ramos for his efforts to streamline this process on a state level, because that is for the benefit of all of us here.

So with that comment I will turn it back to Jay.

JUDGE RAMOS: Just before Jay starts. just for transparency and for full disclosure, I plagiarized my addendum from the International Institute for Conflict Prevention and Resolution—so you will know it's a good document.

MR. SAFER: Thank you. I am going to limit my remarks because I wouldn't want you not to have time to ask questions. What I would like to do is give an overview of some of what we heard. Many of you are not from the United States and New York, and when I've sat down and talked to you, I've learned the different ways that litigators have to litigate in their respective countries. One of the most fascinating things to me was the time I sat down with a lawyer from Germany and I asked him about e-discovery and he said, "What's that?" I hope that what I tell you about our federal and state courts will give you a picture of what's really happening here. There really are changes that will benefit hopefully not only litigants from outside the United States—so that they will find the United States a good place to litigate—but also for the litigants within the country.

Judge Marrero mentioned in his remarks on the federal courts the pilot program. When you compare the pilot program to what the state courts are doing, what the federal pilot program is really trying to do is address issues like "How do you streamline the litigation to make it easier for the litigants and the judge to come to a decision?" "How do you limit costs?" No longer do you have this notion in federal and state court that you must have an entire discovery process, allowing you to discover almost anything. Remember that the whole point of discovery initially was, "Let's have a level playing field in the United States; let's have both sides know what both sides are going to do at trial." And the best way to do that is to have an open discovery process, whether it be documents and interrogatories and, of course, depositions. But then the litigants, particularly one side or another, started taking advantage of that. So the federal pilot program is set forth in the Standing Order of the Southern District of New York. If you go to the Southern District website that Judge Marrero mentioned to you, the type of cases that are included are shown. As you will see, it's based on the civil filing form. If you want to look at the form, just go to the Southern District website and Litigant Standing Orders; click "forms" and you can actually see that there is a wide range of cases. The other thing I will briefly comment on. before I get to the state courts, is that the federal courts have been evolving in two other ways.

First of all, there are proposed changes, big changes, in the Federal Rules of Civil Procedure. We don't have time for me to go through all those changes or have Judge Marrero explain them to you, but I tell you this because, if they are enacted, you are going to see major changes in the Federal Rules, and you should be aware of that. That is particularly so if you represent clients and you are from outside the United States.

So I think it's pretty important that you be aware that the Federal Rules are going to change. You should be aware that the Southern District has the pilot program if you are in the Southern District. The second thing—and it is in the state courts too—is that e-discovery in the United States is a big deal. You can imagine that, with thousands of documents and the complex cases, the costs can be enormous. So what both state and federal courts have tried to do is to require the litigants to meet and confer at the beginning of the case. There's an organization in the United States called the SADONA: they have their own web site and they have wonderful suggestions on how to deal with discovery. But my point is that e-discovery—in terms of controlling costs, in terms of figuring out when you have to preserve testimony and documents in litigation—is a big deal. I want you to be aware of that. The courts are trying to get a grip on this to make it easier for the litigants.

Now, one interesting case, if I may, in terms of clauses is a case where Judge Marrero had two different documents. There was a subscription agreement and there was a partnership agreement, and they had contrary arbitration clauses.

The case is *Papuzzo v. Global Vest Management Company*. It's at 263 F2d 714, and it's a learner—on the FAA and on the New York Convention—and why and how you deal with conflicting clauses. I once had a case like that, where I had two documents, one was to be arbitrated in New York and one was to be arbitrated in London, and it got to the arbitrator in New York first and, maybe not surprisingly, the New York arbitrator said, "My ruling is we are going to do it in New York."

Now, on the state level I will be very quick. First of all, Judge Ramos engaged in a little bit of understatement. There was an Administrative Order that came out and I will just read you the first sentence of the Administrative Order, which says: "…all international arbitration matters filed with the court shall be assigned to Commercial Division Part 53, the Honorable Charles E. Ramos." Then it goes through all the areas of arbitration that Judge Ramos will deal with. I can send you this order or Neil can if you e-mail me, if you go to the site for the New York courts, NewYorkcourts.gov, you go to Judge Ramos and you look at his individual practices. There's a copy of that plus individual rules that I want you to be aware of. Now, particularly the New York state courts are changing. The state courts created this Task Force, then they created a Commercial Division Advisory Council—which Judge Ramos and I are both on—to advise the chief judge of how to change New York Commercial Division litigation.

And, boy, are we trying to do that—and we are doing that.

There are four specific rules that have already been cited by the Office of Court Administration to send out for comment. Once that period is over, then they will decide. Just to give you again an overview, one of them is a device where, if you are creating a contract, and you and the other side focus on dispute resolution as much as you should because you want to get the deal done, this allows the parties to say, "We're going to have exclusive jurisdiction in the State Court of New York, the Commercial Division, and we're going to apply Rule 9 of the Commercial Division."

I wish I had time to really discuss it with you. If you go and look at the proposal, what you will see is an enormous giving up of the things most litigators outside the U.S. don't like anyway. But lots of things are being given up: jury trials are being given up; appeals and interrogatories (which you have in the state courts but not the federal courts) are being given up, so many things are being given up. And you have a nine-month window in theory in which that case will be litigated. That's pretty inviting. So that's one thing they are trying to do. The next thing is, they are proposing to limit interrogatories to twenty-five, although parties can bring some contingent interrogatories at the end.

They are also dealing with electronic discovery. They are dealing with the preliminary conference forum. When you start a case, you go to court and you meet with the judge and law clerk and you plan your case. One of the most interesting areas is there's a proposal to have mandatory mediation which, unless the parties agree not to have it, is within a quick time period. Once it gets to the judge, in the beginning of the case you will have to mediate—and, again, all of this is designed to facilitate and resolve cases. So I think you can see in both the state and federal courts the kind of things that are happening. The final thing I will tell is that I had a case involving an arbitration clause and the clause basically said, if we can't agree, we want to have three accountants named as arbitrators and determine damages, determine what the parties' rights are. It was the *Evergreen Greenstar* case. They brought a civil action to try to have the judge rule on the issue of whether it met the standards of arbitration. It was before the Commercial Division, Judge Branstein, and she ruled in our favor and said that this was an arbitration clause. It was appealed and was affirmed by the Appellate Division.

The other side tried to argue that the clause meant it was not an exclusive arbitration contract; the court didn't buy it. So with all that, you can really see we are changing and it's a good thing. We are trying to make New York courts a better place for the clients and for the litigants. Now, because of time I am going to quickly move to questions that you have for any people on the panel.

AUDIENCE MEMBER: If you are trying to sell New York, how do you explain the rule that he who goes first

goes last, with an odd number of pleas and motions. That's very peculiar worldwide. So I file a motion for whatever, the other party responds to my motion—and I get to respond to their response—but they don't get to respond to my response. There is an odd number of pleadings in the cycle under the New York State court system, which I think most international litigants will find to be a very peculiar form worldwide. Shall we say unlevel playing field?

JUDGE RAMOS: I'm trying to suggest that you craft how you want to litigate, and if you want to incorporate, for example, the rules of a foreign jurisdiction, do so. I've applied the law of foreign nations as well as other states. That's something we do regularly. So that's not a problem so long as the parties will agree to it. You as practicing attorneys in New York understand what the New York rule is: if you find that something is not going to work the way you want it to in your particular situation, just provide for it; we will enforce it.

AUDIENCE MEMBER: You are going to incorporate this procedure as well?

JUDGE RAMOS: So long as we are not talking about something that violates public policy.

AUDIENCE MEMBER: It's their public policy so I will—

JUDGE RAMOS: It's true you can run into problems. There are some nations that have some very strange rules.

MR. SAFER: Let me say one thing. If I understood your question, I thought you were also suggesting, when you said that in the U.S. the first goes last, that the filing party gets to have the last word with the judge.

AUDIENCE MEMBER: Yes.

MR. SAFER: I think that historically it used to be that in the federal courts the reply brief was optional. But think about it: In all the courts the idea simply is that a person brings the motion, and a person responds to the motion. If the responding party raises something new, the person who brought the initial motion wouldn't have had an opportunity to respond to it. So while the reply brief can be used in theory to circumvent the whole process, it really does allow the initial moving party to have a fair opportunity to respond.

Judges know what litigants do. I don't know whether the judges want to say anything about that. Judge Marrero or Judge Ramos, how would you reply to these matters?

JUDGE RAMOS: At least under the New York Division, for example, there is no right to reply if you move to order to show cause, because in the order to show cause there is a supporting affidavit and the opposition, that's it. On the other hand, we try to be flexible on normal motions. If someone does raise a new issue and it really does seem to be dispositive, we give the other side an opportunity. So there is no point in going to motion practice and not coming up with the right result.

That's the reason why we're there in the Commercial Division. We want to be practical. But, really, with regard to this seminar the message that I think I want to send is, "Draft the contract to provide for the remedy that you want."

AUDIENCE MEMBER: I want to just focus on something that Judge Ramos said. I want just to press a little further. Are you saying that the parties could agree to apply the procedural rules of jurisdiction? So for example, if the parties say, "We want to be in New York, but we want to apply English rules regarding depositions," which, of course, are much more restrictive.

JUDGE RAMOS: We take choice of law on a regular basis. There is no reason yet that I know of why we can't adopt procedural rules as well. That is what we are really inviting in terms of limiting discovery. We are modifying the CPLR—not the substantive law but the procedural law. There was one point I didn't make and I should—because it's really important. The District Court and the Commercial Division are the two venues where you are going to end up with international arbitration.

One of the international arbitration cases that didn't come before me was where somebody was trying to do something very wrong. They were in the District Court, and they didn't like the ruling they got in the District Court. They came to me while the district proceeding was still going on for a judicial remedy. I sent them back with a judicial spanking, and I tried to make the point as strongly as I could: you don't do that. We're not the alternative to the District Court; that's disrespectful for both courts. If you are in the District Court, stay there and litigate. If the District Judge says, "This does not meet federal jurisdictional requirements and you are out." Fine, you are more than welcome then to come to the Commercial Division, but don't try to play one against the other.

MR. SAFER: Because we are over time I am going to have to ask your indulgence and we are going to conclude the program, but I would like to thank the panel, and thank you for your interest.

MR. QUARTARO: I would like to get Panel 2 under way. At our seasonal meeting two years ago in Lisbon we had an opinion practice panel that was very well received, and for those of you who were present at that panel, this is sort a continuation of that, with its focus on international transactions and opinion practice in the role of international transactions.

I mentioned earlier the composition of our panel, and again we're very lucky to be joined by such a high level

of practitioners who are really at the front end of some of the issues that are arising within international opinion practice. The chair of our program is Ettore Santucci, who is a partner at Goodwin Procter and who helped assemble this great roster of speakers. I would like to thank him specifically for making the trip down from Boston. I'd like also to recognize Simon for coming from Toronto and Eduardo for joining us all the way from Costa Rica.

So without further ado, we will commence Panel 2 and I will turn it over to Ettore.

MR. ETTORE SANTUCCI: Thank you, Neil. So it's great to look out on a full room—at least until we realize that you know more about this stuff than we do. And at that point I will call for reinforcements. Actually, I am going to call for them right now. If you know more than we do, please raise your hand and interrupt us and set us straight. That's the purpose of these panels, not to hear ourselves talk.

I am a capital markets lawyer. I do practice cross-border. The weird accent comes from where I went to school, in Italy. I have an Italian law degree and a U.S. law degree, but I am a U.S. lawyer. Very brief introductions; we agreed to speed introductions. I will start with Sylvia Chin. She is with White and Case, specializing in structured finance and she co-chairs with me the subcommittee of the ABA Legal Opinions Committee. We have been working for what seems at times like a lifetime on the report which will happen in a few minutes.

To her left is Greg Chase, a senior associate of Reed Smith. He works in shipping, specializing in transactions and particularly with banks financing shipping. To my right is Eduardo Calderone, who is a partner at BLP in Costa Rica. His practice is a general commercial practice and M&A practice. And congratulations, Eduardo, because you just became the president of the Costa Rican Bar. So you have highest title of everyone on the panel.

To my left is Simon Chester, who is a partner at Heenan Blaikie with nine offices in Canada and an office in Paris. Simon is a Canadian lawyer as well as an English solicitor and is based in Toronto. It's the opinions group which has provided great guidance in literature over the years. We have tried to condense about six hours worth of material into sixty minutes of presentations and then leave time for Q and A.

We are perfectly happy to get off our order of discussion if you start asking questions and the discussion goes into two different directions. Otherwise we will stay on to our script. The order is going to be myself briefly; Sylvia will talk about some New York practice points on inbound opinions and cross-border transactions; then Greg will cover some interesting topics on shipping and some interesting inbound and outbound issues; next Eduardo will cover his perspective, as a Costa Rican lawyer, of non-U.S. lawyers being asked to deliver opinions U.S. style, such as closing opinions in transactions that highly involve English or U.S. financial institutions for the most part; and finally Simon will bring you to a roaring end by talking about Canada and reinforcing all the right things that we do in the U.S., which Canada probably started first. But in any event, it's a good way to round off the discussion.

I am going to try to spend no more than five minutes setting the stage a little bit. I think we are talking about why it matters a great deal that we will focus on cross-border opinions as their own topic—and not just a sort of footnote or an appendix to U.S. closing opinion practice.

The reality is that many of us giving opinions in cross-border transactions as often as we do in domestic transactions find that things are harder in cross-border transactions, because, if the recipient is a non-U.S. party and their counsel is a non-U.S. lawyer, things get a little tricky. And if we're giving an opinion on an agreement that is covered by non-case law, that gets trickier yet. At the end of the day though, we still have a U.S. law degree, we practice U.S., law and we represent U.S. clients—so that fortunately brings it back to that territory that is more familiar.

There's a pretty massive amount of guidance from the State Bar Association, the ABA, etc., on what opinions should or shouldn't do, and so it's become easier to give opinions and receive opinions in U.S. practice. The problem is that not much of that guidance focuses on cross-border opinions, and even less of it focuses on what we refer to as "outbound," meaning U.S. lawyers giving U.S. law opinions to non-U.S. commercial parties in transactions where sometimes the center of gravity of the transaction is outside the U.S. There is an IBA report that the late Michael Gruson started back in 1985 that went through maybe five editions on specifically cross-border opinion practices. But back then it was very much the norm for cross-border transactions to have their center of gravity firmly planted in Manhattan.

It was almost unheard of for agreements to be governed by the law of any place other than New York. So it was really a question of non-U.S. lawyers giving opinions, and Eduardo will talk to us about the aspect of non-U.S. lawyers giving opinions to U.S. financial institutions.

The realization that there have been shifts in the center of gravity of cross-border practice induced a bunch of us five or so years ago to begin work on the ABA's cross-border report, which focuses really on the flip side. I am the reporter, and Sylvia is on the group. The report now stands at seventy pages and three- hundred-something footnotes. My hair was actually jet black when I started, and we are hoping to release it by the end of this year in close to final form. So why does it matter so much that we focus on outbound versus inbound? It matters because

there's a lot more liability in outbound cross-border opinion practice and there are many more opportunities for counsel for the opinion-giver and counsel for the recipient to get into friction or unpleasant negotiations about opinions. We are trying essentially to limit that as successfully as we have in domestic practice. It is not perfect but better than it used to be.

So there is less guidance, there is more confusion. In England they have come up with a name, "Across the Table Opinions," for third-party closing opinions. But those things are really creations of U.S. practice, even though they have been adopted by many institutions that are in business worldwide. But they are still a U.S. animal, and when we start doing it across borders, the opportunities to misunderstand each other are pretty significant. We are trying to address that. Also it's no longer just London lawyers and Toronto lawyers and Costa Rican lawyers now, it's lawyers from many, many countries. The recipients are not just European banks or U.S. banks. We have operating companies in anywhere from Pakistan to China, and many different types of transactions. So the issues have gotten more complex.

Here's a couple of key principles. Then I will be quiet.

Principle number one. Despite all these differences, we are doing the same thing we do every day in domestic U.S. practice. We are giving legal opinions—not insurance policies. We're writing legal opinions on matters of U.S. law dealing with U.S. clients. That is not different. It's the same practice that governs my Massachusetts law opinions to Sylvia in New York. It governs my Massachusetts or New York law opinions to Germans. It cannot be anything other than that. If I had to change my opinion under New York law depending on whether I give it to a German bank or a Chinese telecommunications company, I wouldn't know what to do. First of all, I don't know how to write German opinions. I don't know how to say the same things two different ways. Also, chances are that I am not going to say it in any way that's intelligible for either the Chinese recipient or the German recipient. So I will do what I know how to do: I will write a U.S. opinion. By the way, I think the Toronto opinion group has agreed with that approach for a long time. And a couple of years ago the city of London Law Society writing on English opinions also agreed with that principle, basically, "My law, my practice."

Principle number two—and then I will turn it over, and Sylvia will get into it a little bit more. One thing that outbound cross-border opinions by definition do not contain is what we have come to see as the centerpiece of a closing opinion in U.S. practice; namely, an enforceability opinion, a remedies opinion, that an agreement is enforceable. I can't give that opinion if the agreement is governed by German law, so as a matter of fact I have to assume that a contract governed by German law is valid, enforceable, and binding, and that each and every provision in it, including the choice of German law, is in fact effective. We have come up with a name of it for that in the ABA report: it's the "Omnibus Cross-Border Assumption." I am sure lots of people are familiar with that name. It's different, and frankly it applies whether we say it or not, but we recommend that you actually do say it. So very quickly, if you don't have a remedies opinion, why are we bothering with opinions in the first place?

Well, what matters more to a German bank that got sent to you with an agreement governed by German law and forum selection in Frankfurt, is that the bank, as recipient of the opinion, knows that a New York court will honor that choice of law and that forum Selection—meaning it will get out of the way and send people to Frankfurt and that, after the Frankfurt court renders a judgment and the judgment comes to New York to be executed because the assets of the defendant are in New York, the New York court will take the case back and enforce that judgment without going back to the decision on the merits so our decision is recognized on the merits. That is, the New York court gives the bank the power of New York State to execute that judgment. So Sylvia will get into choice of law and forum selection, and then maybe we will get into a little bit of recognition of judgments. There are also a host of opinions that are in traditional U.S. opinions that matter a great deal: corporate power; existence; authority; corporate action; no default; no violation of law. Those are opinions to give every day to each other in domestic U.S. practice and they are as important to a non-U.S. commercial party entering transactions with a U.S. party.

So I have gone over my five minutes. I am sorry, Sylvia. Why don't you get into the choice of law and forum aspects, please?

MS. SYLVIA CHIN: Thank you, Ettore.

Just to let you know, we are working constantly on the cross-border opinion report.

Call Ettore a saint. We are now on draft 134. We're hoping that we don't ever get to draft 200, but Ettore has been an absolute saint in being the reporter on this report. So Ettore has set the scenario of what we are dealing with in the report in terms of what we would call "outbound opinions."

I want to touch briefly on typical inbound opinions: In the cross-border context we are very frequently asked to give an enforceability opinion. A typical example of that is you have a U.S. or New York party who has executed or is going to execute a guarantee governed by New York law, and in that context very frequently I am asked for an opinion. I am asked to give an opinion—in addition to typical enforceability opinion—that the guarantee is binding and enforceable. The opinion recipient will look at it and say, "Okay, well, tell me that the choice of law, the choice of New York law, is effective." And I

may say, "I don't need to do that if I say that the document, the guarantee, is valid, binding and enforceable according to New York customary opinion practice, as stated by Tribar; it means that each and every provision in that agreement is enforceable."

Now, this is not necessarily the case in other states. So we are not even talking about foreign jurisdictions. For instance, California, specifically, is different. We have been lucky in New York, because we have two statutes that deal with choice of law and forum selection. I am going to just briefly touch on this, because there were two recent cases that dealt with those statutes. The first case is *IRB-Brasil*, where the Court of Appeals essentially said that we don't do any conflict of law analysis once the New York governing law has been chosen in the agreement. So you don't have to say in your agreement that the agreement is governed by New York law without taking into effect the conflict of law principles or that the agreement is governed by the internal law of the State of New York. When a party chooses New York law, they mean the internal law of the State of New York; they don't mean to do any kind of conflict of law analysis. You do, of course, have to comply with the statute and there is a minimum requirement in the statute of $250,000, with exceptions that it shouldn't be dealing with labor, personal, family, or household matters, and they do respect the limitations that are in the Uniform Commercial Code Section 1-105.

Now, tied to the choice of law statute is also a choice of forum statute, 5-1402. And 5-1402 also had a recent case. One we should be careful with 5-1402, because that statute actually has different limitations and the jurisdictional amount for that statute is one million dollars—as opposed to $250,000. You have to have chosen New York law before 5-1402 is applicable, but in addition it's something that I think sometimes younger folks overlook. You must make sure that the foreign party actually agrees in the document to submit to the jurisdiction of New York jurisdiction for 5-1402 to apply.

And the recent case that talked about that statute was the *Credit Suisse* case, where this was not, you know, New York Credit Suisse or whatever. This turned out to be what was, I believe, a subsidiary that had not filed for authority to do business in the State of New York, and the Supreme Court New York County basically said, "Yes, 5-1402 is applicable." They could bring an action and they had satisfied all of the other criteria in the statute. But the issues of jurisdiction and forum selection are different than the issue of whether that foreign party had authority.

And under the New York Business Corporation Law Section 1312 they did not have the authority because they hadn't qualified to do business in New York State, even though they had been doing business. So that also has affected our opinion practice to a little bit. You have to be careful when you are being asked to give opinions on whether a lender has to do anything else, such as, for instance, enforcing the document in the State of New York.

So how does this affect outbound opinions—the type of opinions that Ettore has mentioned that our ABA cross-border opinion report is dealing with? The short answer is that these two statutes have nothing at all to do with outbound opinions. They only deal with inbound opinions, that is, opinions that deal with agreements that choose the law of the State of New York, while the opinion that we have here and the agreements that we're being asked to opine upon are governed by the law of some other jurisdiction, some non-U.S. jurisdiction.

So how do we give opinions in this context when we are asked, then, to say that the choice of law is effective? Well, we have to do what attorneys in other states that do not have statutes on choice of law and choice of forum do—which essentially is to look at the Restatement Second of Conflicts of Law and basically to make a determination that the chosen law has a relationship to the parties and that essentially it's fair and reasonable, and would not be contrary to a fundamental policy of the state to have that law govern in the absence of that choice of law provision. I am not going to get into the exceptions. That would take up the next hour and I was told that after us the ABA President-Elect is going to speak, so I definitely do not want to go into his time. But as Ettore mentioned, one of the issues that we face in the report was, how do we deal with a non-U.S. law document?

Let's take an example of a document governed by German law. I don't know how many of you have seen any German laws (I see some heads nodding there), but I first looked at a German document and said, "Well, this is very interesting, where are the remedies?" I was told you don't have to put any of them in; it's all governed by statutes and the civil code. I was like, "Well, that's great. So how am I supposed to know what's in the civil code? I don't read German; I am not a German lawyer." So that was why we came up with what we call the Omnibus Assumption. But even with the Omnibus Assumption, the problem is that we are being asked, for example, to opine that our client, the U.S. party, the New York party, has the authority to enter into this transaction. Does the client have the authority to undertake each and every one of the obligations in this document governed by German law, where each and every one of those obligations is not even stated in the contract? Because we're very spoiled, we believe, "Okay, just put it in the contract; if it's in the contract, then I can read it and I know what it is and that's it." And also at times there are some exceptions. But most of the time you can waive anything, so long as you waive it in the contract.

So the question was, "How do we go about analyzing whether our client has the authority to enter into this

transaction and German-law document?" So, Ettore, what did we decide to do?

MR. SANTUCCI: There are three possibilities. And like anything else in a committee of ten people, with three possibilities there are about 732 variations. On the one end, we throw up hands and say, "It's a German contract, German code. I don't speak German. Just forget it. I am just not going to look at it at all. I can't give you an opinion." Well, fine, but if the closing doesn't happen, that is not very good. At the opposite end is, "Well, it's a contract. You New York lawyers look at California contracts all the time. So get a translation, look at the German contract, you know, assume that enough is in the contract to do what you need to do, and just get to it." Problem again is that, even if you assume that the translation is accurate, can you really assume that the contract is complete when it doesn't have a remedies section because it's such and such of the code? Not really. Then what do you do? Do you say, "Well, it's the four corners of the contract plus section such and such of the code." That gets out of control pretty quickly, so each and every provision doesn't work.

And then in the middle is the position that we all felt comfortable with. It is very scientific. It is very, very scientific: you do just enough—and how much is enough I have no idea. You look at the contract, you look at the situation, and you look at the opinion you are giving. You know, if you want to be simpleminded, all you need to know to give a power opinion is that it's not insurance, it's not taking a deposit, it's a couple more things in the general business corporation law that you can't do but you know, it's not each and every. It's a few things. Then you get to nobody should default.

So my client has a couple of indentures. He is entering into a financing agreement in Germany and I have to give an opinion that entering into that contract doesn't violate, you know, seven or eight covenants in the U.S. indenture. I have to understand things like, is there a lien? What's the repayment? What's the maturity? But I know what those questions are, because I know how to read a U.S. indenture. So I know I have to conclude that they are not granting liens. I have to conclude that no restricted payments are involved in performing the German contract. So I know what questions to ask. I may have to ask them of a German lawyer who actually practices German finance and can read that contract. But I know what questions to ask. So I don't have to throw up my hands. I can come with a page of questions. I can get a thought or two from a German lawyer working for my client—not the German lawyer working for the bank. I can ask him or her, "Please explain these things to me." Others doubt it, but I personally think that I can come up with enough of an understanding of the German loan agreement to give a conflict opinion with a U.S. indenture.

Now, if it's a London indenture (I don't even know if they call them indentures), I am not even sure I can really ask the right questions. Then I am trying to interpret an English law document so that I can ask questions to a German lawyer to determine whether I as a New York lawyer can opine. My head starts spinning, I get whiplash, and I pass out.

And then to close it out, there are two questions. How do I know that they are not violating law if the remedy for default on a loan agreement is to pick up my child and put it through the wood chipper? Well, that's probably not so good under New York law, but chances are that is not the case—but I have to find out. Second, which laws in the U.S. are to be covered by the no-violation-of-law opinions? Such opinions in the U.S. cover securities law, antitrust laws, this, that and the other thing, such as the tax laws. We sort of know the answer to that. But there are other laws our opinions won't cover. So where we come out is I don't want to cover it and, therefore, I will state in my opinion I am not covering it. If this recipient wants me to cover them, we will discuss it and come up with a rational solution. I am going to pause for one second if you people have questions.

AUDIENCE MEMBER: I have a question. How do you ever come to the position to render an opinion on German law?

MR. SANTUCCI: We don't.

AUDIENCE MEMBER: You just said you ask a German lawyer. I am from a small company in Europe. They ask me for an opinion. They just say, "Capacity opinion and force opinion." Et cetera. But they don't ask me questions. In my opinion another opinion beyond this will be also a liability issue for you and also for me.

MR. SANTUCCI: I think I may have not—

AUDIENCE MEMBER: Maybe I misunderstood you.

MR. SANTUCCI: I probably didn't explain myself correctly.

So the question really is, what work do I do to give my opinion? It's my opinion on U.S. law. It's my liability, period, in the end. That's the case, whether it's a domestic opinion or a cross-border opinion. The question is what work do I need to do to get to the point where I can sign my firm's name to that opinion without putting all of us in jeopardy. In the U.S. I need to do a bunch of things. But if I am giving an opinion that my U.S. client entering into a loan agreement in Germany does not violate the U.S. loan agreement that exists (that my client is already a party to), it's a U.S. opinion. But I need to know enough about the German contract to do that analysis. Just like I need to know enough about a California loan agreement to do that analysis. It's a little easier, you think, for a New York lawyer to deal with a California loan agreement. Therefore I need to have a little more help to understand

a German loan agreement than I need to understand a California loan agreement. So I need to ask questions of a German lawyer—not because I want him or her to share liability with me, not because I want an opinion on which I can rely. That gets very confusing. It's because I need his or her help for me to do my job and sign my opinion for which I am solely liable. Is that clearer?

MS. CHIN: You know, the advantage with documents governed by U.S. law is that we basically believe we just stick everything into the contract, so you just need to read the contract. We don't have a system like that under a lot of civil law countries, where most of the obligations are stated in the law as opposed to being stated in the words of the contract. Is that helpful?

AUDIENCE MEMBER: I would like to go back to a point you made about German contracts, which I think is probably general to most civil law contracts. You said it was very sparse—or words to that effect. I think that we shouldn't lose sight of the notion in common law that if the parties have to put something in the contract that is material, and they fail to do so, that contract is going to fail. That's why we put so much into the contract. In German law and in most civil law jurisdictions, if the parties don't put something into the contract, the judge will find the contract nevertheless valid and enforceable, because he is going to presume, or she is going to presume, that the parties intended to rely on the civil law. So in fact if there is nothing there, it doesn't mean it isn't in the contract. It is in fact in the contract, but you have to refer to the civil code to determine exactly what those provisions are.

MS. CHIN: That's a very good clarification and I don't know if everybody heard what the gentlemen said. Basically, he is saying that it's not that there is no contract. There is a contract and the words that are not contained in the contract are bound to be in there by a judge in a particular civil law jurisdiction. All I can do is read the words in that piece of paper. I am not saying that there is no contract. I am assuming that there is, because it has to be an enforceable obligation. That is all part of the Omnibus Assumption. The problem is, I don't know what those obligations are. So how can I give an opinion that my client is authorized to enter into those obligations or that those obligations don't violate any U.S. law that my client is subject to? So we reach this middle ground. We basically look at what the substance of the transaction is, what the substance of document is. But if we don't know what the substance is, then we have to find out from somewhere or somebody as to what it is. And if we can't, then we just have to say, "Well, we can't give this opinion because we don't know what those obligations are."

MR. QUARTARO: You made the comment of the remedies being defined outside the document and you would be worried about that. A German lawyer would not be worried about that, so why would you be worried about that? You are only giving a New York opinion so I think it's important that we maintain the perspective of what we are giving. So you do need to look to a German lawyer, and it's all well and good to get some feedback—so you understand what's in articles 35, 42, 41 of the German Civil Code and da, da, da. But what happens when you can't get a German lawyer? I am going to flip this to Greg, because we had in a maritime role a real issue with Liberia, a major inconvenience with lots of ship financing involved. What was taking place in Liberia was a breakdown of civil society. Liberian law was out there and it governed the contracts, and continued to be used in financing agreements because we had ships that were mortgaged under Liberian law with registration taking place in New York City, not far from here.

GREG CHASE: True. Opinions were being given by lawyers. That is a bit of a unique case, and it is interesting that it is related to our discussion today.

In the shipping world you often have vessels that are registered in different countries. The optimum ones are, of course, Panama, Marshall Islands, and Liberia. In the case of the Marshall Islands and Liberia, the corporate law or maritime law follows very closely in their concepts U.S. federal maritime law and New York corporate or Delaware corporate statutes.

So there are lawyers in New York who get very involved in the drafting of these statutes in each of those jurisdictions, and giving opinions in relevant fairly limited areas about capacity, enforceability and of course enforceability of the mortgage. What I am interested in particularly is almost the inverse of the discussion we have been having so far in regard to the problems encountered by New York lawyers trying to get opinions in the context of transactions that may be governed by some other jurisdiction. I am very interested in the process of what happens when you are working with a lawyer in other jurisdictions to get an opinion with respect to certain types of collateral that may be bootstrapped in the shipping context, compared to the value of the shipping collateral represented by the mortgage. But in a typical financing that I am used to there are often numerous types of collateral, including accounts, where you get financing.

In the context of the construction of a new ship, you might have an assignment of a construction contract with a bank providing financing. In the context of a Chinese construction project, there is often a bank guarantee and we often look to lawyers in foreign jurisdictions to give his opinion. My work has become very much a matter of elaborately dealing with a number of these issues—both as the New York lawyer perhaps rendering a Marshall Island or Liberian opinion to a foreign bank who has certain expectations as to what that opinion really covers and also as the lawyer sitting in the middle between the client bank and the foreign lawyers that we have en-

gaged who are providing opinions on these other types of collateral. I am very sensitive to the issue raised by the gentlemen in the back of the room that the context of other legal traditions—the civil code of such states, for example. This is not an ordinary approach to legal practice, and in a lot of ways lawyers in these jurisdictions are being asked to sort of follow what the New York lawyers and any solicitors would expect from their transaction. And even worse, we are asking them to provide the opinions in words that we understand, based on an analytical framework and a customary practice that we are familiar with. I think it's my experience in talking to foreign lawyers that they have certain forms of opinion that they will give, but there is not a lot of discussion or thought as to exactly what happened or to how did it get to be that they give that form of opinion. I think too many New York lawyers are lulled into the comfort zone of just assuming that those opinions mean the same thing, and I think that, if you are digging deeply into these issues, an analysis of enough due diligence to process is required.

As a New York lawyer advising your client I think you have to have a sense for what the foreign lawyer may be doing in terms of his own work to give an opinion—and what it might be worth to your client. I think New York lawyers really need to be active participants in this process. I also think it's very important to communicate very clearly with foreign lawyers about what the opinion they are giving really means. Eduardo has some comments, and I see some questions.

AUDIENCE MEMBER: May I ask another question? I have somewhat similar experiences with, let's say, a Chinese company. If you have a guarantor or some party in the transaction, such as, let's say, a Saudi company, it becomes very, very important to know what is required, and these are often very, very difficult opinions to get, for some of the same reasons that you mentioned.

MR. CHASE: Very often you put a foreign opinion on the table and ask the foreign lawyer if they can provide it. And sometimes I suspect they say, "Sure"—and they provide it in a form that you are used to. But it is very likely that it's just one layer of the onion, and there is an analysis that you don't quite fully understand in the scope of the opinion they are giving. An example is that we often ask Chinese lawyers to provide opinions on the enforceability of the assignment of the bank guarantee to a U.S. or U.K. bank in the connection with one of the new building projects in China. They will give it, but there are further levels of the analysis to the guarantee: to really be collectible it has to be registered within the appropriate Chinese state body. You might pick it up through a catch-all revision. But one would have to know that that issue is out there and that it should be addressed. And if one didn't know, it could prove to be very problematic down the road. I think just asking for opinions in the U.S. style is very difficult.

AUDIENCE MEMBER: I think the problem is the Chinese lawyer's and not yours, because he gave the opinion.

MR. CHASE: I wouldn't want to be in the situation where we are trying to enforce who was responsible for the omission and I think our clients would expect there to be a certain amount of diligence on our part to be comfortable with the opinion, since we are telling them that essentially, based on our experience in the industry sector with these kinds of projects, we think this opinion does tell us something meaningful about the transaction.

AUDIENCE MEMBER: You are doing all the work instructing another lawyer. Most of us work on caps and things like that.

MR. CHASE: Well, certainly you have to get into the discussion about what is the opinion worth in adding it into the transaction. In the State of New York it's very important to find lawyers that you know are very competent in the practice area with respect to the subject matter at hand. I think that is actually a big piece of it. There are a couple of Chinese law firms we will use because, based on our own custom, practice, and experience dealing with them, we believe that what they are giving us is something worthwhile. But I think even that is a critical part of the diligence process.

EDUARDO CALDERONE: Good morning, everyone.

I think the main idea that I want you to collect from this session from the foreign practitioner—and I have done some research on Central America and some other South American countries in regard to legal opinions—is that this is not a customary practice for our deals governed by local law down there. This is and has been for many years a requirement from U.S. or U.K. financial institutions mainly. That part of the deal is not governed by our laws, but rather by New York law that involves a Costa Rican party, as Greg just mentioned. So the issue here for New York practitioners is, how do you select the counsel down there—wherever you're going—that really understands this practice? Because in our civil law system this is not a customary practice. This is more built through relationships with U.S. law firms and what some lawyers in the region come to do. So it's very important to understand and manage expectations of local lawyers as to what is the requirement being asked and what is the task at hand to be completed.

To give you a couple of examples. We were in a deal last year where there was a bond being issued here under New York law and it touched on a company that was a guarantor to a bank. So two days before the closing, one law firm called us and asked us for our help and said, "We just need an opinion from this company." "Okay," we said, "send it over." A four-page opinion. When you read it, you realize, well, basically you will have to do due

diligence on the company—understand assets, accounts receivables, a lot of things that were not in there. So we went back and forth and it was very close to the deadline of the deal and we didn't have time for due diligence or things like that. So we had to really work on creating a manageable scenario where we could render the opinion and the deal could close, because under New York law it was required. What was needed was that everybody would be happy and we would not risk any liability on our side. In the end we had to do some change of reliances. We were not lawyers for that company (the guarantor), so we sat down with the in-house counsel for like three hours and then he gave an opinion on which we relied. So it's on a case-by-case basis, and you sort of try to address the issue. But for you and other counsel it's very important to manage the expectation at hand and really try to convey what is it that you require.

Also it's very important here that you not take for granted that everybody has malpractice insurance. That is sometimes not the case. It's not mandatory, for example. In our country the bar doesn't require that you have malpractice insurance. It is voluntary. So we have it in our firm, because clients have requested it. But it's an important thing as part of the due diligence.

Another case that we can mention was another deal that involved Costa Rican assets in a very large financing. Very near the closing we were asked to render an opinion that included a reliance letter. And with this letter they were asking us to set a minimum liability or a capital liability for 25 million pounds for a deal in which our firm was probably charging $100,000. For the business we were getting, it was completely disproportionate. We had to go back and forth several times, believe it or not. Because how could you put yourselves in a situation of liability of that sort for the type of work they are asking? They were explaining that this is very typical in the U.K. With any cross-border transaction the issue is trying to capitalize the different parts of the deal in order to make it happen. You want to be a dealmaker; you don't want to be a deal breaker as a lawyer—especially where you are participating in a multimillion dollar deal in regard to a jurisdiction that touches a little part. No one wants to raise a red flag, so we have to be creative in the ways where we don't expose ourselves to that liability and risk of reputation but at the same time also help U.S. counsel understand how the system works. Normally the typical scenario involves financial deals. I would recommend that you send a template. Because otherwise what could come back if you ask for an opinion from a foreign country in Latin America that is not used to this type of transaction—what you are going to get back—is not what you expect.

AUDIENCE MEMBER: I want to go back to the issue that Greg was raising with respect to the German contract that is sparse because the civil code is presumed to be—by operation of law—part of the contract on the one hand. On the other hand the American lawyer is giving an opinion which is somehow going to incorporate the German law. So my question is with respect to the American corporate lawyer: if you go to court how does evidence operate in that situation?

MR. SANTUCCI: I hope somebody can answer the question because I can't.

AUDIENCE MEMBER: I think I can give an answer to that. I don't think it's a completely different system. It's like the provisions of the civil code are presumed to be in the contract unless you affirmatively elect out of them. Some of those you cannot elect out of, so you can have, as Ken said, a very sparse contract if you tend to rely on all of the civil code that you can't opt out of.

MS. CHIN: I mean the question is there because you have a document governed by German law, and the document will probably choose a German forum. So I don't know if you necessarily ever get to that issue. Where you may get to an issue on the opinion is that it turns out that there is a provision in the opinion that somehow incorporated German law. You know, it's rare to see these circumstances, which is why we kind of get comfortable. Because we are in a financing transaction, and the guts of the transaction is that the client is going to borrow money and it's obligated to pay it back. Now, if, as Ettore said, the client also has to deliver a first-born child if something goes wrong, then, yes, that is going to be an issue. But that's an extreme circumstance. So generally speaking, maybe we can't get comfortable. You can go to England and a lot of documents governed by English law talk about a receiver or liquidator—which is a total different concept than in the U.S. And if you don't understand the concept, then you will say, "Okay, what exactly does this mean?" Or else you say, "We are not opining on that particular term, because we just don't understand it."

MR. SANTUCCI: If I may, could I ask you to hold the questions? I don't want to jam Simon up any more than we already have. I know, Simon, you have some interesting things to say.

SIMON CHESTER: It sounds like I am back in a law school exam.

I am speaking as the second foreign lawyer on this panel but I am probably the least foreign foreign lawyer in the room. That's because we share so many things with New York, most recently we've shared our weather.

I come from a tradition which uses the English language to draft contracts that look very much like yours, but are litigated in a federal system in which we have a securities legislation that's modeled after the '33 Act. Our corporate law is modeled on the New York Business Corporations Act. We have all sorts of equivalences with the Uniform Commercial Code. And our opinion practice expressly tracks Tribar and ABA models.

So I am going to talk about a couple of sources. We have the equivalent that's written by a friend of mine, Bill Espy, in "Legal Opinions in Commercial Transactions," which is effectively the codifying Bible of Canadian practice.

Secondly, I am part of a group of Toronto lawyers who have developed model documents and model protocols on foreign law documents, and that is called the "Toronto Opinions Group." It's a network of all of the large national firms, including both practitioners from New York and Alberta, and we in turn participate in the Tribar discussions. We have monthly meetings and our published statements (in particular the one that I would draw to your attention, on Third-Party Opinion on Foreign Law Documents) are on a web site called Slaw—S-L-A-W—dot CA.

So what have we got in the foreign law context? Well, we won't give enforceability on non-Ontario-governed documents. Nor will we give as-if opinions. We won't give opinions in which we assume that, notwithstanding the parties expressed choice of law, we are going to assume that a different choice applies and do the analysis. We think that's ludicrous. What we will give are opinions on choice of law and opinions on the enforceability of foreign judgments. We do that because approximately twenty years ago our Supreme Court completely modernized our private international law principles, recognizing the reality of global capital flows, global markets, and the expectations of our clients. The court said, "Look, we are going to effectively give full faith and credit to the laws of other jurisdictions; we will recognize and enforce New York judgments provided that there is a substantial connection. We are just not going to review anything on the merits. Where there are frankly sophisticated parties and normal commercial transactions, the court has no business interfering."

Secondly, on choice of law, in another case our court said, "Look, if you've got sophisticated parties, we respect party autonomy." Now, there is a slight difference in Quebec. Since 1992 they have had a codifying system of private international law based on the Swiss Code of Private International Law. Why Switzerland? It was simply a modern contemporary system and it's consistent with the common law, and Ontario lawyers will be thoroughly used to providing opinions on both Quebec law and Ontario law. We do that because we have a mobility protocol. We have abolished the unauthorized practice of law across jurisdictions. We can give opinions on the law of other jurisdictions in Canada, provided that we don't spend more than one hundred days a year doing it. So in all respects what we've got is a system where we have adapted our expectations so that we are speaking the same language and we're giving the New York clients what they need in language that is very similar to what you give—in the same way that our domestic opinions would be something you would read and say, "Oh yes, that looks exactly like what we would give in a domestic context." So on a practical level we've solved many of the theoretical issues that might have come up, because we've worked through and developed a model, an annotative model, and in the context of a particular transaction anyone who departed from that should have really good reasons to do so.

MR. SANTUCCI: Someday we will get to that level of enlightenment. Sir, you had a question that you didn't have a chance to ask.

AUDIENCE MEMBER: I was going to suggest that you take that case to Judge Ramos; he will be able to handle that.

MR. SANTUCCI: So please.

AUDIENCE MEMBER: I heard the gentleman from Costa Rica introduce caps and liability in the legal opinion; did I understand you correctly?

MR. CALDERONE: Well, we didn't need any cap in that particular case, but, yes, it's pretty much open. I mean, there is no regulation whatsoever locally for rendering these types of opinions. So, as I mentioned, it is more on a case-by-case situation when you try to accommodate yourself to what the requirement is and how to make it feasible without exposing or risking any liability on our end. But it takes a little bit of back and forth with foreign or U.K. or U.S. counselors—sort of trying to pin down this type of common practices up here but very rarely used in our country.

MR. CHESTER: It's a situation that is perfectly common in England and in fact is legal in England. In Canada, it is contrary to the Solicitors Act for anyone to limit their liabilities. So classically we carry 150 million of coverage, and I am now in negotiations with clients who want that raised to half a billion dollars. Again, where our fees are somewhere in the hundred- or thousand-dollar range, then I start to wonder, am I being asked to be a guarantor of my clients' transactions? Because if I am assuming that sort of real risk, my fees should be at the level of the merchant bankers' fees.

MR. SANTUCCI: The orthodox role in the U.S. was you don't cap your liability. It's illegal. But, in fact, it is not illegal to cap your liability for misrepresentation to a non-client based on your opinion. And whether you want your opinion to be litigated in Kazakhstan under Kazakhi law or New York under New York law, I think I'd choose the latter.

MS. CHIN: I was going to just say that there is a feeling that the model rules, the ethical rules, prohibit the caps on liability. But actually there is a recent opinion that's come down. This is State Bar opinion that basically said it is not unethical because what you are doing is you are capping the liability not to your own client—that is

still not permitted—you are capping liability to another party who is not your client, and that is fine. Whether it's going to evolve as a customary practice, I don't know. In some ways it might be a good development. What we have seen—which to some extent makes some sense—is cap liability in the amount of one's malpractice insurance. This is very jurisdictional. So, for instance, in the Netherlands I understand that not only do a lot of Dutch law firms cap their liability, but basically when you sign the engagement letter they will refer you to the web site and on the web site they have a whole list of terms and conditions. And in there, in the terms and conditions, is the cap of their liability.

MR. QUARTARO: I think a cap on liability is certainly an issue that every lawyer here should keep in mind. I would like to thank Ettore and the panel for a very interesting and very informative presentation. Thank you very much.

MR. QUARTARO: I would like to welcome on our last panel, on non-lawyer ownership. Our section has had a project on non-lawyer ownership for the past year. We had a panel on it during our meeting in Hanoi, Vietnam, in October, and we are really looking forward to our esteemed panel this morning, which consists of Ken Standard as the chair (he is the past president of New York State Bar Association); Jonathan Armstrong, who is one of our chapter chairs from London; William Hubbard, President-elect of the American Bar Association; and Nicholas Fluck, president of the Law Society of England and Wales. So I will now turn it over to Ken Standard.

KENNETH STANDARD: Welcome.

We want to talk about alternative law firm structures. We have panelists up here who have been doing this now for a while in a variety of contexts, and I just want to lay the groundwork a little for those of us here who do not practice in the United States. We have a convoluted system of governance of law firms in the U.S., because we have multiple jurisdictions. Each governmental entity at the local level—and when I say local (as opposed to the federal level) I am referring to the states—is empowered and required to regulate the profession.

In addition to our states, we have our unique District of Columbia, which also is empowered to regulate the legal profession. In some instances the profession is regulated directly by the court systems. In other states there may be a unified bar, which is subject to the discipline of the court system which regulates the profession. A unified bar is a bar that all lawyers are required to join. It is not like the New York State Bar, which is a voluntary bar: our members choose to belong to the bar. With a unified bar, there is no choice involved. The issue of alternative law firm structures has been under discussion for perhaps twenty-five or thirty years. It goes back to the Kutak Commission at the American Bar Association, in the late seventies and early eighties, which looked at it first. There have been other looks since then.

Most recently there was a commission established by Carolyn Lamb, when she was president of the American Bar Association, that reviewed the issue and it worked on the project for about three and a half years and issued a comprehensive report about a year and a half ago. William Hubbard and I were board of governors liaisons to that commission. I was preceded by Steve Crane, another former president of this Association. There has been a lot of consideration given to whether consumers—our clients—would benefit from multidisciplinary practice and also whether the profession would benefit from multidisciplinary practice. The conclusions that the profession has made in almost every instance is that the benefits to the consumer and the benefits to the profession do not warrant the risks that are involved. Hence, there has been a reluctance in the United States to move toward that model.

We have one exception here: we have the District of Columbia, which does have a variation of multidisciplinary practice. Their lawyers may incorporate into their law firms—and I am not using incorporate in the sense that it has to be a corporation—but may embody in their law firms other professions to provide assistance to the lawyers in delivering services to their clients. The lawyers are not adjuncts to these other practitioners. These other practitioners are adjuncts to the lawyer and to the lawyer firm providing assistance. We have in Canada a situation where a number of the provinces do allow multidisciplinary practice. And, of course, we have the examples of the U.K. and of Australia and New Zealand and we are going to talk a little bit about each of those. And Pedro here is from Portugal, and I know Portugal has been involved in a controversy about this issue. There are strong feelings on both sides of the question.

So I am now going to turn to William Hubbard, who is the President-elect of the American Bar Association. He will be taking office in August of this year. William is going to give you somewhat more detail about the previous efforts that have been made by the American Bar Association and the considerations that informed the decisions and recommendations that they ultimately made. William is from Columbia, South Carolina, and practices in the largest law firm in the state, Nelson Mullins Riley, in Columbia.

WILLIAM HUBBARD: Ken, thank you very much.

It's a real privilege to be here. I think it's warmer here then it was in Columbia when I left. Looks like everything is turned upside-down. Thank you, Ken, for inviting me to come and participate.

This is a subject that's been one of great study and emphasis in the American Bar Association for about thirty

years. And to sum up my remarks today, we are about where we were thirty years ago. We haven't done a whole lot to change our position on it. But I do think it's important to provide somewhat of a history lesson today and talk about the role of the New York State Bar in those deliberations in the American Bar Association.

And then we will have an opportunity to learn from Nick and Jonathan about what actually happens when you move to an alternative business structure and how that might actually provide some benefits. And I think that ultimately might instruct and inform the American Bar Association as we move forward and take our next look at these issues.

But before I start, let's think about three concepts, three points, three principles, I think we all think about and honor: client and public protection; the best interest of the client; and independent legal profession. You're all familiar with those concepts. Those concepts are—in all of what we say and do, and our conversation continues today—the values that should guide our discussion. The issue of non-lawyer ownership has certainly been challenging for lawyers in the United States. It's a complex issue that we continue to review carefully and on which we continue to seek input from all segments of our profession. We also know there is much to learn from our colleagues in other countries—especially as our world becomes increasingly interconnected and we have more opportunities to work together across borders. The world changes; we all know that. But with that change comes the need to make necessary adjustments in the Bar and as I said, the ABA has looked at this issue in depth for more than thirty years and very closely during the past several years.

Ken mentioned the ABA Ethics 20/20 Commission. It looked at non-lawyer ownership and other issues that affect the practice of law in this increasingly global society. The ABA House of Delegates, though, has long opposed multidisciplinary practices—where lawyers joined with non-lawyers in a practice that delivers both legal and nonlegal services. The ABA also opposes other forms of non-lawyer ownership over owner partnership in law firms. But various ABA committees and commissions have pushed for change over the years. The ABA first considered what we now call Alternative Business Structures in the early 1980s, and Ken mentioned a few moments ago the Kutak Commission, which was the commission charged with looking at the model rules and recommending changes. That commission carefully considered whether lawyers could partner with non-lawyers, and the commission proposed that such partnerships be permitted as long certain safeguards were employed.

But in 1983, after a robust debate, the ABA House of Delegates, the Association's policy-making body comprised of lawyers representing all fifty states and the territories as well as the sections of the American Bar Association, declined to accept the commission's proposal. But our discussions at the ABA level did not end there. In 2000 the House of Delegates revisited the issue, when the ABA Commission on Multidisciplinary Practice presented the House with additional recommendations. Prior to the appointment of that commission, consulting firms aligned with large accounting firms had begun to take over tasks similar to those performed in law firms. The Multidisciplinary Practice Commission recommended to the ABA House of Delegates that the ABA model rules be amended to permit multidisciplinary practice with certain safeguards. Those safeguards were designed to ensure preservation of core values of the legal profession: confidentiality; independent professional judgment; and the importance of conflicts of interest. At the time that the ABA MVP Commission examined MDPs, this New York State Bar Association established a special committee on Law Governing Law Firm Structure, chaired by the esteemed Steve Crane.

Ken reminded me this morning that he was a member of that committee. While the ABA MDP Commission was finalizing its recommendations to the ABA House of Delegates, the NYSBA Committee issued its reports, entitled "Preserving the Core Values of the American Legal Profession, the Place of Multidisciplinary Practice in the Law Governing Lawyers." Unlike the conclusions of the ABA MDP Commission, which proposed changes in the model rules to permit certain types of MDPs, the NYSBA Report concluded that the prohibition on non-lawyer ownership and ownership of law firms should remain intact in New York. And, of course, any report coming from the New York State Bar carries enormous weight with the American Bar Association.

The NYSBA Report concluded that the risk to professional independence and other core values was too overwhelming. That report was approved by New York State Bar Association House of Delegates, and formed the basis of the objections in the ABA MDP Commission's ultimate proposal. The ABA House of Delegates had a passionate debate, and it declined to accept the Commission's recommendation to allow multidisciplinary practice. Instead, the ABA House of Delegates adopted a policy stating that non-lawyer ownership of law firms and the sharing of legal fees with non-lawyers were inconsistent with the core values of the legal profession, including the lawyer's duty of loyalty to the client, the lawyer's duty to exercise independent judgment, the lawyer's duty to hold the client's confidence, the lawyer's duty to avoid conflicts of interest and the lawyer's duty to maintain a single profession of law with responsibilities as a representative of clients, as an officer of the legal system, and as a public citizen having special responsibility for the quality of justice. The affirmative statement was that MDPs violated those core principles and therefore should be rejected.

Today, as Ken mentioned a moment ago, the District of Columbia permits a form of non-lawyer ownership,

a partnership in the D.C. Rules. But the D.C. rules are restrictive in some particulars. The partnership or organization must have as its sole purpose the provision of legal services; it can't be an MDP. Any non-lawyers having managerial authority or holding a financial interest must undertake to abide by the rules of Professional Conduct that govern lawyers. And those conditions must be set forth in writing. As we've seen from the District of Columbia experience and what has transpired in other countries, including the U.K., Australia and Canada, MDP is too narrow a term. While D.C. firms with some measure of non-lawyer ownership do exist, the Ethics 20/20 Commission learned that the D.C. Bar does not keep records of those particular organizational firms that would have those organizational structures. Those firms are not required to report their status as having non-lawyer owners for managers, and I think you will hear shortly from Nick that that's a far cry from the current configuration in the U.K. The recent ABA Commission on Ethics 20/20, established by ABA President Carolyn Lamb, engaged in a significant amount of research and outreach. It was chaired by my trainer and former president of the American Law Institute, Jaime Farrell, who held various important legal positions in the Clinton Administration.

Again, that group undertook an enormous amount of work. I think Ken will agree it's one of the most conscientious efforts that I have ever been engaged in. It was a discussion and an outreach and research at the highest level. But again, New York State lawyers and the New York State Bar Association were very active participants in the work of that commission, informing the work of the Ethics 20/20 Commission. In June 2011, after considerable review and outreach, the Ethics 20/20 Commission ruled out certain forms of non-lawyer ownership as it currently exists in other countries. It ruled out publicly held law firms and passive outside non-lawyer investment of ownership in law firms.

The Commission also rejected multidisciplinary practices, which are law firms that offer both legal and nonlegal services separately in a single entity. The Commission also considered and rejected a proposal to permit different offices of the same firm to share fees with non-lawyers, where one jurisdiction permits this practice when the other does not. The commission continues its input about a more restrictive model of non-lawyer ownership, based in part in the District of Columbia Model, a model about which the commission sought comment based primarily on the D.C. Model, including the following provisions. First, the sole purpose of the new type of structure must be the delivery of legal services and those services provided by non-lawyers must be limited to assisting the lawyers in the delivery of those legal services. Second, the lawyers would be responsible for assuring that the conduct of the non-lawyers is consistent with the lawyers' obligations under the model rules. Third, non-lawyer owners would not have their own clients or offer non-legal services to clients independent of the legal services provided to the clients of the firm. And, finally, lawyers would have to maintain the control and financial interest in voting rights in the law firm. At the same time, the President of the New York State Bar Association appointed a Task Force on non-lawyer ownership to consider the commission's work on the subject. The New York Task Force issued a report in time for the ABA Commission to have the benefit of its work before it finalized any proposals to the ABA House of Delegates.

However, in April 2012, after careful study and outreach, the ABA Commission on Ethics 20/20 declined to propose changes to ABA policy prohibiting non-lawyer ownership of law firms. It determined that there was insufficient evidence of a need, or demand even, for non-lawyer ownership more limited than the D.C. model. The New York State Bar Association Task Force issued its report in November 2012 and affirmed the New York State Bar Association's earlier opposition to non-lawyer ownership of law firms absent better and stronger evidence that it is in the best interest of clients and will not undermine the integrity of the legal profession. Importantly, the Ethics 20/20 Commission and the New York State Bar Association found an absence of evidence supporting the need for ABS in the U.S. at this time. They determined that ABS alternatives and structure should continue to be studied and analyzed. We will be watching carefully the U.K. experience and that of other Commonwealth countries and other non-Commonwealth countries to see if and how ABS in the U.K. fulfills the promise to lower the cost of legal services and increase access to justice. I think a case could be made that, if these two things were to occur, I think the ABA might take a different look.

So I am looking forward to hearing from Nick and Jonathan on the experience. So here is where the situation stands in the U.S. at this moment. Since 2000, indeed since 1983, the ABA's position has been that the non-lawyer ownership of law firms and the sharing of legal fees with non-lawyers is inconsistent with the legal profession's core values, and the consensus within the Bar is that non-lawyers do not appreciate the fiduciary responsibilities that lawyers have to our clients. But even so, within the large and diverse U.S. legal profession the range of opinions on the topic varies. On one hand, many believe that any form of non-lawyer ownership of law firms or fee-sharing arrangements would undermine the profession's core values. Others are more open to finding ways for our rules of professional conduct to accommodate various forms of alternative business structures. And still others are aware of the reality of alternative business structures in various jurisdictions and are working to develop guides to lawyers who cross jurisdictions to work on client matters with other lawyers.

The ABA will continue to look at these matters in detail. I have more I can go into—more detail about some

ethics opinions and some other things—but I think I would like to close now and defer to the other panelists so we can get an account of first-hand experience on what is transpiring in the U.K. and see if we can learn from that on whether or not that will change the way we approach the issue in the United States. Thank you very much.

MR. STANDARD: Thank you, William. You will have a chance to ask questions of the other panelists later on and the panelists will have time to ask questions of each other as well. We are now going to have a presentation by Nick Fluck, who is the president of the Law Society of England and Wales.

NICHOLAS FLUCK: I am not too sure whether I should say good morning or good afternoon, ladies and gentlemen. To me I think it's breakfast time, but you are all probably acutely aware it's about to be lunch time. So I will get on with it rather quickly.

I would of course like to thank the New York State Bar Association for inviting me here to talk about our experience of non-lawyer ownership. In England and Wales, we call it Alternative Business Structures. I think that's one of those cases where you say "tomayto" and we say "tomahto," but to be honest, the principles behind them are the same. They are both terms referring to the concept of non-lawyer ownership, investment in, or management of law firms. Non-lawyer involvement and outside investment in law firms existed before our Legal Services Act, and in other jurisdictions before England and Wales. I think our alternative business structure term is one that we can use as a casual description of different business models all over the globe. But it isn't really descriptive or accurate enough to allow us to understand exactly what those different models mean in each jurisdiction. Alternative Business Structures provide a portfolio of different options that lawyers can, if they wish to, choose from in order to adapt and innovate to suit their own markets and their own clients, and you would understand that, as such, each jurisdiction's experience of ABS is unique. Each has been formed by their own circumstances. We are learning in England about the history here. I think that, if you get enough lawyers involved in anything, you would never reach a decision at all. But our experience with ABS is different than that of, say, Australia. In England and Wales, for example, the ability of advocates and solicitors to practice together marked a significant break from the past. That isn't something easily noticed in a jurisdiction that doesn't have a split profession as we do. And I would like to take a moment just to do a bit of history lesson as well—which is to say how we got to where we are now.

In 2001 our Office of Fair Trading recommended that unjustified lack of competition in the legal services market should be removed. The government, as governments do, responded in a consultation paper with their conclusion that the then-current framework was outdated, inflexible, overly complex and insufficiently accountable or transparent, and decided, again as governments tend to do, that an independent investigation was warranted. Two years later, in 2003, Sir David Clementi was appointed and he carried out an independent review of the regulatory framework for legal services in England and Wales. David Clementi, of course, is known to all of you as a Harvard MBA amongst other things, but his review of the regulatory framework of legal services in England and Wales was published the following year. That review recommended the establishment of these alternative business structures, so they could see different types of lawyer and non-lawyers managing many legal practices.

In 2005 the government said, "You know what? That is the future of legal services: putting consumers first." In essence that was, in many different shapes and sizes, the impetus for the external ownership, investment in or management of law firms. The bill pushed through Parliament was actually the Legal Services Act of 2007. That process hasn't been easy. Some of my organization's members don't welcome the introduction of ABS. I have been criticized by some for instilling the virtues of ABS over traditional law firms, but of course with my hat on as President of the Law Society, as the membership organization for all solicitors, we have just as much of a duty to those who work in ABS as we do to those who work in traditional law firm structures. They are all our members. And although the U.K. legal system is one of the most traditional in the world, that doesn't mean that tradition and innovation are mutually exclusive, because for many ABS is really just one more reason for law firms to innovate in the U.S. I don't think the debate around the external involvement in law firms across the world is a debate that is going to go away anytime soon. I was reading this morning at about a quarter to five some of the New York State Bar Association report and the comment on these things is something that still excites a lot of interest. I think as lawyers we have a duty to constantly consider this state as well, and of course given the importance to us all of maintaining an independent, ethical, leading profession. I think that, like everyone in this room, our members, my members, live and breathe the interests of our clients and of course the independence of our profession. And like many of their international colleagues, some of our members practice in legal practices that don't just include solicitors. Those in mixed environments that we already have won't be considered out of place in other jurisdictions, including for example, Denmark, Germany, Spain, France. Authorities in Scotland have just applied to become a regulator for Alternative Business Structures. If anybody thinks that Scotland is part of the U.K. well, it is, but England and Wales are separate for legal purposes. Even here, in the United States, Washington, D.C., allows up to twenty-five percent ownership of law firms by non-lawyers. I think where we differ from our colleagues is that we have a regulatory authority that doesn't just regu-

late solicitors but any legal practice, whatever the composition or the make up of the firm is.

Our entity-based regulation means that our regulatory system doesn't just get at individuals; it's also looking at scope and structure. If you work for an organization that provides what they call reserved legal services—those bits of legal practice that only qualified lawyers can do and if it's any part of your activities—then you have to be authorized and regulated by us. This ensures that, while some ABSs may be owned by non-lawyers, control remains firmly in the hands of individuals regulated by the Law Society and held to account to the exact same standards by the same high professional standards as a firm comprised of solely lawyers. There are consequences, of course, if either falls short of the high standards expected of them. Both the SRA—the Solicitors Regulation Authority—and the Solicitors Disciplinary Tribunal have imposed sanctions on non-solicitor managers and employees.

As of today, 233 ABS licenses have been granted, and they vary very widely from large new entrants to the legal market to the existing sole practitioners making their accountants a partner, including firms tying up with other service providers (such as wealth or claims management firms), or firms seeking outside investment from private equity companies or individuals, or firms listed on the stock exchange, or firms wishing to promote non-lawyers to a partnership level. I think you have to say that innovation, creativity, and the ability to be one step ahead of the crowd has transformed New York and London into two of the leading—if not the leading —legal centers. I think your mega firms here are some of the biggest and most successful we have ever seen. They turn over profits and are involved in a business in a way that couldn't have possibly been imagined when John Wells founded a firm here in New York City in 1782.

ABSs aren't just attractive to one aspect of the legal profession. Three of our top fifty law firms have been granted an ABS license. But at the moment most ABS licenses have been granted to smaller and medium-sized firms outside London. It grants access to capital and expertise that might have previously been beyond their means. And I think the ability to provide legal services alongside other professional and non-professional services—like, for example, lawyers and bankers—is attractive to our clients, since our members can now deliver a whole suite of services to their clients. It's an attractive proposition for the clients too. They know they are getting a fully regulated and protected service in a way that meets their needs. Firms wanting to embrace a different way of working may be more inclined to innovate and seek a competitive edge by accessing outside capital and business expertise in partnership.

There was a recent review by the Legal Services Board in England and Wales that carried out a report of the impact of ABS in England and Wales. It concluded several things. It concluded that ABSs were associated with more frequent reports of new innovations when compared with all the other providers regulated by our Solicitors Regulation Authority. It also concluded that ABSs were found to be better at resolving complaints about service compared to LDPs and other firms. I think that's partly because some of these are big consumer brands that have established procedures. They have established complaints procedures and they have established experience in consumer buying behavior. But critically they have also discovered that ABS has made greater use of technology to deliver legal services.

Now, of course none of those elements—innovations, higher turnover, customer service or technology—are limited to ABSs. More traditionally structured firms can embrace or use any or all of those. But the initial independent evidence is that ABS structures seemed to be more inclined to do so. I'm convinced that, whatever the future of legal services market, our solicitors from England and Wales will continue to deliver legal services to exceptional standards and we will go on meeting the developing needs of their clients in this increasingly complex world. I think the development of those integrated services—legal and bank, funeral and probate, barristers and solicitors—offer clients the opportunity to shop from a single provider. I did promise I wasn't going to say one-stop shop so I won't. We have co-op legal services, and this helps businesses really climb the scale. And of course that helps them as a business, since it brings down their cost. That's particularly relevant in the global context of economic prosperity. I think that this is actually seen as revolutionary. There were similar setups in all sorts of other jurisdictions. Today people shop smarter. They shop differently than before. They expect to be able to shop around for the best value and the most convenient service for them. As far as I can tell, now the only thing people don't expect to buy online is their morning coffee. But somebody told me we can even order that online now, and then go and collect it. But if you have that context, you have to expect people are going to expect to access their legal services differently from the traditional model. Each of traditionally structured firms and ABSs provides an attractive package for businesses and clients looking for lawyers. But in combination I think they showcase all of that's best about English and Welsh law and solicitors. As for speaking with my hat on, as a representative body of solicitors, we're committed to working with their employees. It doesn't matter what form of legal practice they work in. We will support our members so that we can continue to protect those core principles of justice, professional independence and the rule of law. I'm acutely aware—because I've stood on a number of panels and talked about it—that international colleagues are watching our ABSs with interest. Presidents of my Law Society have long spoken

on panels similar to this around the world. We're also of course keeping an eye on the debate here in the United States and elsewhere. We're interested to see who forms an opinion about the opportunities different jurisdictions offer and should offer. That means the bar associations but it also means their members too. Some of those members are even now voting with their feet. The fact is that we are seeing foreign firms that are coming to England to take advantage of the business models that we offer in our jurisdiction in the new market. Those people are confident of what the regulation offers, they are confident in the many ways they can structure their businesses so they can best service the changing needs of their clients. And, after all, that's what we're all here for. That's what law firms exist to do. I am looking forward to the debate today and I am very glad to have Jonathan answer any and all questions. Thank you.

JONATHAN ARMSTRONG: Thanks so much to both of you for enlightening talks and thanks to Ken for the invitation to join such an august panel. For those of you who know me, I should apologize in advance for my facial appearance, I have a temporary disability so I am not as sterling as I usually am. For those of you who don't know me, I usually look like a young George Clooney.

Now, if there is any doubt at all as to the way in which people—the general public in the U.K.—think strongly about these issues, it was removed from me when I got onto the plane to come here and I was handed the local newspaper. For those of you who can't read the heading, it is "Backlash as City Law Firms Are Forced to the Wall," and the article's sub-headline says that the local law society says that one-fifth of the legal practices in one city in England will go out of business in the next two years. So I think this is all connected in my view to the same debate. Now in some respects I feel I am in both courts in that Jim [Duffy –*ed*.] and now with Drew [Jaglom – *ed*.] we have been working on two reports that are what you might call a "principled difference" from the approach that the ABA has taken. We would like, I think, to see people concentrate not on a law firm ownership but on law firm control, because I think that that's what we all really care about. And I think the reality at the moment is that too many firms are controlled by their banks, are controlled by their financiers, and we see every week in the U.K. firms go out of business because their bankers have refused to support them. A good litigation firm in North England last week, for example. All because their banks have told them to get out of an area like real estate where they have made their presence for a hundred years or more and the world has, I'm afraid, changed in the last thirty years. I can recall that, just about ten years before, NASA had what was then considered to be a big computer to put Neil Armstrong on the moon. Today most of us have more computing power on our belts and in our pockets then NASA did to put somebody on the moon. As NASA used that computing power to put a man on the moon, we use it to go on Twitter and tell people what we had for lunch.

But the other thing we do if we are members of the public is we use that computing power to buy legal services. We use it to write our own wills. If we're a small company, we use it to buy Google products to form our corporations, to prepare banking documents and loan documents—things like this. This is definitely happening. So our competitors as law firms—particularly if we are in a general practice dealing with individuals on the High Street—is not each other any more. It isn't the firm down the street whom we know pretty well and we know are ethical. It's Google. It's large technology corporations, and it's offshore operations in places like India and Manila that will concentrate on process and the delivery of the most services in the cheapest way to the people conveniently.

So I would like us to concentrate as lawyers on what we do that makes us different—and it's things like our professionalism, it's things like our ethics. And I would like us to build on that, rather than simply to concentrate on ownership. Because of course the way in which you can compete with the likes of Google is through investing in technology, but two-partner firms maybe can't commit to the same level of investment that Google can. My firm with, whatever, eight hundred fifty lawyers can't, but maybe with backers we could, if not level the playing field, at least make it not such an obscene competition. I don't think this move to look at new ways of law firm ownership is limited to the U.K. and the U.S. We are doing a survey. For those of you who haven't seen it, we would love to have people from different jurisdictions take a simple fifteen-minute online survey. But we know that some countries like Guatemala are already committed to non-lawyer ownership. We know that countries like Portugal are on the way, and we know that, just yesterday I think, Singapore said that it was going to introduce ABSs because it could no longer compete with Australia and the U.K., where it is permitted. So I think this is a rising tide of change. And we can address it so that we don't have the tide wash over us. At least we can realize where our defenses are and we can stand firm against particularly some who would deliver less worthy legal services. Just to reassure you slightly, I think the regulation regime in the U.K. is strenuous.

It's my belief—Nick probably can't agree with me—it's over-regulated. I mean, at this stage we have the Law Society as the representative body; we have the Solicitors Regulatory Authority, who can fine me and discipline me if I am a member of an ABS. And to give you an indication of that, a solicitor in private practice in a regular firm can be fined two thousand pounds if he or she does something wrong. But somebody in an ABS can be fined 250 million pounds: so two thousand pounds; 250 million pounds. ABSs are more heavily regulated than con-

ventional firms. That's part of the trade-off. But you still have to have lawyers who are responsible and lawyers leading the firm to make sure the professional standards are maintained. But as well as the SRA regulating you, the SRA is in effect regulated by the LSB, another regulation board that's regulating a regulator, and then if that wasn't bad enough, we then have the legal ombudsman regulating the regulator's regulator.

So it's not a system that is without checks and balances. I won't go into it in detail but there's a paper that I've written that describes the role of each of those. And then the final point I would like to speak about, Ken, which I think is a challenging point that we are going to have to look at throughout is this: if we are going to concentrate on non-lawyer control, rather than non-lawyer ownership, then that isn't as straightforward as it sounds either. There are very difficult questions to look at. Things like privilege for example. We know in the U.K., for example, that the European Commission is trying to erode privilege, particularly erode privilege of those who are not qualified in Europe or who are corporate counsel. We know that the various regulators are trying to evoke privilege and we know that at the same time counsels, for example, are trying to win privilege so they can compete with lawyers as well. So we have to look at the issue of privilege—particularly, I think, in the U.K. There it is part of the statute: privilege applies to ABSs as if they were regular law firms. But I think that is my note of caution. There are many challenges along the way, but we can't just jump from one to the other. The ABA's approach of looking at this in a diligent manner is, I think, absolutely right. But we have to look at it in a diligent manner very quickly and very regularly, I think, because of the way English legal services and technology are developing. That's my remarks, Ken.

MR. STANDARD: Does any of our panelists have any questions of the other panelists up front? If not, I'll turn to the audience. Who would like to be first?

AUDIENCE MEMBER: Yes. First I just like to thank Jonathan for mentioning the report that we worked on together. I think there is another point in that report that I would just like to bring out. That is, that we did look at the demise of some very, very significant law firms. However, all the ones that we were looking at we were doing so because we thought there was a problem between them and their bank that led to the demise. And I certainly think that in the two of those examples it was pretty clear. One of the things that we considered was that it's usually a lot easier to work with an investor than it is to work with the banks. Banks have a much higher standard of that they need to be paid as agreed: otherwise, they have to grab the collateral. They have to take steps to protect their interest in a way that investors would be much more flexible about. So I think that's another element in here that we should put on the table.

MR. STANDARD: Interesting point. There is a question over here.

AUDIENCE MEMBER: A number of years ago, and quite unforeseen by anybody, Connecticut adopted a procedure so that any professional corporation from anywhere can come in and register in Connecticut and do business in Connecticut. So it's still a single entity. So if you're just doing law, you're just doing law. So a D.C. law firm can come to Connecticut. What we did is that we put in a proviso—and it's actually more restrictive than other places—that in order to control a licensed professional you must be licensed in the same profession. So a New York lawyer can't tell a Connecticut lawyer what to do within the structure of the corporation. So in fact Connecticut will allow non-lawyer members by statute and you as a New York lawyer couldn't control the committee. So in fact that's on the books for twenty-five years. We never had a problem, and I am sure no one ever used it. But it does in fact allow one to come in through the back door.

MR. STANDARD: Thank you. All right. I am going to take a couple from this side in the back.

AUDIENCE MEMBER: In terms of the Task Force, Jonathan, I think one of the things that a lot of lawyers were concerned about is the relationship between lawyer-owner and the firm that is practicing and also the lending bank and its practice. In your Task Force, did you review the nature of the influence of lenders on the firm? In other words, was it only at the time that the firm began to get into trouble or was it a constant influence or a constant effort to influence the firm's practice? And secondly, in terms of non-lawyer owners, do you have a sense of whether there's a constant pressure from non-lawyer owners—such as maximization of profit? How do these two influences—outside influences of lenders versus non-lawyer owners—what is their effect? Or is there not simply not enough evidence at this point to know?

MR. ARMSTRONG: To answer the first question directly, of course in preparing the report, Jim and I tried to do the report at very short notice: we had a tight deadline of ten days. But we did have some public domain materials which talked about the banks being very influential—if not wholly responsible—for the firm's collapse. Secondly, both Jim and I did manage to get bankers who would talk to us about conditions—and that was candidly more worrying than the public demand reports. We heard of bankers who have tables as to what the profitable law firm would earn in different services. So if real estate was twelve percent, I think, of turnover, then the bank would call them in for a chat because real estate had to be less than twelve percent of a profitable law firm's turnover. So there were many aspects of micro-managing. Now, the other thing that we have seen—of course more prominently more recently—is that many of the banks are themselves in difficulty and many of those have changed their

lending practices. So, for example, my understanding of the firm that went into administration last week in the U.K. (I may be wrong on this) is that they were a group of litigators. They wished to break away from their existing firm. They went to speak to a bank, who offered them an overdraft facility. They were at all times a profitable firm, but the bank decided they wanted to get out of law firm lending and shut them down because the bank environment had changed borrowing for any sort of business. The bank said they wanted three years of audited accounts, and the firm hadn't been there for three years, so they had no alternative but to close the doors. So banks, I think, are an authority of influence. I think it's too early to say whether equity investors will assert the same influence. Obviously, our law tells us they are less likely to do so. They are more likely to be into a long-term relationship. And of course, for a bank, it's relatively easy for them to exert influence, because they've got secured lending either guaranteed from the partners or on the premises or whatever, so closing the firm down is something where they can still possibly drag out even with a private equity investor. Of course, they can't if they close the firm down and wave their money goodbye. That in itself might be an incentive for them to stick with it in the longer term. But there is, as I know, no firm evidence of that yet.

MR. STANDARD: Before I take the next question, Jonathan, can you please explain what "High Street" is?

MR. ARMSTRONG: Sorry, we use the term "High Street" for a general practice firm, which is generally on the main street of a town that will be a general practice and that will offer advice to businesses and to individuals on things like probate, real estate matters, litigation, family matters, et cetera. Perhaps, Nick, you can describe it better since you are one.

MR. FLUCK: Jonathan, you are absolutely right. With the phrase "High Street firm," people generally mean an old-fashioned general practice where people do a large number of different disciplines. There are a number of people that say that makes you a tradesman, master of none. The reality is quite different. What we do is quite practical. I think the other thing that is relevant in the room is that we are fighting for external control. Jonathan just gave us a fantastic example of what external control is exercised by those who hold the financial weapons.

There is another tier of that, of course: those who hold your insurance. We've recently had a little headline from Law Services Regulatory Authority: 136 firms that have closed who did not obtain insurance by the required deadline date. Now, some of them had chosen to close anyway. Some of those had chosen to merge with other firms that already had insurance in place. But there is no doubt that some of the firms are now being forced out because they can't meet the requirements of their insurer. When you start talking about whether you can meet or can't meet external requirements, you are only just a hop, skip and a jump away from talking about external ownership, external control. So in one sense what I am saying is that I completely understand territorial imperatives, and even state imperatives, to not have their ethical principles or legal practices influenced by considerations of outside capital or of indenture or whatever.

But the reality is that most of our big global legal services are big businesses. They are global. They trade everywhere. Their footprint in any one country is pretty light. Their ability to move to a different jurisdiction in a heartbeat—simply to designate an office in Hong Kong or Singapore—is getting nearer and nearer. And I think that part of the argument is about that element of control. I think unfortunately we are far past the days when we had all the knowledge, and we had our ethics, our background and our training and our professionalism to rely upon. But the reality is that nowadays people want to buy at a price or a rate that suits them. Many, many times you are still facing the same problem, which is the buyer doesn't really know what they want and doesn't really know what they are buying. So we have to be so careful about this. I hugely admire the ABA's very principled stand on ethics. One of things my firms say all the time is that we really think that ethics qualifies our law degrees. There is a very seductive move to selling somebody what they want rather than providing what they need.

MR. STANDARD: Third row.

AUDIENCE MEMBER: I had a question about how you envision controlling equity investments of law firms in small and medium-sized firms—and in those big ones—because when you have equity investment in commercial firms which are not public, the capital guys are definitely looking to run the firms. Because they intend to take it public in three to five years—hopefully three. So are you saying, "Well, okay, we are not going to have any of these ABSs going public?" Or are you going to say the investors don't get to be on the board of directors? They don't get to have a representative? We have trouble with journalistic independence of TV and radio networks that are owned, that have outside investments, by commercial corporations and holding companies and things. What is your vision? Because, frankly, the control follows the money in most cases. So what is your vision for how to make that not happen for law firms?

MR. FLUCK: Well, unfortunately, she pointed at me, Ken, so I will do my best. It isn't my vision, first off. What we are talking about here is the way in which the structure in license is authorized. In order to be an ABS, if you want to form an ABS, you have to apply for a license to form the ABS and every person who will be involved in it—in particular those with the money—has to pass a fitness-to-own test. They are all bound by the same regulatory regime because the entity itself is regulated. So if you

have a private equity investor that says, "My only interest is let's only do what's profitable," that's fine. And you will end up with a large firm that does only a mish-mash of legal services. If he says, "Let's do what's profitable in a way that is unethical or legally wrong," then the nature of the ABS structure requires that the people involved in that structure have control. For example, an ABS has to have a head of legal practice and a head of finance administration; those two people are directly regulated. They have to have a say in the running of the enterprise and it's their job to be, if you like, the spy. They have to report the firm if they believe that it is straying from the straight and narrow.

Now, of course, how that works I could only honestly tell you after we have had the first major problem. As for journalism's independence, many journalists have been held prisoner by the fact that their only capital body is saying, "You have to print this." The reality is that, actually, it's a tough world. Yes, I understand control follows the money. I think what we will see is that we will see a special interest in this. We've already seen some. There is an issue called Sacco. Sacco is, largely speaking, an organization for older people over fifty. But the reality is that they are interested in all those bits of legal services for their needs. So, of ABS, they are, if you like, cherry picking a marketplace. All of us as lawyers cherry pick our marketplace. All of us want to choose our marketplace. All of us have a particular expertise and the reality of having external capital investment doesn't necessarily mean you can't go and sell your expertise. Because the one thing you find out is that, if you sell bogus expertise, you come unglued. Everybody knows that the best person to regulate a lawyer is another lawyer. Because we all know what everybody else is up to. That's why I think it's ridiculous when people talk about the only way you can do this is if you have laymen. Sometimes they don't know.

MR. STANDARD: I am going to go back to the left.

AUDIENCE MEMBER: This is an International Section gathering. It's interesting, but last year there was one application by an Italian firm for registration by the SRA under the Legal Services Act. Just last week a separate firm, which is engaged in construction law, was actually granted a license and one of the things that it has done is that it has moved its site to London. I would just like to ask the panel whether the portability of law firms moving is something that should be of concern to the Law Society because one assumes you haven't regulated the group up to now, and this is a body that is simply coming in to take advantage of the particular regulatory regime.

MR. ARMSTRONG: Just quickly. The SRA has been criticized for taking too long to process applications. That would have not have been an overnight flip from Cyprus to London. The process is probably around about two years. The difficult cases take longer and I know from speaking to people that the test includes, for example, that if you have a non-U.K. national who's involved in the money, they have to turn up and are fingerprinted. So it's not a painless process. The individuals as well as the organization will be vetted and have to pass this test. But I think the wider thing that maybe William wants to address in part is whether the U.S. will suffer as a result of other regimes liberalizing. If, for example, Canada decides to allow ABS, will a number of firms from Buffalo, for example, move just that little bit north of the border to take advantage of a different regulation regime? And I think that aspect is something that is also of interest as well.

MR. HUBBARD: Well, I think big law firms do worry about being at a competitive disadvantage. Again, if you recall, the three commissions of the American Bar Association came out with recommendations to liberalize the process and allow the use of non-lawyer ownership, but it was the House of Delegates each time, with the good counsel of the New York State Bar Association, which decided not to go down that road. And I think one reason was, of course, the core principles. But there was also no documented proof that it really added that much value to what law firms do. And there was this protection of the public. And also I think in the back of many peoples' minds you heard a lot about the U.K. experience and these new commissions and regulatory authorities and other things that might govern this process and regulate this process. I think many American lawyers are concerned about another level of regulation. So it's a practical matter. It's a cost-benefit analysis. Do we want to take on all these extra layers and this complexity without the compelling need of each?

MR. STANDARD: Another one on the left over there.

AUDIENCE MEMBER: I think there is an interesting contrast here with the first program this morning. For those who were at both, the first program was about bringing your case in New York. We had a judge from state court tell us how we will even adopt somebody else's civil procedure if you don't like our New York rules. So that's trying to build in the legal profession the same approach London is taking. But then New York—and I mean New York in the sense of the regulation of multidisciplinary practice in this country—says we don't want non-lawyers involved. And I think that what we hear from across the pond is that you have really got to take a whole view of all things that are changing if we want to stay relevant. It may be that we have to look at this thing again. I would be interested to see that.

AUDIENCE MEMBER: Just to follow-up on that, you have to put into the context of a whole non-lawyer ownership issue the fiduciary issue. And if you take a look at the New York State Bar Association Ethics Committee

Opinion Number 911, which came out, I think, about two years ago, that basically says that it would be an improper sharing of fees with non-lawyers for a New York-admitted lawyer to affiliate with a firm that has non-lawyer ownership. Just to add a corollary to that, we register foreign legal consultants here not admitted in New York, but they have to follow the same ethical rules as admitted lawyers do. So we're basically saying that, if you want to practice law in New York—whether as a New York lawyer or as a Foreign Legal Consultant—you can't affiliate with an overseas law firm that has a non-lawyer ownership that is completely lawful in its home jurisdiction. That's going to make it very difficult for an international law firm with non-lawyer ownership to set up shop in New York at all. Well, they could go to Connecticut; they could go to D.C. They could go somewhere where there's a more tolerant view of other ways of doing business. And I think you come back to the question that Jonathan started with—which is the question of control. We have control issues with banks that are exercising control—whether we like it or not—because we haven't regulated what lenders can tell us to do. We have jurisdictions—we've heard about how England and Wales does it and we've heard about how Connecticut does it—which have figured out ways to regulate the degree of control a non-lawyer equity owner of the firm can exercise. And I think that, unless we want the world to leave us behind, we've got to figure out a way to address the control issue—how to maintain the ethical independence and enhance the access to law. But not to simply say, "Well, you guys do what you want, but you can't do it here." Singapore is jumping on board, because they realize they need to compete. There's a movement there in Canada that sounds like it may be close. And we are going to be left behind.

MR. STANDARD: Back over on the right.

AUDIENCE MEMBER: Not to get personal about this, but generally what is your annual solicitor's fee which incorporates malpractice insurance?

MR. FLUCK: The fee would be regulated. Currently we pay something like 1600 pounds each. It doesn't incorporate the malpractice insurance. That is separate and you have to contract that yourself—and that is enormously variable.

AUDIENCE MEMBER: So when you open the door you are looking at those amounts of money. I have been looking for several years now for an insurance company concerned about the fact that this ABS-type of program—like most lucrative aspects of this kind of practice to non-lawyers is funding those whopping big tort cases that we have in this country. So there you can make some serious money, but they don't really care about the probate matters. But you've got Legal Zoom, I think it's called. You can buy your will and buy your contract and buy that as if you were taking it off the shelf shopping in a supermarket. It seems that what we are probably heading towards is something where law firms disappear. Every lawyer becomes an in-house counsel to some other funding organization unless we somehow maintain a sense of discipline, a sense of responsibility. We need it here because we are not telling truth in trials; we are telling the best story. Time to let it out.

For those who measure law by objective truth as opposed to subjective truth, maybe we don't need privilege in the same way. But the fact is that having an independent profession somehow in most of our minds means that we are going to protect those who do not have anyone to protect them. And some of us will take on those cases, even though there is no money, because we feel that there is an obligation to them to uphold their rights.

MR. STANDARD: Let me suggest that you try to get a hold of these speakers as they are exiting. This is the last question/comment.

AUDIENCE MEMBER: How come in the United States we do allow invested tort cases by third parties, some of them who have no interest in the case. The same is true, I understand, now in U.K. One of the largest companies that is investing is a U.K. company. You will not allow ownership or part of an ownership of a law firm, but you will allow investing in tort cases—which really is much the same thing.

MR. HUBBARD: You can certainly draw distinctions, but ultimately it's the call of each state's authoritative body if they determine that the public interest is not harmed by that. But it is what you can make it. The reality is that we're governed by the respective mandatory bar and by the Supreme Court of the various states, and they make those decisions. That's not a good answer to your question but that's the reality of the situation. You know, one remark just briefly on the competitiveness issue. One reason that U.S. lawyers are losing some competitiveness is the fact that we are regulated by fifty different jurisdictions. In most places you are licensed by the country and you have much more flexibility to adapt and move around.

So there are all sorts of issues we can go into at another time about inconsistencies and other things. But the fact remains that the American Bar Association's House of Delegates has rejected three recommendations on these issues. It is comprised of representatives from bar organizations just like yours from all fifty states and the territories, and they weighed the interests and looked at the inconsistencies to determine that we are not ready yet. And as our esteemed brother said, there has just been no appetite for it in the U.S. at this particular time.

MR. QUARTARO: Thank you very, very much for another wonderful panel.

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Cross-Border Opinions

By Ettore Santucci

I. Introduction

With increasing frequency U.S. lawyers are delivering closing opinions on matters of U.S. law to non-U.S. parties in transactions involving both U.S. and non-U.S. parties ("cross-border transactions"). I refer to closing opinions given by U.S. lawyers to non-U.S. recipients as "outbound opinions." In domestic U.S. practice opinion givers and opinion recipients share a common framework for preparing and interpreting closing opinions. U.S. customary practice[1] is well established on many issues, and guidance on what specific opinions mean, and the work required to support them, is readily available in bar association reports and other materials. For outbound opinions, however, similar guidance often does not exist.

The seminal report on cross-border opinion practice was first published by the IBA in 1985 and, while it has been updated several times since then, it has maintained its original focus primarily on closing opinions given in cross-border transactions governed by New York law.[2] The Committee on Legal Opinions of the ABA Section of Business Law is currently working on a new report, for which I am the Reporter, that covers cross-border closing opinions of U.S. counsel with a primary focus on outbound opinions, which is expected to be published later in 2014.

The absence of a shared conceptual framework between U.S. opinion givers, on the one hand, and non-U.S. opinion recipients and their counsel, on the other, can give rise to misunderstandings over what opinions it is appropriate to request, the meaning of opinions that are given, and the work required to support them. Those misunderstandings can be compounded by differences in legal systems, legal education and practice, language barriers (even when documents are in English or are translated into English), limited experience in many non-U.S. jurisdictions in giving and receiving U.S.-style third party closing opinions, and lack of familiarity with the form U.S. closing opinions typically take. The risk of misunderstanding has grown as the number and type of participants in, and the complexity of, cross-border transactions have increased.

II. The Impact of U.S. Customary Practice on Outbound Opinions

The role of U.S. customary practice in amplifying the meaning of words and phrases commonly used in closing opinions, supplying customarily understood limitations, and enabling opinion givers to rely on many assumptions, exceptions, and qualifications that are understood even when not expressly stated in the opinion letter is as critical when giving outbound opinions as when giving closing opinions in domestic U.S. transactions. When U.S. lawyers give outbound opinions, they necessarily rely on U.S. customary practice to establish the meaning of the opinions they give and the work required to support them. If that were not the case, outbound opinions could not take the same abbreviated form as domestic U.S. closing opinions and instead would need to spell out—in what is likely to be impossible detail—the assumptions, limitations, and qualifications that under U.S. customary practice are understood to be implicit.

III. The Scope of Cross-Border Opinions

A. Enforceability

Some opinions requested of U.S. counsel in cross-border transactions are the same as opinions frequently given in domestic U.S. transactions. In a cross-border context, however, giving these opinions often raises issues not presented in the domestic U.S. context. Other opinions frequently requested in cross-border transactions are not given in domestic U.S. transactions. With increasing frequency cross-border opinions are given by U.S. lawyers in transactions in which the agreement between the parties chooses the law of a country other than the U.S. as its governing law. Those opinions can only cover U.S. federal law and the law of a specified U.S. state (or states)—never the law of the foreign country whose law governs the agreement. Therefore outbound opinions do not include what is commonly regarded as the centerpiece of a third-party closing opinion given in a U.S. domestic transaction, namely, an enforceability opinion on the agreement as a whole (commonly referred to as the "remedies opinion"). An outbound opinion is, instead, based on an assumption (ideally an express assumption) that, under the law of the non-U.S. country whose law has been chosen to govern, the chosen-law clause is effective and each provision of the agreement is valid, binding and enforceable under the governing non-U.S. law.

B. Effectiveness of Certain Clauses

In the absence of a remedies opinion, non-U.S. recipients ordinarily want an outbound opinion to give them comfort on the effectiveness under U.S. law of specific provisions of the agreement, such as choice-of-law clauses, arbitration clauses, and forum-selection clauses, as well as related matters such as the recognition and enforcement in the U.S. of foreign judgments or of international arbitral awards. Assuming that the agreement as a whole is enforceable under the governing non-U.S. law, the effectiveness of these provisions under U.S. law often matters a great deal to non-U.S. recipients in the cross-border context because of their potential impact on how claims by them to enforce their rights under the agreement against a

U.S. party will be resolved (e.g., litigating a German law contract before a German court as the exclusive forum or having a suit brought by a U.S. party before a U.S. court dismissed in favor of binding international arbitration abroad). Therefore outbound opinions typically will include specific separate opinions on these "procedural" provisions of the agreement, in addition to traditional opinions about the U.S. party (status, power and corporate action, no violation of law, required filings and permits, no breach or default with other specified agreements, et cetera).

C. Specific Issues in Regard to Outbound Opinions

Giving these "specialized" opinions in a cross-border setting involves issues that opinion givers may not face in domestic U.S. opinion practice. Typical of these specialized issues are the following.

- Can the opinion be given at all?
- How does the law (state and/or federal) covered by the opinion letter interact with the foreign country's law chosen in the agreement as its governing law?
- How do the opinion preparers deal with contract construction when the agreement chooses foreign law as its governing law?
- Should contracts governed by foreign law be included in the list of contracts covered by a no-breach or default opinion?
- What is properly included or excluded from the universe of laws and regulations that a cross-border no-violation-of-law opinion can reasonably be expected to cover?
- What express assumptions and exceptions are necessary or advisable with respect to these opinions?

In addition, opinion givers need to be aware that outbound opinions raise special interpretive and liability issues. These include the following.

- How will a non-U.S. court interpret the language of an outbound opinion?
- Will U.S. customary practice be taken into account by non-U.S. courts?
- What duties to the non-U.S. recipient, and related liability regime, will a non-U.S. court impose on a U.S. opinion giver?
- How will a non-U.S. court trace the applicability of the laws of multiple jurisdictions to a single transaction?
- What is the impact of regulatory barriers to the free movement of capital, goods and services across national borders?

While similar uncertainties as among different states and the relationship between federal and state law affect domestic U.S. opinion practice as well, in cross-border opinion practice the combined effect of these interpretive and liability issues may result in a misalignment of expectations as between U.S. opinion givers and non-U.S. opinion recipients. This risk is greater because the opinion giver and opinion recipient do not work within a mutually understood conceptual framework or share common expectations as to both process and result. That is different from domestic U.S. opinion practice, where lawyers practicing in different states understand U.S. customary practice, share the same language and background, and operate within a federal legal system and largely compatible legal systems among the states.

This puts a premium on spelling out in outbound opinions some of the things that in domestic U.S. opinions may not need to be (and customarily are not) spelled out. In practice that means calibrating reliance by the opinion preparers on U.S. customary practice (particularly qualifications that apply—whether stated or unstated) with the risk of misunderstandings as to the opinion's coverage and meaning by non-U.S. opinion recipients, as well as future non-U.S. courts if they are called upon to resolve disputes.

This exercise, however, calls for careful judgment, balance and restraint, because opinion givers in cross-border practice should not default to the "kitchen sink" opinion approach that most recipients in domestic U.S. practice no longer accept. The single most difficult aspect of drafting outbound opinions is to decide how far to go in terms of stating expressly assumptions, qualifications and exceptions, thus providing more context around the wording of opinion paragraphs themselves. This may be necessary to minimize the risk of misunderstandings, but without crossing over into self-serving boilerplate that undermines the proper function of closing opinions.

At the same time, an outbound opinion normally can be understood fully only by someone familiar with U.S. opinion practice, and non-U.S. recipients should be willing to commit the necessary time and resources (possibly including retention of U.S. counsel to advise them) to become conversant with U.S. customary practice.

This is true even when parties and their counsel are used to operating on a global basis in transactions where documentation protocols are standardized across borders. When the parties agree that a "U.S.-style" third-party closing opinion will be delivered, lengthy and sometimes adversarial discussions still ensue with non-U.S. counsel for the opinion recipient when a U.S. opinion giver proposes what it believes to be standard language for an outbound opinion, but non-U.S. counsel believes the language fails to address the needs of the opinion recipient. Resolving these negotiations is easier if opinion givers

and recipients understand some of the sources of friction. Those sources of friction include the following.

- Although the opinion paragraphs themselves often are the same as in domestic U.S. transactions, the fact that the chosen law is that of a non-U.S. jurisdiction means that unique issues are implicated by an outbound opinion.
- Substantive legal issues underlying the opinion may be less well understood in cross-border practice than in domestic U.S. practice, and the legal research and factual due diligence required to give the opinion are often more significant.
- Non-U.S. opinion recipients may have unrealistic expectations based on their own domestic practice and, possibly, limited familiarity with U.S. customary practice, which may cause initial opinion requests from non-U.S. opinion recipients to be inconsistent with U.S. customary practice.
- Financial institutions that engage in business globally may strive to adopt "international best practices" that include legal opinions, but differences in practice among countries may clash with their desire for uniformity.

The most important thing is for U.S. opinion givers and counsel for non-U.S. opinion recipients to discuss candidly: (i) the work required to deliver every requested opinion; (ii) the costs to the opinion giver's client of preparing each opinion compared to its benefits to the recipient; and (iii) the proper scope of assumptions and exceptions. Some friction may be alleviated by reminding recipients that in some cases the role of the opinion process is to identify areas of legal uncertainty and to help the parties understand and allocate risks, not to eliminate uncertainty or bridge risk.

D. Opinions Regarding Collateral Agreements

Sometimes cross-border transactions in which the principal agreement between the parties chooses the law of a country other than the U.S. as its governing law contemplate collateral agreements or instruments that choose U.S. law (often the law of New York) as their governing law. That may be because of the location of U.S. parties or their assets, including subsidiary guarantors located in the U.S., or U.S. collateral in which a security interest is being granted in connection with the transaction. U.S. counsel in these cross-border transactions may be asked to give, in addition to an outbound opinion with respect to the principal agreement, a closing opinion covering those agreements and instruments governed by U.S. law. These are, in effect, inbound aspects of a cross-border transaction that is primarily governed by non-U.S. law.

This type of opinion often will include an enforceability opinion with respect to selected agreements or instruments under U.S. law because, in contrast to the principal agreement in the transaction, they are to be governed by the law covered by the opinion letter (New York law). Nevertheless, giving these "inbound cross-border opinions" is not always the same as giving similar opinions in a purely domestic U.S. context, even though they are in fact "New York law opinions" on agreements functionally equivalent to agreements used commonly in U.S. domestic transactions.

Endnotes

1. The term "U.S. customary practice," as used herein, refers to the practice of lawyers who regularly give, and lawyers who regularly advise opinion recipients regarding, opinions of the kind involved in transactions between U.S. parties. U.S. customary practice covers both the meaning of standard language used in opinion letters and the work that U.S. opinion preparers are expected to perform in preparing them. *See generally* Comm. on Legal Ops., ABA Section of Bus. Law, Legal Opinion Principles, 53 BUS. LAW. 831 (1998) hereinafter ABA PRINCIPLES; Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions, 63 BUS. LAW. 1277 (2008) [hereinafter *Statement on Customary Practice*] (a statement approved by the legal opinion committees of many state bar associations and other U.S. bar groups); *Guidelines for the Preparation of Closing Opinions*, 57 BUS. LAW. 875, 876 (2002).
2. M. Gruson, S. Hutter & M. Kutschera, LEGAL OPINIONS IN INTERNATIONAL TRANSACTIONS 10–11 (4th ed. 2003) (a project of the Subcommittee on Legal Opinions of the Committee on Banking Law of the Section on Business Law of the International Bar Association).

Notes on the Regulation of the Legal Profession in England and Wales

By Jonathan P. Armstrong

I. Introduction

It is important to remember that the legal profession in England and Wales is currently heavily regulated. This is in contrast to the situation in the United States.[1] A number of bodies exist to regulate the profession, including the Bar Council and Bar Standards Board (for barristers), the Solicitors Regulation Authority (known as the SRA, for solicitors) and independent bodies, including the Legal Services Board (LSB) and the Legal Ombudsman (LeO). Strictly speaking the Law Society of England and Wales is no longer the regulatory body for solicitors and under the new regime in England and Wales the Law Society's functions are largely representative. This article outlines what some of those bodies do. It then goes on to outline a number of aspects of Alternative Business Structures (ABS) in England and Wales and their regulatory regime.

II. The Various Regulating Bodies

A. The Law Society

Historically the Law Society was in charge of the regulation of solicitors in the U.K. The Society was formed in 1825. In 1834, the Society began its first proceedings against dishonest practitioners. By 1907, the Society possessed a statutory disciplinary committee, and was empowered to investigate solicitors' accounts and to issue annual practicing certificates. The Law Society's disciplinary powers are now largely performed by other bodies, so that the Law Society now functions largely as a body representing solicitors. Barristers in England and Wales have a similar professional body, the General Council of the Bar, commonly known as the Bar Council. There is more on the Law Society at http://www.lawsociety.org.uk. The Law Society also funds the Solicitors Disciplinary Tribunal (SDT), which hears complaints about misconduct.

B. SRA

The Solicitors Regulation Authority was launched in January 2007. It is the regulatory body for more than 120,000 solicitors in England and Wales. Its purpose is "to set, promote and secure in the public interest standards of behaviour and professional performance necessary to ensure that clients receive a good service and that the rule of law is upheld." All solicitors must follow professional Principles and a Code of Conduct issued by the SRA. The SRA was previously known as the Law Society Regulation Board, but changed its name to emphasize its independence. It remains part of the Law Society, but operates separately from it.

The SRA's functions include the following.

- Setting down minimum academic and behavioral standards for entry into the profession.
- Ensuring continued compliance with these standards.
- Issuing of yearly Practising Certificates.
- Investigating allegations of a failure to meet the set behavioral standards.
- Reviewing breaches of the Solicitor's Code of Conduct and other rules.
- Intervening into a solicitor's firm in the public interest.

The majority of the SRA's members are non-lawyers. There is more on the SRA at http://www.sra.org.uk.

C. LSB

The Legal Services Board is the independent body responsible for overseeing the regulation of lawyers in England and Wales. It is a non-departmental public body sponsored by the Ministry of Justice. Its set-up and ongoing costs are met entirely by a levy on practitioners in the legal sector. It has existed since 2010. Its duties include the following.

- Protecting and promoting the public interest.
- Supporting the constitutional principle of the rule of law.
- Improving access to justice.
- Protecting and promoting the interests of consumers of legal services.
- Promoting competition in the provision of legal services.
- Encouraging an independent, strong, diverse and effective legal profession.
- Increasing public understanding of the citizen's legal rights and duties.
- Promoting and maintaining adherence to professional principles.

The professional principles are the following.

- Authorized persons should act with independence and integrity.
- Authorized persons should maintain proper standards of work.
- Authorized persons should act in the best interests of their clients.

- Persons who exercise before any court a right of audience, or conduct litigation in relation to proceedings in any court, by virtue of being authorized persons should comply with their duty to the court to act with independence in the interests of justice.
- Affairs of clients should be kept confidential.

The LSB is responsible for oversight of the other legal regulatory bodies including the SRA and Bar Council. There is more on the LSB at http://www.legalservices-board.org.uk/.

D. The Legal Ombudsman

The Legal Ombudsman is an ombudsman service that opened in October 2010. It is a service which is free to the complainant. The Legal Ombudsman was set up as a result of the Legal Services Act 2007 and took over from a number of legal complaint-handling bodies. The LeO is intended to be a non-lawyer body: the Chief Ombudsman cannot be a lawyer. It has formal powers to resolve complaints about lawyers. It is open to all members of the public, small businesses, charities, clubs and trusts. Despite being set up by legislation changing legal services, it is independent of government. There is more on the LeO at http://www.legalombudsman.org.uk/.

III. The Involvement of Judges

Unlike some other jurisdictions, judges are not involved directly in the regulation of the legal profession—although both solicitors and barristers owe duties to the court, and solicitors are still admitted to the courts. However, there is a close relationship between the judiciary and regulators. In September 2013, for example, the SRA closed down a London law firm, Consilium Chambers, after a judge in the Queen's Bench Division of the High Court ordered the SRA to conduct an urgent investigation after the firm's senior partner was found to be in contempt of court. It seems that the referral followed a hearing at which the firm's senior partner had introduced untruthful evidence in support of an emergency out of hours application for an injunction to stop one or more of the firm's clients being deported. The intervention means that the SRA has effectively closed the firm down, takes possession of all of its documents and papers and takes possession of any money held by the firm.[2]

In addition to specific legal regulation, legal practices in England and Wales are also subject to more general regulation in common with other businesses. The Office of Fair Trading (the rough U.K. equivalent of the Federal Trade Commission in the United States) also has a regulatory role generally among businesses, and in 2013 it completed a study into the regulation of the legal profession. Not surprisingly, given the large number of regulatory bodies in the legal profession, it found that clients were often unclear about to whom to complain and recommended a simplification of the regulatory regime.[3]

An example of how the process can work when a solicitor is convicted of an offense is also provided by the case of Bhadresh Babulal Gohil.[4] Gohil was a solicitor involved with the former Governor of Delta State in Nigeria, James Ibori. He was convicted of a number of offenses relating to his business dealings with Ibori in November 2010, and in December 2010 pleaded guilty to additional offenses. He was sentenced to ten years in jail. In February 2012, the SRA applied for him to be struck off the roll (the equivalent of disbarment). At a hearing on 8 October 2012, the SDT struck him off and ordered him to pay the SRA's costs.

IV. Who Pays for Regulation?

The regulatory regime is largely paid for by the profession. The Law Society's net funding requirement for 2014 will be £116.8 million (up from £103.5 million in 2013). This levy covers the Law Society, the SRA and contributions towards the running of the LSB and Legal Ombudsman. Contributions come from both individual solicitors and law firms, with the contributions of law firms tiered. Law firms will bear the brunt of the 2014 increases, with the levy increasing by thirteen percent for the largest law firms.

Client losses through the actions of solicitors are also underwritten by the profession. The profession absorbs the first £10 million of claims against affected firms, with the mandatory insurance a solicitors' practice must have in place covering the next £10 million.[5]

V. Alternative Business Structure

A. What Is an ABS?

An Alternative Business Structure (ABS) is something that has a specific heading in the Legal Services Act 2007 (the legislation that set up the ABS), but has no statutory meaning. An ABS is effectively an organization

- that is licensed to carry on one or more of the specific legal activities that are regulated by the Legal Services Act 2007; and
- whose owners and/or managers include individuals or entities who are not qualified lawyers.

B. ABS Licenses

As of 10 January 2014, only 231 ABS licenses had been granted by the SRA.[6] This may be in part because of the regulatory pre-conditions which must exist before an ABS license is issued.

The Law Society has issued a Practice Note on the ABS regime which is at http://bit.ly/15P2dT3. As the Practice Note explains, an ABS is a firm where a non-lawyer

- is a manager of the firm, or
- has an ownership interest in the firm.

A firm may also be an ABS where another body

– is a manager of the firm, or

– has an ownership interest in the firm;

and at least ten percent of that body is controlled by non-lawyers.

A non-lawyer is a person who is not authorized under the Legal Services Act 2007 to carry out reserved legal activities. It is important to remember that only reserved legal activities are reserved to the legal profession under the Act. Section 12 and Schedule 2 of that Act define six reserved legal activities.[7]

– Exercise of rights of audience in court;

– Conduct of litigation;

– Reserved instrument activities, being certain activities concerning land registration and real property;

– Probate activities;

– Notarial activities; and

– Administration of oaths.

The Practice Note rightly advises solicitors to think carefully before accepting outside investment. It says:

> If you plan to accept outside investment then there will be more complex considerations particularly regarding how the firm will ensure compliance with principles and the new code of conduct. You should think about
>
> 1. the purpose of the investment;
> 2. the level of control that the owner will have over your business;
> 3. whether the owner could sell on their interest or withdraw their investment and the potential consequences to the firm of such an occurrence;
> 4. if the owner's control could interfere with the firm's ability to act in the best interests of clients and, if so, how this risk can be mitigated.

An ABS must have at least one manager who is a qualified individual. A qualified individual is one of the following.

- A solicitor with a current practising certificate.
- A registered European lawyer.
- A lawyer of England and Wales and who is authorized by an approved regulator other than the SRA.
- A lawyer registered with the Bar Standards Board under Regulation 17 of the European Communities (Lawyer's Practice) Regulations 2000 (SI 2000/1119).

The Practice Note goes on to emphasize that the SRA will only grant a license where it is satisfied, among other things, that

– the firm is an ABS;

– the firm will comply with the requirements relating to professional indemnity insurance and the compensation fund;

– compliance officers have been appointed;

– all authorized role holders are approved; and

– that one of the lawyer managers is qualified to supervise.

The SRA may refuse a license application if

– it is not satisfied that the managers and owners are suitable as a group to operate the ABS;

– it is not satisfied that the management and governance arrangements are adequate;

– it is not satisfied that the ABS will comply with the SRA's requirements, including any conditions imposed on a license;

– the applicant has provided inaccurate or misleading information, or failed to inform the SRA of a change to the information provided; or

– it believes it is against the public interest or inconsistent with the regulatory objectives set out in the Legal Services Act 2007.

It is the responsibility of the applicants to show that they meet the SRA's requirements. The regulations apply to managers (not just the CEO or Senior Partner), owners, and designated compliance officers. Two compliance officers are needed: one for legal practice (the COLP) and another for the finance and administration of the ABS (COFA). The COLP must be a lawyer. It is possible for one person to be both the COLP and the COFA. The definition of ownership is a wide one covering anyone with a "material interest."

All managers, owners and compliance officers will need to meet the suitability requirements that a solicitor would need to meet on entry to the profession. In assessing a person's suitability the SRA will consider

– any criminal offenses;

– any behavior not compatible with that expected of a prospective solicitor (e.g., behavior which is dishonest or violent in nature);

– regulatory history; and

– financial behavior

There are also additional requirements for authorized role holders. In these cases, when assessing a person's suitability the SRA will also consider

– corporate or professional history; and

– a person's affiliates.

The SRA will normally refuse an application where it has evidence that reflects on the honesty and integrity of

a person who an authorized role holder is affiliated with and who the SRA believe would influence how the role holder would carry out his or her role.

C. Professional Conduct and Complaints

Non-ABS law firms regulated by the SRA can be fined up to £2,000 by the SRA. The fines for ABSs are more significant: an ABS can be fined up to £250 million, with its employees (and managers) risking fines of up to £50,000. The early evidence from the LSB suggests that ABS firms have a better track record of dealing with complaints. Figures published by the LSB in October 2013 suggest a resolution rate for complaints of eighty-three percent for conventional law firms, eighty-eight percent for LDPs, and ninety-three percent for ABS firms.

The LSB's October 2013 Report also had some interesting statistics on market share. According to that Report, ABS firms at that time accounted for five percent of the number of firms in the U.K. but fourteen percent of turnover.[8]

Endnotes

1. See, for example, the interview with Professor Gillian Hadfield reported in Law Blog on 4 November 2013. In that interview Professor Hadfield, who teaches at the University of Southern California's Gould School of Law, is reported as saying "the US does not provide much in the way of lawyer quality control—most attorneys sit for the Bar exam at the beginning of their careers. Disbarment and other sanctions are rare other than in the most egregious cases."
2. Law Society Gazette 9 September 2013.
3. See the OFT press release at http://www.oft.gov.uk/news-and-updates/press/2013/07-13.
4. A copy of the judgment in the *Gohil* case is available at http://bit.ly/16UsO13
5. Law Society Gazette 15 July 2013.
6. SRA website at http://bit.ly/1ipkEC3.
7. A copy of the Legal Services Act 2007 is at http://bit.ly/19x6EPN.
8. Law Society Gazette online 22 October 2013.

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